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THE JUDGE WHO ABSTAINED IN *PLESSY v. FERGUSON*: JUSTICE DAVID BREWER AND THE PROBLEM OF RACE

*J. Gordon Hylton**

The final line of the United States Supreme Court opinion in the landmark case of *Plessy v. Ferguson* states, "Mr. Justice Brewer did not hear the argument or participate in the decision of this case."[1] Because of the untimely death of his daughter, the 58-year old Justice had been forced to leave Washington, D.C. for his home in Leavenworth, Kansas, on April 13, 1896, the day *Plessy* was argued before the Court.[2] Without Brewer, the Court voted 7 to 1 to uphold Louisiana's "separate but equal" public accommodations law. Only Justice John Marshall Harlan, a former slaveholder from Kentucky, agreed that the challenged "Jim Crow" statute violated the Fourteenth Amendment's guar-

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[1] 163 U.S. 537, 564 (1896). On *Plessy v. Ferguson* generally, see C. VANN WOODWARD, *The Case of the Louisiana Traveler*, QUARRELS THAT HAVE SHAPED THE CONSTITUTION 145-58 (J. Garraty ed. 1964) and C. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

[2] Francis Adele Brewer died of tuberculosis in Texas where she and her mother had moved the previous year in hope that the climate would improve her health. Wasington Post, April 14, 1896 at 3; *see also*, H. KARRICK, DAVID JOSIAH BREWER: A BIOGRAPHICAL SKETCH BY HIS DAUGHTER (1912) (available at Yale University Library in collection of Brewer Family Papers). Because of his involvement with an international commission appointed to resolve a boundary dispute between Venezuela and British Guinea, it is possible that Brewer would have missed the argument anyway. *See infra* note 103.

antee of equal protection of the laws.[3]

A general familiarity with the personal background and constitutional views of David Josiah Brewer might have led one to believe that had the Kansan been present, he would have joined in Harlan as a second vote against the challenged ordinance. The son of an abolitionist clergyman, Brewer had enlisted in the cause of antislavery as a youth, and in 1858, at age 21, had joined the migration of antislavery New Englanders to "Bloody Kansas."[4] As a judge in Reconstruction era Kansas, he had authored one of the first judicial opinions upholding the right of an African-American citizen to vote in a general election, and as the superintendent of schools in Leavenworth, he had helped establish the first schools for blacks in the state. Furthermore, since joining the United States Supreme Court in 1890, he had been a vocal supporter of African-American advancement in his pronouncements off the bench. In an 1892 address to the American Home Missionary Society, for example, Brewer had proclaimed, "This is not an Anglo-Saxon, not a Teutonic, not even a Cauca-

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[3] Harlan's eloquent defense of the civil rights of African-Americans in the late nineteenth and early twentieth centuries is one of the best known chapters in the history of the United States Supreme Court. It is ironic that on a court composed largely of northerners who either participated in or came of age during the American Civil War the one clear voice in favor of a racially egalitarian society was that of a former Kentucky slaveholder who, before his appointment to the nation's highest tribunal, had opposed the ratification of both the Thirteenth and Fourteenth Amendments. For a discussion of Harlan's views on race and civil rights, see Westin, *John Marshall Harlan and the Constitutional Rights of Negroes*, 66 YALE L.J. 637 (1957).

[4] There is, unfortunately, no biography of Brewer. This absence is explained in large part by the failure of Brewer to leave behind any substantial body of private papers. The existing Brewer papers are collected in the Brewer Family Papers, Yale University Library, New Haven, Connecticut. A small collection of his papers (64 items) can also be found in the Library of Congress. Unless otherwise noted, biographical information in this article is derived from materials in the Brewer Family Papers.

There are many secondary sources which address various aspects of Brewer's career. *See, e.g.*, Bergan, *Mr. Justice Brewer: Perspective of a Century*, 25 ALB. L. REV. 191 (1961); R. CUSHMAN, 2 DICTIONARY OF AMERICAN BIOGRAPHY 22 (D. Malone ed. 1928); Eitzen, *David Brewer, 1837-1910: A Kansan on the United States Supreme Court*, 12 THE EMPORIA STATE RESEARCH STUDIES 1 (1964); O. FISS, *David J. Brewer: The Judge as Missionary*, in THE FIELDS AND THE LAW 53-63 (1986); Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615 (1965); A. PAUL, 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1967, AT 1515 (L. Friedman & F. Israel eds. 1969); L. Lardner, The Constitutional Doctrines of Justice David Josiah Brewer (1938) (unpublished Princeton University Ph.D. dissertation).

sian nation. The blood of all races mingles in that of the American people."[5]

Moreover, Brewer had exhibited great sympathy for other "minority" groups. He was the Court's foremost spokesman for the rights of Asians residing in the United States, siding with the Oriental party in eighteen of twenty-three cases decided by the United States Supreme Court during his tenure.[6] (The Court itself found for the Oriental party in only six of these cases.[7]) He was also a supporter of women's rights, at least as the term was

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[5] *Address of Mr. Justice Brewer*, MINUTES OF THE SIXTY-SIXTH ANNUAL MEETING OF THE AMERICAN HOME MISSIONARY SOCIETY 95 (1892).

[6] *See* Tang Tun v. Edsell, 214 U.S. 523 (1909); Liu Hop Fong v. United States, 209 U.S. 453 (1908); Chin Yow v. United States, 208 U.S. 8 (1908); Ah Sin v. Wittman, 198 U.S. 500 (1905); United States v. Ju Toy, 198 U.S. 253 (1905); United States v. Sing Tuck, 194 U.S. 161 (1904); Tom Hong v. United States, 193 U.S. 517 (1904); Ah How v. United States, 193 U.S. 65 (1905); The Japanese Immigrant Case, 189 U.S. 86 (1903); Chin Bak Kan v. United States, 186 U.S. 193 (1902); Lee Lung v. Patterson, 186 U.S. 168 (1902); Fok Yung Yo v. United States, 185 U.S. 296 (1902); United States v. Lee Yen Tai, 185 U.S. 213 (1902); Li Sing v. United States, 180 U.S. 486 (1901); United States v. Gue Lim, 176 U.S. 156 (1900); United States v. Wong Kim Ark, 169 U.S. 649 (1898); Lem Wong King Ark, 169 U.S. 649 (1898); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Lau Ow Bew v. United States, 144 U.S. 47 (1892); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); *In re* Lau Ow Bew, 141 U.S. 583 (1891); Wan Shing v. United States, 140 U.S. 417 (1891); Quock Ting v. United States, 140 U.S. 417 (1891). Brewer did not participate in Wang Wing v. United States, 163 U.S. 228 (1896). In three additional decisions, the Court did not issue written opinions but instead disposed of the cases by summary affirmance or dismissal. *See* Goon Shung v. United States, 212 U.S. 566 (1909); Chinese Cases, 165 U.S. 275 (1897); Chinese Cases, 140 U.S. 676 (1891).

At the time of the *Plessy* argument, Brewer had sided with the Asian position in six of seven cases. In four of these cases, he was in dissent.

[7] *See In re* Lau Ow Bew, 141 U.S. at 583; Lau Ow Ben, 144 U.S. at 47; Gue Lin, 176 U.S. at 156; Tom Hong, 193 U.S. at 517; Chin Yow, 208 U.S. at 8; and Liu Hop Fong, 209 U.S. at 453. Brewer sided with the Oriental party in 78.3% of the cases in which the court issued a written opinion. Of his colleagues on the Court between 1890 and 1910, only Rufus Peckham consistently supported Brewer's position, doing so in 76.5% of the cases in which he participated (13 of 17). No other Justice's percentage exceeded 50.0%, although Stephen Field did support the Oriental position in 4 of 8 cases. Chief Justice Melville Fuller most perfectly represented the Court's sentiment, voting in the majority in all 24 cases decided in this twenty year period (six times favoring the Chinese/Japanese position and eighteen times opposing it). Harlan, on the other hand, was slightly less sympathetic to this position than the court as a whole, supporting the Oriental position in only 5 of 23 cases (21.7%). The records of Brewer's other contemporaries on the court are as follows: Bradley, 2 of 5; Gray, 4 of 11; Blatchford, 2 of 6; Lamar 2 of 5; Brown, 5 of 22; Shiras, 2 of 11; Jackson 0 of 1; White, 4 of 17; McKenna, 3 of 15; Holmes, 2 of 8; Day 3 of 8; and Moody, 1 of 2. Neither Justices Miller or Lurton participated in such a case during the brief time they sat with Justice Brewer.

understood in his era. As a judge in Kansas in the 1870's, he had supported the right of women to hold property in their own names and had upheld their right to serve as school supervisors.[8] While a member of the Supreme Court, he publicly supported women's suffrage and called for an increased role for women in the professions.[9] In a 1905 speech at Vassar College, Brewer endorsed the idea of a woman President and suggested that social worker Jane Addams would make an excellent mayor of Chicago.[10] Moreover, in one of his best known Supreme Court opinions, *Muller v. Oregon*,[11] he departed from his long-standing opposition to legislative interference in the labor market to uphold the constitutionality of protective legislation for women workers.

Brewer was also an outspoken supporter of a variety of what were in his era viewed as "liberal" causes. He was a life-long advocate of world peace and a crusader for the cause of international arbitration.[12] He served for years as an officer of the American Missionary Association; he was an active supporter of the Associated Charities in Washington, D.C., and he was a devout member of the Congregational Church.[13] In the late 1890's he would emerge as an outspoken opponent of United States imperialism, a critic of the war with Spain, and an advocate of immediate independence for the Philippines.[14]

Furthermore, of all the men who sat on the United States Supreme Court in the late nineteenth and early twentieth centuries, none was more vocal than Brewer, both on and off the bench, in his support of the cause of individual liberty. He be-

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[8] H. KARRICK, *supra* note 2, at 24.

[9] *Women's Suffrage: Its Present Position and Its Future*, 30 THE LADIES WORLD 6 (1909). *See generally*, J. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 221 (1978).

[10] Address by Justice Brewer to Vassar College on Women, Changed Relations to Life and Society (1893) (available at Yale University Library in collection of Brewer Family Papers). *See also*, *Women in the Professions*, THE DELINEATOR (May 1906).

[11] 208 U.S. 412 (1908).

[12] For Brewer's efforts on behalf of international cooperation, see Butler, *Melville Weston Fuller-David Josiah Brewer, Memorial Note*, 4 AM. J. INT'L L. 909 (1910).

[13] Brewer was involved in both charitable and liberal "causes." *See, e.g.*, R. CUSHMAN, *supra* note 4, at 23; K. MORTON, DAVID JOSIAH BREWER (1912) (available at Yale University Library in collection of Brewer Family Papers).

[14] Brewer, *The Spanish War: A Prophecy or an Exception*, in 16 KANSAS COLLECTED SPEECHES AND PAMPHLETS 16-17 (n.d.).

lieved that liberty of contract was a right protected by the Constitution; he favored a narrow interpretation of the state police power; and he rejected the concept of a paternalistic state. These positions seemingly clashed with the efforts at social engineering that lay behind the emerging regime of legally-mandated segregation that was emerging in the American South at the end of the nineteenth century.[15] Brewer was also not reluctant to stake out a position at odds with that of his colleagues. He was the greatest dissenter of his era, breaking with the majority on 226 occasions during his twenty years on the court.[16] He dissented, on average, 11.3 times per term, a rate greater than any of his colleagues, including Harlan, the so-called great dissenter.[17] Furthermore, Brewer did not limit his remarks to the Court's official utterances. His private papers contain the texts of more than 100 public orations and magazine articles composed while on the Court.[18] He was, according to the *Virginia Law Register* (a legal journal for the practicing bar), a justice who "mingled with the people and addressed his countrymen . . . upon matters concerning the general welfare," and who "did not hesitate to express vigorous opinion upon all the great questions of the day and with vigorous rhetoric . . . lashed the

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[15] *See infra* notes 75-98.

[16] A. BLAUSTEIN & R. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 144 (1978). Brewer wrote dissenting opinions in 57 of the 226 cases in which he dissented. He also wrote the majority opinion in 533 cases, 70 of which involved constitutional issues. He also concurred in 44 majority opinions, writing separate opinions in 8 of them. Cushman provides slightly different figures, i.e., 526 majority opinions, 38 concurrences including 8 separate opinions, 215 dissents, and 53 dissenting opinions including 18 which dealt with constitutional issues. R. CUSHMAN, SUPRA note 4, at 24,

[17] Harlan dissented, on average, in 11.1 cases per term. Of the other seventeen justices whose terms on the Court overlapped with Brewer, only Rufus Peckham (10.9) and Edward White (10.7) averaged more than 10 dissents per term. Samuel Blatchford dissented with the least frequency, averaging less than one dissent (0.7) per term during his eleven year career. *See* A. BLAUSTEIN & R. MERSKY, *supra* note 16, at 148.

[18] The Brewer Family Papers contain approximately eighty public addresses and nearly fifty articles, the vast majority of which were written during his two decades on the Supreme Court. K. MORTON, INTRODUCTION TO BREWER FAMILY PAPERS 2 (1912) (available at Yale University Library in collection of Brewer Family Papers). A six-page list of Brewer's extracurricular writings while on the Court, many of which were originally delivered as public orations, can be found in L. Lardner, *supra* note 4, at 226-31.

abuses of legal processes and the chicanery of lawyers."[19]

In spite of all the reasons that might lead one to expect Brewer to be sympathetic to the claims of African-American citizens, his voting record in civil rights cases hardly justifies such a conclusion. During his twenty year tenure, the Supreme Court handed down decisions in thirty cases involving the civil rights of African-Americans.[20] Not surprisingly, the defenders of African-American rights and liberties were generally unsuccessful, prevailing in only five of the thirty cases.[21] Brewer participated

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[19] 16 VA. L. REGISTER 65 (1910). Brewer's penchant for publicly voicing his disagreements with his colleagues was not always appreciated by his brethren on the bench. Oliver Wendell Holmes, Jr., who served with Brewer from 1902 to 1910, observed that while Brewer "was a very pleasant man in private," he "had the itch for public speaking and writing and made me shudder many times. I have heard him speak in public with a curious bitterness about some of the decisions of his brethren that he disagreed with." 1 HOLMES-POLLACK LETTERS 160 (M. Howe ed. 1941). In the same letter, written shortly after Brewer's death, Holmes also noted, "I had to remind myself that one should not allow taste to blind one to great qualities, as it is apt to." *Id.* Mr. Dooley, the popular creation of Finley Peter Dunne, was also less than enamored with Brewer's proclivity toward public speaking, although he did at least acknowledge his prominence. *See* Dunne, *College and Degrees—Justice at Yale*, in MR. DOOLEY AND THE CHOICE OF LAW 52-57 (1963).

[20] *See* Marbles v. Creecy, 215 U.S. 63 (1909); United States v. Shipp (II), 214 U.S. 386 (1909); Thomas v. Texas, 212 U.S. 278 (1909); Bailey v. Alabama, 211 U.S. 452 (1908); Berea College v. Kentucky, 211 U.S. 45 (1908); United States v. Shipp (I), 203 U.S. 563 (1906); Hodges v. United States, 203 U.S. 1 (1906); Martin v. Texas, 200 U.S. 217 (1906); Riggins v. United States, 199 U.S. 547 (1905); Clyatt v. United States, 197 U.S. 207 (1905); Jones v. Montague, 194 U.S. 147 (1904); Giles v. Teasley, 193 U.S. 146 (1904); Rogers v. Alabama, 192 U.S. 226 (1904); James v. Bowman, 190 U.S. 528 (1903); Giles v. Harris, 189 U.S. 475 (1903); Brownfield v. South Carolina, 189 U.S. 426 (1903); Tarrance v. Florida, 188 U.S. 519 (1903); Cummings v. County Board of Education, 185 U.S. 528 (1903); Chesapeake & Ohio Ry. v. Kentucky, 179 U.S. 388 (1900); Carter v. Texas, 177 U.S. 442 (1900); Williams v. Mississippi, 170 U.S. 213 (1898); Plessy v. Ferguson, 163 U.S. 537 (1896); Murray v. Louisiana, 163 U.S. 101 (1896); Charley Smith v. Mississippi, 162 U.S. 592 (1896); Mills v. Green, 159 U.S. 651 (1895); Andrews v. Swartz, 156 U.S. 651 (1895); *In re* Shibuya Jugiro, 140 U.S. 291 (1891); *In re* Wood, 140 U.S. 278 (1891); Louisville, New Orleans, & Texas Ry v. Mississippi, 133 U.S. 587 (1890).

[21] *See* United States v. Shipp, (II), 214 U.S. 386 (1909); United States v. Shipp, (I), 203 U.S. 563 (1906); Riggins v. United States, 199 U.S. 547 (1905); Rogers v. Alabama, 192 U.S. 276 (1904); Carter v. Texas, 177 U.S. 442 (1900). One could argue that black Americans gained little from these decisions. *Carter*, *Rogers*, and *Shipp* (I) dealt with the right of an African-American criminal defendant to present evidence that blacks had been systematically excluded from the jury that had convicted him. In each, the decision of the Court was unanimous. In *Shipp* (II), which addressed the power of federal courts to hold members of lynch mobs and compliant law enforcement officials in contempt of court, a six-judge majority (including Brewer) affirmed the existence of such power. The

in twenty-nine of these cases, and in only six did he side with the African-American position.[22] On only one occasion did he do so in dissent.[23] Nor was Brewer a quiet participant in the actions

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three dissenters (Edward White, Rufus Peckham, and Joseph McKenna) differed only as to the issue of the power of the federal court to hold a sheriff and his deputies in contempt for their failure or unwillingness to stop the mob. *Riggins* dealt with the power of federal courts to issue writs of habeas corpus for white members of lynch mobs who had been arrested by federal authorities. The Supreme Court unanimously ruled that this was an improper remedy.

[22] As the following breakdown of judicial voting in these cases illustrates, with the exception of Harlan and Day, Brewer's contemporaries exhibited little sympathy for such claims.

Individual Voting, United States Supreme Court Decisions Involving African-American Civil Rights, 1890-1910

Justice	Yrs. on Ct.	Cases	Pro-Civil Rts.	Pct.
Harlan	1890-1910	29	15	51.7%
Day	1903-1910	17	7	41.2%
Bradley	1890-1892	3	1	33.3%
Moody	1906-1910	4	1	25.0%
Holmes	1902-1910	17	4	23.5%
Brown	1891-1906	22	5	22.7%
McKenna	1898-1910	19	4	21.7%
BREWER	1890-1910	29	6	20.1%
Fuller	1890-1910	30	5	16.7%
Peckham	1895-1909	24	4	16.7%
White	1894-1910	27	4	14.8%
Shiras	1892-1903	10	1	10.0%
Gray	1890-1902	11	1	19.1%
Field	1890-1897	9	0	0.0%
Miller	1890	1	0	0.0%
Jackson	1893-1895	0	0	—
Lurton	1909-1910	0	0	—
Totals	1890-1910	30	5	16.7%

Note: The above percentages are distorted somewhat by the fact that four of the five pro-civil rights decisions were handed down between 1904 and 1909. There is little reason to believe that any of these cases would have been decided differently had they arisen between 1890 and 1904. The percentages for only five justices—Harlan, Day, Brown, Brewer, and Bradley—exceeded that for the Court as a whole during their years on the Supreme Court.

[23] Brewer's dissenting opinion came in Giles v. Harris, 189 U.S. 475 (1903). His five other pro-African-American votes came in the five cases cited in note 21. Of course, dissents in such cases were extremely rare. Other than Brewer, only four justices ever dissented on behalf of unsuccessful civil rights claimants during Brewer's tenure. Harlan dissented in nine cases: Bailey v. Alabama, 211 U.S. 452 (1908); Berea College v. Kentucky, 211 U.S. 45 (1908); Hodges v. United States, 203 U.S. (1906); Clyatt v. United States, 197 U.S. 207 (1905); Giles v. Teasley, 198 U.S. 146 (1904); James v. Bowman, 190

of the Fuller Court majority. In seven of the twenty-five cases in which African-American civil rights claims were rejected, Brewer authored the majority opinion.[24] Perhaps the most telling fact of all is that Harlan was willing to concur in only one of Brewer's seven majority opinions.[25]

From the vantage point of the late twentieth century, Brewer's votes in these cases make him appear highly inconsistent, if not hypocritical. On the one hand, he was able to incorporate a special concern for the civil rights of Chinese into his constitutional views, even though such a view put him at odds with most of his colleagues and with prevailing popular opinion. On the other, he seemed unable to develop a comparable view of the rights of African-Americans, even though his off-the-court activities suggested that he would be sympathetic to such a view and even though his friend and colleague Harlan had paved the way for a position years before Brewer joined the Court.[26] Brewer's apparent inability to square his general beliefs with his votes as a Supreme Court Justice is evidence of the intractable nature of the problem posed by the institutionalization of racial segregation in turn-of-the-century America. To fully understand the accommodation that Brewer finally worked out, one has to begin with his pre-Civil War experiences as a son of the Greater New England culture.

U.S. 127 (1903); Giles v. Harris, 189 U.S. 407 (1903); Plessy v. Ferguson, 163 U.S. 537 (1896); Louisville, New Orleans, & Texas Ry. v. Mississippi, 133 U.S. 597 (1890). He was joined by William Day in three of these cases: Hodges v. United States, 203 U.S. 1 (1906); Berea College v. Kentucky, 211 U.S. 45 (1908); Bailey v. Bowman, 190 U.S. 528 (1903). He was joined by Henry Brown in two: Giles v. Harris, 189 U.S. 475 (1903); James v. Alabama, 211 U.S. 45 (1908). He was joined by Joseph Bradley in Louisville, New Orleans, & Texas Ry. v. Mississippi, 133 U.S. 587 (1890).

[24] *See* Berea College v. Kentucky, 211 U.S. 45 (1908); Hodges v. United States, 203 U.S. 1 (1906); Clyatt v. United States, 197 U.S. 207 (1905); Jones v. Montague, 194 U.S. 147 (1904); Tarrance v. Florida, 188 U.S. 519 (1903); and Louisville, New Orleans & Texas Ry. v. Mississippi, 133 U.S. 587 (1890).

[25] The one case was Jones v. Montague, 194 U.S. 147 (1904) (discussed at length in text accompanying note 126). In *Tarrance*, Harlan did not attend the oral argument and did not take part in the decision of the case. In the other five cases, he dissented.

[26] Westin, *supra* note 3 at 638. Harlan had first taken this position in his dissent in the Civil Rights Cases, 109 U.S. 3, 26 (1883).

DAVID BREWER AND CIVIL RIGHTS, 1837-1890

Although he spent his entire adult life in Kansas and Washington, D.C., Brewer was a product of the reform-oriented culture of antebellum New England. His father, Josiah Brewer (1796-1872), was a Congregationalist minister who had been educated at Phillips Academy, Yale, and Andover Theological Seminary and who had, in the late 1820's, undertaken an educational mission to Smyrna, Asia Minor. It was there, on June 20, 1837, that David Josiah Brewer was born. Brewer's mother, Emilia Ann Field Brewer, was a member of one of the most illustrious families in America. Her father was the Reverend David Dudley Field, Sr. Her brothers included David Dudley, Jr., the author of the Field Code and one of the premier American lawyers of his era; Cyrus, the entrepreneur who laid the Atlantic cable, Henry, a noted clergyman, editor, and author, and Stephen, who would rise to prominence as a member of the California Supreme Court and, after 1864, as a justice on the United States Supreme Court. In fact, Stephen was living with the Brewers in Smyrna at the time of David's birth, and 53 years later they were to be reunited as colleagues on the Supreme Court.

A cholera epidemic and a decline in financial support for their mission forced the Brewers to return to Connecticut in 1838, at which point the elder Brewer accepted a position as a prison chaplain that he was to hold until 1841. Josiah Brewer's ministry took him from one Connecticut town to another over the next fifteen years, during which time he became an active crusader for a variety of liberal causes including prison reform, pacifism, and, most importantly, anti-slavery. Although little is known of David Brewer's early life, he was apparently profoundly influenced by his father's strict Congregationalism and his support for social reform. In his later life, Brewer would regularly speak with pride about his New England reform heritage, on one occasion stating, "I glory in the fact that my father was an old-line abolitionist, and one thing which he instilled into my youthful soul was the conviction that liberty, personal and political, is the God-given right of every individual, and I expect to

live and die in that faith."[27]

In 1852, the fifteen-year-old Brewer enrolled in Wesleyan College in Middletown, Connecticut. Two years later, he transferred to Yale, his father's alma mater. In 1856, he graduated with honors, ranking fourth in a class of ninety-seven which included Henry B. Brown, another future colleague on the United States Supreme Court. He then spent a year clerking in the New York City law office of his uncle, David Dudley Field, after which he enrolled in the Albany Law School.

It was during this period of law study that Brewer himself publicly embraced the cause of anti-slavery. In a letter to a Massachusetts newspaper, the *Middlesex Republican*, in early 1857, he denounced the outgoing administration of President Franklin Pierce as "a failure and a curse to the country" and blamed Pierce personally for the ongoing civil war in Kansas between pro and anti-slavery forces. In regard to his fellow New Englander—Pierce was from New Hampshire—he wrote: "Never in our annals has there been presented a sadder picture of imbecility, spurred on by overriding ambition."[28]

A subsequent edition of the paper carried a letter from a reader criticizing the intemperance of Brewer's remarks, but the editor defended Brewer's actions. Ironically, the same issue of the paper also carried a story announcing the United States Supreme Court decision in *Dred Scott v Sandford*.[29] In a follow up letter, Brewer ignored his critic and instead attacked the controversial Supreme Court opinion, referring to it as "that last great satire on Constitutional logic." Although he criticized the Court's majority for deciding the case on broader grounds than were necessary, the central focus of his attack was Chief Justice Taney's assertion that African-Americans were not citizens of the United States and never had been. Brewer wrote:

> Without commenting on the injustice of this striking out from the rolls of citizenship, so large a body of our fellow citizens,

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[27] Brewer, *The Spanish War: A Prophecy or an Exception*, in 16 KANSAS COLLECTED SPEECHES AND PAMPHLETS 16-17 (n.d.) *quoted* in Eitzen, *supra* note 4, at 53-54.

[28] Middlesex Republican (undated clipping included in Brewer scrapbook in collection of Brewer Family Papers).

[29] 60 U.S. (19 How.) 393, 469 (1857).

> whose ancestors shared with ours the trials and honors of the Revolution, we assert that the Constitution was framed to secure the blessings of freedom and citizenship to all who wished them, and though its authors were compelled to bend a little to peculiar interests, they laid the foundation and bade America prepare for universal citizenship.[30]

Other contributions to the *Middlesex Republican* by Brewer included a letter that argued on behalf of the United States Congress' power to prohibit slavery in the territories and a lengthy anti-slavery poem, entitled "Dred Scott."[31]

In the spring of 1858, Brewer received his law degree and was admitted to the New York bar. At this point, he made a decision that would shape his future career. Rather than return to New York City to practice law with his already famous uncle, David Dudley Field, the twenty-one year old Brewer decided to follow the example of his uncle Stephen and move west, specifically to Kansas.[32] His motives appear to have been a combination of youthful idealism and the desire to secure fame and fortune in a new land. He departed for Kansas City in 1858, arriving at the peak of the hostilities between pro-slavery and anti-slavery Kansans. Shortly thereafter, Brewer left Kansas City on a prospecting expedition to Colorado in search of gold. When the venture failed, he returned to the East. His visit was brief, however, and in the fall of 1859, he returned to Kansas and settled in Leavenworth, a city that would be his home until his appointment to the United States Supreme Court thirty

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[30] *See* E. FEHRENBACHER, THE DRED SCOTT CASE 417-48 (1978).

[31] These items are available at Yale University Library in Justice Brewer's scrapbook included in the collection of Brewer Family Papers. Brewer's scrapbook from this period of his life reflects an intense interest in poetry. Many of its pages are given over to clippings of poems written by others. Page one of the scrapbook includes two poems by Longfellow, one by Bryant, one by Poe ("Annabel Lee"), the Lord's Prayer, and an article on Kansas. The *Middlesex Republican* also published "Evening at Nahant," a non-political poem by Brewer.

[32] The exact reasons for Brewer's decision to relocate to Kansas are not known. Later in life, Brewer claimed that he decided to forego practice in New York City for fear he would always be known as the nephew of David Dudley Field. Family rumor had it, however, that David Dudley Field was unimpressed by Brewer's prospects for success in the law in New York and encouraged him to seek his fortune in the West. L. Lardner, *supra* note 4, at 53.

years later.

The attention of the young Brewer had been focused on Kansas for some time. His scrapbook, begun in 1856, contains a newspaper story on Republican William Seward's "Bill for the Admission of Kansas into the Union" on its first page, and numerous other articles on Kansas, collected between 1856 and 1859, are included. As his sister later recalled, "We should have been surprised when David decided to go west, had he thought of elsewhere than in Kansas."[33] Throughout his life, Brewer celebrated the early anti-slavery efforts in his adopted state, comparing John Brown to John the Baptist and designating Brown as the forerunner of Abraham Lincoln.[34] Although his sympathies were clearly with the anti-slavery forces, the subsiding of hostilities at the end of 1859 allowed him to avoid most of the violence of "Bleeding Kansas" and to concentrate instead on the more mundane task of establishing a law practice.

In spite of his education and prestigious family, Brewer's initial efforts in Leavenworth met with very limited success. When a sufficient number of clients failed to materialize, he turned to public service, filling a variety of governmental positions in his early years in Leavenworth. Initially a notary public, he was appointed commissioner of the Federal Circuit Court in Leavenworth in 1861 and was later elected judge of the county probate court. In 1865, he was elected judge of the first judicial district of Kansas, and the same year assumed the position as Superintendent of Schools for the city of Leavenworth. His only political setback came in 1863 when he failed to obtain the Republican nomination for a seat in the state legislature.

It was in Kansas in the late 1860's that Brewer first dealt directly with the issue of the African-American citizenship, a concept that he had whole-heartedly endorsed in his pre-Civil War attack on the *Dred Scott* decision. Shortly after his election to the district court bench, he was required to interpret Section 1, Article V of the Kansas Constitution which limited the right to vote to white males. In *Morris v. McHale, Rapine, and Har-*

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[33] H. KARRICK, *supra* note 2, at 57.

[34] Brewer, *Some Thoughts About Kansas*, in TWELFTH ANNUAL MEETING OF THE BAR ASSOCIATION OF THE STATE OF KANSAS 61 (1895).

ris,[35] John Morris, a thirty-seven year old male whose father was white and whose mother was three-quarters black, had attempted to register to vote but had been barred from doing so by local officials because of his race. In a decision that struck a blow for racial egalitarianism, Brewer ruled that Morris did indeed have the right to vote. Brewer rested his holding upon a series of propositions. First, he held, "the theory of our government is universal [manhood] suffrage." Second, laws are presumed to be "humane and just" unless convincing evidence exists that the legislature intended the contrary. (Implicit in this proposition was the view that to deny someone the vote would be inhumane and unjust.) Finally, Brewer noted that the Kansas Constitution referred to race, not color, and that Morris was more of the white race than the black.

Brewer did not, however, claim that the provision in the state constitution was invalid. Given that the Fourteenth Amendment (and possibly the Thirteenth as well—the exact date of the case is not recorded) had not yet been adopted, it is hard to see how he could have, even if he had so desired. Consequently, he did acknowledge that individuals of undiluted African heritage were not entitled to vote under the Kansas Constitution.

Brewer's early years in Leavenworth may also have been the first time in his life that he had the opportunity to interact with African-Americans on a regular basis. By all accounts his personal relations with his black neighbors were warm and heartfelt, although his attitude toward them seems highly paternalistic. He embraced the cause of African-American education shortly after his arrival in Kansas, but his affectionate description of black pupils as "juvenile Ethiopians" suggests that he thought of Leavenworth's African-Americans as something less than social equals.[36] The nature of Brewer's attitude can be

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[35] This case is unpublished but an unidentified newspaper report of the case is contained in Justice Brewer's scrapbook, No. 2, p. 10 in the Brewer Family Papers. The case was apparently decided in 1865, but prior to the ratification of the thirteenth amendment; at least, there is no reference of the amendment in the newspaper report of the case.

[36] SECOND ANNUAL REPORT OF THE SUPERINTENDENT OF PUBLIC SCHOOLS OF LEAVENWORTH CITY, KANSAS 18 (1866) [hereinafter SECOND ANNUAL REPORT].

gleaned from a story related by Arthur Simmons, a white cigar maker in Leavenworth. Harking back to the late 1870's when Brewer was a Kansas judge, Simmons recalled:

> One day Justice Brewer was in the store, talking to me, when an old negro came in, who had been janitor at the court house ten years before, when Brewer was District Judge. Neither the Justice nor the negro recognized the other. The negro bought a bit of smoking tobacco, and started shuffling out.
> Then I told Brewer who he was. "What!" he exclaimed, "Is that Uncle Ebe? Heavens, how he has aged!" Then he went over and stopped the old man. "Uncle Ebe," he said, "don't you recognize me?" The negro looked at him blankly for a second, then his face became positively radiant.
> 'Fo de Lord, it's Marse David!" he exclaimed, and reached out his two hands and took those of Brewer. Then Justice Brewer stood there shaking hands with him and recalling old times in the court house for I don't know how long.[37]

Brewer's most direct and most significant involvement with the African-American population of Leavenworth came in his capacity as Superintendent of Public Schools in Leavenworth. He had become involved with public education shortly after his arrival in Kansas, and in May of 1864, he was chosen as vice president of the local board of education. In this capacity he was instrumental in the establishment of the first two public schools for African-Americans in Leavenworth (which were apparently the first such schools in the state.)[38] In November of 1864, he assumed the office of president of the board and in August of 1865, he became superintendent of schools, a position he held until 1868 when he was elected president of the state teachers

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[37] H. KARRICK, *supra* note 2, at 57.

[38] SECOND ANNUAL REPORT, *supra* note 36, at 14. Brewer claimed that the Leavenworth schools were the first public schools for African-Americans in Kansas in a public address delivered shortly after the turn-of-the-century. *See infra* note 171. Other evidence seems to support this claim. Working with H. D. McCarty, another of the pioneers of public education in Kansas, Brewer helped secure $25,000 for the construction of public school buildings for both races in Leavenworth. C. WRIGHT, ONE HUNDRED YEARS IN KANSAS EDUCATION 18 (1963). Of Brewer's colleague McCarty, the historian of public education in Kansas has written, "with equal enthusiasm, he promoted Negro education in the established schools of Kansas." *Id.*

association.[39] As superintendent, he proudly reported on the progress of the "colored" schools, including the establishment of a third school during the 1865-66 school year. In 1867, he noted with approval that virtually all of the city's African-American children under age sixteen had attended school for at least part of the year.[40]

There is no evidence, however, that Brewer believed that black and white children should be educated in the same schools. Although the "General Regulations of the Schools" in force during the years 1865 to 1868 made no reference to the assignment of pupils by race, Brewer's superintendent's reports refer to "white schools" and "colored schools" as general categories without comment of the appropriateness of the division.[41] In his 1866 report, he applauded the decision of the citizens of Leavenworth to appropriate $20,000 for the construction of a separate brick school house for the white and colored pupils.[42]

In 1869, Brewer stepped down from his position as state district court judge and assumed the position of Leavenworth City Attorney. However, he was back on the bench the following year when he was elected to the first of three six-year terms on the Kansas Supreme Court. Eleven years later, while a member of Kansas' highest court, Brewer had the occasion to rule on the legality of a system of segregated schools similar to the one he had helped establish in Leavenworth. In *Board of Education v. Tinnon*,[43] an African-American parent challenged the legality of the decision of the board of education of Ottawa, Kansas, to establish separate schools for black and white children. Tinnon apparently argued that the Ottawa Board of Education lacked the authority to establish such a system under the Kansas Gen-

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[39] L. Lardner, *supra* note 4, at 10.

[40] THIRD ANNUAL REPORT OF THE SUPERINTENDENT OF PUBLIC SCHOOLS OF LEAVENWORTH CITY, KANSAS 17 (1867). At this time, African-Americans accounted for approximately 18% of school age children in Leavenworth.

[41] SECOND ANNUAL REPORT, *supra* note 36, at 75-76.

[42] *Id.* at 18. Brewer's primary point of course was not to endorse the concept of segregated schools, but to congratulate his fellow townsmen on their decision to fund new, brick schools and for their willingness to extend their largess to the town's African-American pupils who accounted for approximately one-sixth of the school age population.

[43] 26 Kan. 1 (1881).

eral Education Act and that such a system was prohibited by the Fourteenth Amendment to the United States Constitution, ratified in 1870. The trial judge agreed and issued a writ of *mandamus* compelling the admission of the plaintiff's children to the nearest school, which in this case was the white school. The Board then appealed to the Kansas Supreme Court.

By a two-to-one vote, the Kansas Supreme Court upheld the ruling of the lower court, but with Justice Brewer in dissent. The two judge majority based its ruling exclusively on the grounds that the local board of education could exercise *only* those powers explicitly granted to it by the General Education Act. Since the statute was silent on the issue of racial segregation, the majority reasoned, the Ottawa Board had no authority to establish a dual school system. The issue of what the fourteenth amendment required was specifically left unresolved.

Brewer dissented on both state and federal grounds. First of all, he did not believe that the power of localities to establish separate schools for the races rested on specific authorization from the state legislature. Moreover, he found that the fourteenth amendment imposed no barrier to separate schools. As he put it, "I dissent entirely from the suggestion that under the 14th Amendment of our Federal Constitution, the State has no power to provide for separate schools for white and colored children. I think, notwithstanding such amendment, each State has the power to classify school children by color, sex, or otherwise, as to [sic] its legislature shall deem wisest and best."[44]

Brewer's dissent in *Tinnon* is a difficult opinion to evaluate. To say that Brewer was indifferent to the plight of African-Americans would be to ignore his early work of behalf of black education. It may well be that his own extensive experience in this area led him to believe that, given contemporary racial attitudes, the inability to establish separate schools would frustrate the development of public education in the state.[45] A belief that

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[44] *Id.* at 23-24.

[45] The potential for conflict over the issue of interracial schools was exacerbated by the Kansas legislature's adoption of a compulsory attendance law in 1874. Morris, *One State's Struggle with* Wisconsin v. Yoder: *the Kansas Compulsory School Attendance Statute and the Free Exercise of Religion*, 17 WASHBURN L.J. 574 (1978) (citing 1874 Kan. Sess. Laws ch. 123, § 1, 194-95).

African-Americans, only recently removed from slavery, needed special help to enter American society and that that special help could be best dispensed in black-only schools was not necessarily inconsistent with Brewer's earlier expressions of support for the black race.[46]

Moreover, Brewer was almost certainly correct that the fourteenth amendment was not commonly understood in 1881 to have "outlawed" racially separate schools.[47] While individual spokesmen for that position did exist, in the nineteenth century no state supreme court or federal court ever held that the fourteenth amendment categorically prohibited racially segregated schools.[48] The *Tinnon* majority, for example, shied away from such a holding, choosing instead to invalidate the city ordinance on much narrower grounds of statutory construction.[49] Even Justice Harlan, the great defender of African-American civil rights, apparently accepted the constitutionality of separate schools.[50]

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[46] Brewer's ambivalence on this issue was characteristic of Kansans of his era. State laws pertaining to racial segregation in schools were changed seven times between 1870 and 1881. According to the historian J. Morgan Kousser, "the shifts in the legal status of blacks in public education in the Jayhawk State were so frequent and dramatic that they can be followed only with a tabular guide." Kousser, *Before* Plessy, *Before* Brown: *The Development of the Law of Racial Integration in Louisiana and Kansas* in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 221 (P. Finkelman & S. Gottlieb eds. 1991).

[47] J. KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS 9-22 (1986).

[48] *Id.* Kousser located 82 state and lower federal court cases involving racial discrimination in schools decided between 1834 and 1903 (three-quarters of which were decided after the adoption of the fourteenth amendment). While African-American plaintiffs prevailed in approximately half of the cases, they normally did so on state law grounds or else because of the patently unequal facilities provided for black schools. The only incident of a court striking down a school segregation plan on grounds that it violated the fourteenth amendment was an 1881 decision by Judge Pearson Church of the Crawford County (Pennsylvania) Court of Common Pleas that was reported only in a local newspaper. For a discussion of this case, see Price, *School Segregation in Nineteenth-Century Pennsylvania*, 43 PA. HIST. 121, 133-34 (1976).

[49] Even so, during Brewer's lifetime, the holding of the *Tinnon* majority was reaffirmed in Knox v. Board of Educ. of the City of Independence, 45 Kan. 152 (1891) and Bowles v. Board of Educ. of the City of Wichita, 76 Kan. 361 (1907). Ironically, Brown v. Board of Educ., 349 U.S. 294, 301 (1954) involved a segregated school system in Topeka, Kansas.

[50] See Harlan's majority opinion in Cummings v. Board of Educ., 175 U.S. 528, 545 (1899).

Whatever his motivation, Brewer's dissent in *Tinnon* would be as direct a statement as he would ever make as to the applicability of the fourteenth amendment to the civil rights of African-Americans. Once he reached the United States Supreme Court, his approach would be to avoid this central constitutional issue, even when it was directly presented, and even when it meant rooting his opinions in the narrow technicalities and crabbed legalisms that he normally eschewed. In each subsequent opinion that Brewer wrote involving the question of race, he was able to sidestep the critical question of the constitutional basis of state-mandated racial classifications.

BREWER'S APPOINTMENT TO THE UNITED STATES SUPREME COURT

After winning reelection to the Kansas Supreme Court in 1876 and 1882, Brewer was appointed to the Federal Circuit Court for the Eighth Circuit in 1884 by President Chester Alan Arthur. Five years later, after gaining national attention with a number of his opinions, he was named by President Benjamin Harrison to replace the recently deceased Justice Stanley Mathews in the United States Supreme Court.[51] In January, 1890, he was sworn in as an associate justice of the Court, a position he was to hold until his death in 1910. His colleagues on the Court included his uncle Stephen Field and, less than a year after his appointment, his Yale classmate Henry Brown.

Brewer's first United States Supreme Court opinion dealing with the rights of African-Americans came in *Louisville, New Orleans and Texas Railway Co. v. Mississippi*,[52] a case that was argued during his first month as a justice. The *Louisville Railway* case represented a challenge to the recently adopted Mississippi statute that required the segregation of passengers by race on any railroad in the state. The appellant railroad, which had been convicted of violating the act shortly after it took effect, contended that the legislation operated as an unconstitutional restraint on interstate commerce.

While the case did present an important commerce clause

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[51] The story of Brewer's appointment is recounted in L. Lardner, *supra* note 4, at 53.

[52] 133 U.S. 587, 588 (1890).

issue, the more fundamental question raised by the Mississippi statute was whether or not such restriction could survive scrutiny under the equal protection clause of the fourteenth amendment. In his opinion, however, Brewer chose not to address the latter issue, observing at the outset that the present case was not "a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train."[53] Consequently, Brewer asserted, the case did not present a "question of personal insult or alleged violation of personal rights."[54] Instead, he maintained, the question was limited "to the power of the State to compel railroad companies to provide, within the State, separate accommodations for the two races."[55] Whether such accommodation was "to be a matter of choice or compulsion" did not "enter into this case."[56] This attempt to define the issues before the Court in such a way that racial implications could be discounted would become characteristic of the way in which Brewer would approach civil rights cases throughout his tenure on the Court. Although the case fundamentally turned on the constitutionality of a state-mandated racial distinction, Brewer struggled to resolve it on the more technical and racially neutral issue of the constitutional limits of state police power.

Even with the issue restricted in this manner, precedent seemed to be on the side of the railroad. In an 1877 decision, *Hall v. Decuir*,[57] the United States Supreme Court had invalidated a statute enacted by Louisiana's reconstruction era government *forbidding* racial discrimination in the seating of passengers on common carriers on the grounds that it infringed upon the federal commerce power. Although *Louisville Railway* appeared to be the mirror image of *Hall*, Brewer was able to distinguish the later case by arguing that the effect of the Louisiana statute in *Hall* was to control commerce beyond the borders of the state (i.e., interstate commerce) while the Mississippi law applied solely to commerce within the state (intrastate com-

[53] *Louisville Railway*, 133 U.S. at 589.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] 95 U.S. 485 (1878).

merce). Brewer conveniently ignored the fact that no such distinction had been made in the Court's opinion in *Hall*. Brewer also accepted as conclusive the determination by the Mississippi Supreme Court in the previous decision that the statute applied only to intrastate commerce[58] even though a similar determination by the Louisiana Supreme Court had been rejected by Brewer's predecessors thirteen years earlier.[59]

According to Brewer, the requirement of separate cars was analogous to the statutes requiring certain accommodations at depots or compelling trains to stop at crossings of other railroads—restrictions that had been recognized as consistent with the powers of state governments to regulate on behalf of the health and safety of their citizens. Brewer's decision to resolve the case exclusively on commerce clause grounds was accepted by all of his colleagues except Joseph Bradley and John Marshall Harlan who, in a vigorous dissent, denounced the weaknesses of Brewer's distinction between intrastate and interstate commerce and insinuated that the statute might also be unconstitutional on other grounds.[60]

If one concedes that the *Louisville Railroad* case was properly decided as a commerce clause case, then it is difficult to say that Brewer's opinion is inconsistent with his subsequent holdings in other commerce clause cases. The commerce clause opinions of the Fuller Court generally defy any easy categorization, in large part because the Court never worked out an adequate theoretical framework for determining the point at which the exercise of the state police power impinged upon interstate commerce.[61] Brewer's opinions also reflect this tendency toward result-orientation. On the one hand, he was sympathetic to the desires of states to regulate the operation of railroads and other common carriers. He supported, over commerce clause challenges, the right of states to bar the importation of allegedly diseased livestock from other states, even when it took the form of

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[58] Louisville, New Orleans and Texas Ry. v. State, 66 Miss. 662, 675 (1889).

[59] The *Hall* Court rejected the reasoning of the Louisiana Supreme Court in DeCuir v. Benson, 27 La. Ann. 1 (1875).

[60] *Louisville Railway*, 133 U.S. at 592.

[61] *See* D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1896 31-32, 79-80 (1990).

an absolute ban on imports from a particular state.[62] He also believed that the commerce clause permitted states with prohibition laws to bar the importation of alcoholic beverages from other states[63] and allowed them to impose licenses on agents hiring laborers for work outside the state[64] and on elevators and warehouses on the right of way of railroads,[65] as well as to require railroads to provide rail connections for the exchange of cars,[66] and to fine interstate telegraph companies for illegal charges.[67] On the other hand, he believed that both a ban on the sale of cigarettes within a state[68] and a state law requiring interstate trains to stop at specific towns[69] were both undue burdens on interstate commerce and that the commerce clause prohibited a state from requiring out of state corporations to pay a charter fee based on capital stock as a prerequisite for *continuing* to do business within its borders.[70] In the other major commerce clause case decided during the October 1990 term, *Leisy v. Hardin*,[71] Brewer joined the dissenters who argued for greater deference to the state police power.

Brewer's tactic in *Louisville Railroad* of defining away the racial issue was not lost on his contemporaries. For those who hoped to have the Supreme Court directly confront the issue of the constitutionality of the spate of "Jim Crow" accommodation laws adopted around 1890, it was an obstacle that had to be overcome.[72] Homer Plessy's attorney Albion Tourgee realized

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[62] Rasmussen v. Idaho, 181 U.S. 198, 201 (1901); Smith v. St. Louis & S.W. Ry., 181 U.S. 248 (1901). Brewer was the author of the majority opinion in *Rasmussen*.

[63] Leisy v. Hardin, 135 U.S. 100, 125 (1890). Brewer took this position by joining in Justice Horace Gray's dissent.

[64] Williams v. Fears, 179 U.S. 270, 278 (1900).

[65] Wisconsin, Minnesota & Pac. R.R. v. Jacobson, 179 U.S. 287 (1900).

[66] *Id.*

[67] Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 103 (1901).

[68] Brewer took this position in his dissenting opinion in Austin v. Tennessee, 179 U.S. 343, 364 (1900).

[69] Lake Shore and Michigan S. Ry. v. Ohio, 173 U.S. 285, 336 (1899).

[70] Western Union Tel. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 55-56 (1910).

[71] *Leisy*, 135 U.S. at 125.

[72] Between 1887 and 1894, nine southern states—Florida, Mississippi, Texas, Louisiana, Alabama, Arkansas, Tennessee, Georgia, and Kentucky—adopted laws mandating segregation on common carriers. For a discussion of the wave of segregationist legislation in the 1880's and 1890's in the South see C. LOFGREN, *supra* note 1, at 20-27.

this in 1892 while planning the appeal in the case that would reach the Supreme Court as *Plessy v. Ferguson*. In an apparent reference to Brewer's *Louisville Railroad* opinion, Tourgee wrote to his co-counsel that "the first effort of the Supreme Court is always to hunt a hole to crawl out of deciding anything they [sic] can possibly evade."[73]

JUSTICE BREWER'S ROLE IN *Plessy v. Ferguson*

There were a number of reasons to believe that if Brewer were forced to confront the issue of whether a separate accommodations act violated the personal rights of African-Americans, he would rule in the affirmative. The very fact that he had gone to such lengths to draw a careful distinction between the commerce clause and the Fourteen Amendment issues in *Louisville Railroad* implied that were the latter before the Court, he at least might have reached a quite different result. Moreover, by the mid-1890's, Brewer had emerged as perhaps the Court's most fervent defender of individual liberty against state encroachment.

As a justice, Brewer travelled the route of laissez-faire constitutionalism blazed by his uncle, Stephen Field.[74] In an era when the Supreme Court became, at least in the opinion of its critics, notorious for its hostility to the regulatory state, Brewer stood apart from his colleagues in the intensity of his belief that the United States Constitution protected private property from public regulation in all but a limited number of situations.[75]

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[73] Letter from Albion Tourgee to James C. Walker (Mar., 1892).

[74] *See* C. SWISHER, STEPHEN FIELD: CRAFTSMAN OF THE LAW (1969 ed.). Field's constitutional views are examined in a number of works. *See also* McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. OF AM. HIST. 970 (1975); McCurdy, *Stephen J. Field and the American Judicial Tradition*, in THE FIELDS AND THE LAW 5-18 (1986); G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 84-108 (2nd ed., 1988). Brewer's subsequent relations with his uncle have also been addressed. *See generally* L. Lardner, *supra* note 4, at 53-54; J. SEMONCHE, *supra* note 9, at 57-58.

[75] In the words of constitutional historian David Currie, both Justice Brewer and Rufus Peckham, his colleague from 1895 to 1909, stood at the "forefront of the Court's assault on social legislation." Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U. CHI. L. REV. 867, 901 (1985). Perhaps the boldest

Brewer's views on the issues of economic liberty had been evident long before his appointment to the Supreme Court. On the Kansas Supreme Court and later on the federal Eighth Circuit, he had openly questioned the wide latitude given to state economic regulation by the United States Supreme Court decisions of the 1870's and 1880's. On the Kansas Supreme Court in 1883, he had questioned the propriety of the Kansas prohibition act,[76] and three years later as a federal circuit court judge he declared it unconstitutional,[77] a holding reversed the following year by the United States Supreme Court in *Mugler v. Kansas*.[78] In 1888, in a case involving the reasonableness of rates established by the Iowa Railroad Commission, Brewer rejected arguments that the United States Supreme Court's 1873 landmark holding in *Munn v. Illinois*[79] obligated him to hold that the reasonableness of rates was a legislative, not a judicial, question.[80]

From the time of his arrival in 1890, Brewer joined in most of the United States Supreme Court's highly publicized "pro-property" decisions, beginning with the landmark case of *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*[81] which overturned the Minnesota Railroad and Warehouse Commission Act of 1887 on due process grounds. In subsequent years, he

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statement of his views came in Brewer, *Protection to Private Property from Public Attack*, 55 NEW ENGLANDER 97 (1891) (initially delivered as address at Yale Law School and later published in pamphlet form).

[76] State v. Muglar, 29 Kan. 252 (1883).

[77] State v. Walruff, 26 F. 178, 200 (D. Kan. 1886). In *Muglar*, Brewer had raised the issue of the act's constitutionality, but had not formally dissented. *Muglar*, 29 Kan. at 252.

[78] 123 U.S. 623 (1887).

[79] 94 U.S. 113 (1876). *Munn* and its companion cases upheld the so-called "Granger" laws that placed restrictions on railroads and grain elevator companies in the name of the public interest.

[80] Chicago & N.W. Ry. v. Dey, 35 F. 866, 879 (S.D. Iowa 1888). Brewer's opinion has been viewed by some as in direct contradiction to *Munn*. *See* A. PAUL, *supra* note 4, at 53-54. However, the Iowa act at issue did provide for judicial review of the Commission's rates, and Brewer himself maintained that its decision was consistent with Chief Justice Morrison Waite's assertion that "the State cannot require a railroad corporation to carry persons or property without reward." Stone v. Farmers' Loan and Trust Co., 116 U.S. 307, 331 (1886). Also, the following year, Brewer upheld a revised rate schedule against a similar challenge. Chicago, Burlington & Quincy Ry. v. Dey, 38 F. 656, 664 (1889). For a discussion of these cases, see L. Lardner, *supra* note 4, at 53-54.

[81] 134 U.S. 418 (1890).

joined in decisions that upheld a railroad's right to a fair return on its investment and the Court's power to determine the reasonableness of maximum railroad rates,[82] struck down the federal income tax,[83] narrowed the effect of the Sherman Antitrust Act,[84] sanctioned the power of federal judges to enjoin strikes against railroads,[85] and elevated the principle of liberty of contract to constitutional status.[86]

The true indication of Brewer's commitment to the constitutional protection of individual liberty, however, came not from the cases in which he agreed with the majority, but from those in which he dissented because he felt his colleagues were not willing to go far enough. From the outset, Brewer had made it clear that he believed that the Supreme Court had been lax in its obligation to enforce the rights of private property guaranteed by the fourteenth amendment and the Declaration of Independence (to which Brewer afforded quasi-constitutional status). In an 1891 address at Yale Law School, the recently appointed justice proclaimed:

> [W]e must re-cast some of our judicial decisions; and if that be not possible, we must re-write into our Constitution the affirmations of the Declaration of Independence, in language so clear and preemptory that no judge can doubt or hesitate, and no man, not even a legislator, misunderstand. I emphasize the words clear and preemptory, for many of those who wrought into the Constitution the Fourteenth Amendment believed

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[82] Reagan v. Farmer's Loan and Trust Co., 154 U.S. 362 (1894); Smyth v. Ames, 169 U.S. 466 (1898). Brewer was the author of the majority opinion in *Reagan*.

[83] Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 583 (1895).

[84] United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895).

[85] *In re* Debs, 158 U.S. 564, 594-95 (1895). *Debs* was a Brewer opinion. For a discussion of the significance of the three major constitutional decisions of 1895 (*Pollack*, *Knight*, and *Debs*), see A. PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW 131-220 (1969 ed.).

[86] Adair v. United States, 208 U.S. 161, 173 (1908); Lochner v. New York, 198 U.S. 45, 53 (1905); and Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897). Arnold Paul has maintained that the idea that the due process clause of the fourteenth amendment embodied the principle of liberty of contract was first acknowledged by a majority of the Court in an otherwise obscure opinion written by Brewer in Frisbie v. United States, 157 U.S. 160, 165 (1895). In *Frisbie*, the Court upheld a congressional limitation on lawyer's fees in cases involving United States pensions, but implied that Congress was not free to do as it chose in governing employment relations.

> 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.* [Emphasis in the original.][87]

On two occasions in the early 1890's, Brewer sought to overturn the Court's holding in *Munn v. Illinois* that rates charged by "businesses affected with the public interest" were a proper subject for regulation under the state police power.[88] Although neither effort succeeded, his dissent in the first of the two cases, *Budd v. New York*, contains what is perhaps the most concise statement of Brewer's constitutional vision:

> The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection for him and his property, is both the limitation and the duty of government. If it may regulate the price of one service, which is not a public service . . . why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, "Looking Backward" is nearer than a dream.[89]

In subsequent cases, Brewer argued in dissent against the constitutionality of laws that established an eight-hour day for miners and employees engaged in public works,[90] outlawed payment of employees with scrip redeemable only in company stores,[91] prescribed the methods to be used in weighing coal in mines where workers were paid on the basis of the amount mined,[92] forbade the sale of artificially colored oleomargarine,[93] and required individuals to submit to compulsory vaccination.[94] In cases involving the power of eminent domain or the use of the police power to limit the rights of property owners, Brewer fre-

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[87] Brewer, *supra* note 75, at 97.

[88] Brass v. North Dakota, 153 U.S. 391, 410 (1894); Budd v. New York, 143 U.S. 517, 551 (1892).

[89] *Budd*, 143 U.S. at 551.

[90] Atkin v. Kansas, 191 U.S. 207, 224 (1903); Holden v. Hardy, 169 U.S. 366, 398 (1898).

[91] Knoxville Iron Co. v. Harbison, 183 U.S. 13, 25 (1901).

[92] McLean v. Arkansas, 211 U.S. 539, 550 (1909).

[93] Plumley v. Massachusetts, 155 U.S. 461, 461 (1894).

[94] Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905).

quently dissented on the grounds that the state ought to be required to compensate the party affected by the regulation, or that the compensation paid was inadequate.[95] Furthermore, he showed a reluctance to accept extensions of the federal police power, dissenting in *Champion v. Ames*[96] and concurring in the decision to overturn an act of Congress in *The First Employers' Liability Cases*.[97] He also consistently maintained that the fourteenth amendment's equal protection clause outlawed all graduated taxes whether they be direct or indirect.[98]

Brewer's general constitutional principles should have made him highly suspicious of state-imposed regulation that limited an individual's liberty solely on the basis of his race. If the state could not constitutionally limit the number of hours a miner or a baker could work (as Brewer maintained in *Holden v. Hardy* and *Lochner*), how could it tell a citizen that he or she must attend a specific school or ride in a specific street car? Similar logic led him to declare unconstitutional a Congressional act that provided for the deportation of Chinese residents who failed to obtain a certificate of residence from the nearest district collector of internal revenue.[99] Three years prior to *Plessy*, in a blistering dissent in *Fong Yue Ting v. United States*,[100] Brewer attacked the act as a violation of numerous rights protected by the first eight amendments (which he insisted applied to aliens as well as to citizens) and as being contrary to the Christian ethic.[101] In his dissent Brewer warned:

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[95] Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 259 (1897); Chicago, Burlington & Quincy Ry. v. Drainage Comm., 200 U.S. 561, 600 (1906).

[96] 188 U.S. 321, 364 (1903) (Fuller, C.J., Brewer, Shiras and Peckham, J.J., dissenting).

[97] 207 U.S. 463, 504 (1908).

[98] *See* Knowlton v. Moore, 178 U.S. 41, 110 (1900); Magoun v. Illinois Trust and Sav. Bank, 170 U.S. 283, 294 (1898). Both cases involved inheritance taxes, the former a state tax and the latter a federal one. *Id.* Brewer was the lone dissenter in both cases. *Id.*

[99] Act of May 5, 1892, ch. 60, 27 Stat. 25. This act was part of an ongoing campaign against the Chinese who were no longer permitted to immigrate to the United States and who were barred from obtaining United States citizenship regardless of how long they had lived in the country. *Id.* On the movement to exclude Chinese immigrants from the United States, see generally, M. KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 156-158, 397, 443-45 (1977).

[100] 149 U.S. 698 (1893).

[101] *Fong Yue Ting*, 149 U.S. at 733. That the United States was a "Christian Na-

> It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guarantees of these amendments can be thus ignored, in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to?[102]

If nothing else, Brewer's *Fong Yue Ting* dissent demonstrated that his concern for constitutional liberty was not limited solely to the economic realm. Moreover, his 1892 address to the American Home Missionary Society in which he described the United States as a multi-racial nation also seemed to suggest that he would oppose a statute whose sole purpose was to emphasize the alleged inferiority of an entire race.

The difficulties that Brewer experienced in reconciling his views on liberty and race may do more to explain his abstention in *Plessy v. Ferguson* than the mere fact of his absence from oral argument. Brewer was in fact absent from the Court on April 13, 1896. Although he was serving as the chair of the Venezuelan Boundary Commission at the time, his absence from the Court that day was probably more directly attributable to his daughter's untimely death.[103] However, his absence from the

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tion" was an important principle for Brewer, although he never fully explored the meaning or consequences of this designation. *Id.* He was not, however, reluctant to incorporate this assertion in his judicial opinions. *Id.*; *see* Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892); D. BREWER, THE UNITED STATES A CHRISTIAN NATION (1905).

[102] *Fong Yue Ting*, 149 U.S. at 743. Chief Justice Fuller and Justice Field issued separate dissenting opinions. *Id.* at 744, 761 (Field and Fuller, J.J., dissenting).

[103] *See* W. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES, 1888-1910 ,at 250-51 (1967); J. SEMONCHE, *supra* note 9, at 58. Brewer's involvement with the Venezuelan Boundary Commission did take a great deal of his time during the early months of 1896. *Id.* On January 1 of that year, President Grover Cleveland appointed Brewer to chair a congressionally authorized investigating commission whose purpose was to help settle a long-standing boundary dispute between Venezuela and British Guinea. The commission sat in Washington at intervals from January 4, 1896 to May 26, 1897. In its published report, the Commission noted that "[t]his investigation imposed on us a large amount of labor . . . The extent of this work no one not a member of the Commission and not participating in its labors can fully appreciate." REPORT OF THE UNITED STATES COMMISSION TO INVESTIGATE AND REPORT UPON THE DIVISIONAL LINE BETWEEN VENEZUELA AND BRITISH GUINEA 13-14 (1898). For other sources concerning Brewer's involvement with this commission, see G. IRELAND, BOUNDARIES, POSSESSIONS,

Court during the oral argument in *Plessy* did not *necessarily* eliminate his participation in the case. The Court itself at that time had no rule that required a justice to be present at oral argument before he could participate in the resolution of a case.

Between April 13 and April 20, the period in which Brewer was away attending his daughter's funeral, eleven cases were presented to the Court. Of these, five were argued orally before the Court by both parties;[104] two were argued by one party only;[105] four were submitted to the Court with written briefs but with no oral argument.[106] Brewer clearly did not recuse himself from all eleven, since he authored the majority opinion in *Wig-*

AND CONFLICTS IN SOUTH AMERICA 236-38 (1938). Additional material may be found in the special file on the Anglo-Venezuelan Boundary Commission included in the collection of Brewer Family Papers at Yale University Library.

After Great Britain and Venezuela agreed to submit the matter to arbitration in February, 1897, Brewer and Chief Justice Melville Fuller were appointed as the United States' representatives on the five-man arbitral tribunal. This ultimately required Brewer to spend the month of January and much of the summer of 1899 in Paris attending to the business of the arbitration panel. W. KING, *supra*, at 249-60.

Brewer's work with the investigating commission clearly limited his ability to participate in the affairs of the Supreme Court during the spring of 1896. After attending the Court sessions on March 9 and 10, Brewer was absent from the Court every day until it recessed on April 3, missing a total of sixteen daily sessions. The Court reconvened on April 13, the day of the death of Brewer's daughter, but as previously mentioned, Brewer was absent that entire week. He returned to the Court on Tuesday, April 21, and was present for the remainder of that week as well as the following Monday, April 27. He was then absent for the remainder of the week. He returned to the bench on Monday, May 4, but did not appear again until May 25. The Court was in recess between May 9 and 24, with the exception of May 18, when it convened for one day to deliver opinions, including the one in *Plessy v. Ferguson*. Brewer was absent that day as well, and two of his opinions in other cases were read by Chief Justice Fuller. The record of Brewer's attendance at the sessions of the United States Supreme Court for the spring of 1896 is contained in the JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (October Term, 1895). In other words, Brewer's work with the Commission might or might not have required him to be absent on April 13, but the issue was mooted by his daughter's untimely death.

[104] Dibble v. Bellingham Bay Land Co., 163 U.S. 63 (1896) on April 17; Talton v. Mayes, 163 U.S. 376 (1896) on April 16 and 17; Black v. Elkhorn Mining Co., 163 U.S. 445 (1896) on April 15 and 16; Kirk v. United States, 163 U.S. 49 (1896) on April 14; and Plessy v. Ferguson, 163 U.S. 537 (1896) argued on April 13.

[105] Murray v. Louisiana, 163 U.S. 101 (1896) argued and submitted on April 16; and Northern Pac. R.R. v. Egeland, 163 U.S. 93 (1896) on April 20.

[106] Steamer Coquittam v. United States, 163 U.S. 346 (1896) on April 20; Wiggan v. Conolly, 163 U.S. 56 (1896) on April 16; Barwitz v. Beverly, 163 U.S. 118 (1896) submitted on April 13; Wilson v. United States, 162 U.S. 613 (1896) submitted on April 26.

gan v. Conolly,[107] one of the cases that was submitted without oral argument. In the reported opinions for the seven cases in which at least one of the sides presented its argument orally, only in *Plessy* is it specifically mentioned that Brewer took no part in the proceedings.[108]

Although neither Brewer's personal papers nor the records of the Court provide adequate evidence to support such a conclusion, one is tempted to believe that Brewer's unavoidable absence from oral argument gave him the opportunity to avoid participating in a case that made him uncomfortable and, given the opportunity, he took it. Interestingly, in his subsequent civil rights opinions, Brewer quietly distanced himself from the *Plessy* decision, never citing it as authority—even when, as in

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[107] *Wiggan*, 163 U.S. at 59. *Wiggan* involved an appeal from the Supreme Court of Kansas, a fact that may explain why the opinion was assigned to Brewer. *Id.* The decision was handed down on May 4, 1896. *Id.*

[108] *Plessy*, 163 U.S. at 564. Similarly, on May 18, 1896, a day set aside by the Court for the delivery of opinions, the Supreme Court handed down decisions in 34 cases, 27 of which had been argued or submitted to the Court between March 17 and May 1 of that year. Of the 27, 17 had featured an oral argument either by both (14) or at least one (3) of the parties to the case. The remaining 10 were submitted on briefs alone. According to Court records, Brewer was present for the oral argument in only one of the 17 (Indiana v. Kentucky, 163 U.S. 520 (1896)), argued on April 27. However, in only five of the remaining 16 cases is he identified as having taken no part. It is difficult to see a pattern in these cases. Two of the five decisions-*Plessy* and Wong Wing v. United States, 163 U.S. 228, 229 (1896)-involved the rights of racial minorities, but so did Murray v. Louisiana, 190 U.S. 127 (1903), which contains no reference to Brewer's absence. The other three cases seemed to have little if anything in common. Hennington v. Georgia, 163 U.S. 299, 300 (1896) involved the power of a state to prohibit the running of freight trains on Sunday while United States v. Rider, 163 U.S. 132, 135 (1896) and Webster v. Daly, 163 U.S. 155, 156 (1896) involved the Court's jurisdiction over appeals under the Judiciary Act of 1891. In terms of the sequence of the arguments, Brewer is listed as having taken no part in the first, fourth, fifth, sixth and fifteenth of the seventeen cases. Oral arguments in United States v. Winchester and Potomac R.R. Co., 163 U.S. 244 (1896) were begun on March 31 and concluded on April 1, the day the Court heard the argument in *Rider*. Brewer was absent both days, but is listed as having taken no part only in the latter decision.

In two of the 10 cases submitted on briefs alone, Brewer authored the majority opinion. *See* Burfenning v. Chicago, St. Paul, Minneapolis, and Omaha Ry., 163 U.S. 321, 322 (1896); Union Nat'l Bank v. Louisville, New Albany, and Chicago Ry., 163 U.S. 325, 329 (1896). The remaining eight contain no Brewer opinions, and there is no mention of his failure to participate in the deliberations of the Court. Because Brewer was absent on May 18, his opinions in *Burfenning* and *Union National Bank* were read by Chief Justice Fuller. All of the decisions handed down on May 18, 1896, are included in volume 163 of the United States Reports.

Berea College v. Kentucky,[109] it seemed to be directly on point.

BREWER'S SUBSEQUENT CIVIL RIGHTS OPINIONS

Brewer's next opinion in a case involving African-American civil rights did not come until 1903. That year, in *Tarrance v. Florida*,[110] Brewer refused to overturn the convictions of several African-American appellants who had been convicted by an all white jury from which blacks had allegedly been systematically excluded. On December 5, 1900, James Tarrance, Will Smith, Amos Clark, and others had been indicted for murder by a grand jury in Escambia County, Florida. In response, the defendants' attorney had filed a motion to quash the venire and the panels of the grand and petit jurors on the grounds that all African-Americans had been excluded from juries in Escambia County for many years. The following day the prosecutor moved to dismiss the defendants' motion, a request that was granted by the trial judge. The defendants subsequently refiled their motion, supported by an affidavit asserting that while there were more than 1400 adult African-American males in Escambia County, none had ever been called for jury duty. This motion was also denied, and the defendants were subsequently tried, convicted, and sentenced to fifteen years in prison. The conviction was upheld by the Florida Supreme Court.[111]

Although there was little reason to doubt the veracity of the defendants' claim of systematic racial exclusion, Brewer managed to resolve the case without reaching the central issue—the legality of the indictment of the defendants by a grand jury from which African-Americans were systematically excluded. Instead, Brewer defined the case as one that turned on procedural, rather than constitutional, issues. Although Brewer acknowledged that the right to trial by a jury selected without discrimination on the basis of race was protected by the Constitution,[112] he dismissed the appeal on two grounds. In an opinion that quoted liberally

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[109] 211 U.S. 45 (1908).

[110] 188 U.S. 519 (1903).

[111] Tarrance v. State, 43 Fla. 446, 30 So. 685 (1901).

[112] This had been established in Strauder v. West Virginia, 100 U.S. 303, 308-09 (1879).

from the previous opinion of the Florida Supreme Court, he first found that defendants had not properly proved that the discrimination had in fact existed. Brewer admitted that "an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law,"[113] but that such an episode of discrimination could not be proven solely by an affidavit from the indicted parties.[114] Since the appellants had offered no additional evidence other than their own assertion that the discrimination existed, the Supreme Court could not assume that the assertion was correct.[115] The second basis for denying the appeal was the determination of the Florida Supreme Court that under Florida law objections to the selection procedure for a grand jury by an indicted party had to be made through a plea in abatement, rather than through a motion to quash the venire and panel (the motion filed by the defendants in this case). After examining the prior decisions of the Florida Supreme Court cited in the previous opinion, Brewer concluded that this was the settled law in the state of Florida and that, therefore, there was no error for the Supreme Court to correct.[116]

Later that same year, Brewer issued his only dissent in a case dealing with the rights of African-American voters. In *Giles*

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[113] Tarrance v. Florida, 188 U.S. 519, 520 (1903).

[114] *See* Carter v. Texas, 177 U.S. 442, 496 (1900); Smith v. Mississippi, 162 U.S. 592, 600 (1896).

[115] In *Carter*, the Court, in an opinion joined by Brewer, had held that African-American defendants had to be provided the opportunity to introduce evidence of systematic racial exclusion if they sought to do so. In *Tarrance*, the defendants apparently had not done so at the time their motion was denied.

[116] *Tarrance*, 188 U.S. at 524. Consideration of the second ground was necessary because of the county prosecutor's response to the original motion filed by Tarrance and his fellow defendants. *Id.* In response to the December 5, 1900, motion to quash the venire and the panels of the grand and petit jurors, the state's attorney moved to strike the motion on the ground that it "set up no state of facts which, if true, would justify the quashing of the venire." *Id.* Technically, this amounted to an admission of the facts alleged in defendants' motion (which included the assertion of systematic racial exclusion from the jury pool) and thus relieved the defendants of an obligation to introduce further proof of their claim. *Id.* In its opinion, the Florida Supreme Court held that the county attorney's motion to strike was the equivalent of a request to deny the motion to quash on the grounds that it was not the proper method of raising the question sought to be raised. *Id.* As such, it did not amount to an admission of the accuracy of the facts stated in defendants' motion. Brewer accepted this argument as a valid statement of Florida law. *Id.*

v. Harris,[117] an African-American resident of Montgomery, Alabama, had been refused the right to register to vote. In response, he filed a bill of equity in an Alabama federal circuit court asking the court to require the Montgomery, Alabama, election officials to add his name and those of 5,000 other qualified African-American applicants who had been refused enrollment to the registry of permanent voters. The appellant Giles also requested that the recently enacted provisions of the Alabama Constitution pertaining to voter eligibility be declared unconstitutional as contrary to the fourteenth and fifteenth amendments. The circuit court refused to hear the request for want of jurisdiction.

The Supreme Court, in an opinion written by Justice Oliver Wendell Holmes, found that the federal courts had jurisdiction but refused to grant equitable relief. Holmes callously concluded that the appellant could not ask the court to order him registered to vote under a system that the appellant himself claimed to be unconstitutional. Furthermore, Holmes maintained that the equity powers of the federal courts did not give them the power to enforce political rights against the state, and that "relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."[118]

Justices Brown, Harlan, and Brewer all dissented, with the latter two writing opinions. While Harlan stated that he believed that Giles was legally entitled to be enrolled on the permanent voter registry, he concluded that the federal circuit court lacked jurisdiction to hear the case.[119] Brewer, on the other hand, felt that Giles had asserted a right that was protected by the United States Constitution, and that the majority was in error in holding that there was no remedy available from the federal courts.

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[117] 189 U.S. 475 (1903).

[118] *Giles*, 189 U.S. at 488.

[119] The issue that concerned Harlan was the argument in Judiciary Act of Aug. 13, 1988, ch. 373, 24 Stat. 552, that no civil action arising under the Constitution or laws of the United States could be filed in federal court unless the value of the matter in dispute involved more than $2000. In the majority opinion, Holmes ruled that since the jurisdiction of the trial court had not been challenged on these grounds prior to the appeal, no such claim could be raised before the Supreme Court.

He did, however, believe that the only issue properly before the Supreme Court was the jurisdiction of the federal courts and, therefore, that the proper remedy was to remand the case to the lower court for a determination on the merits.

While Brewer's dissent in *Giles v. Jackson* was sympathetic to the problems confronting Southern African-Americans who were struggling to exercise their right of suffrage, he was not persuaded by related claims in *James v. Bowman*,[120] also decided in 1903. Writing for the majority, Brewer upheld the release from federal custody of a white Kentuckian charged with the bribery and intimidation of black voters during the 1898 congressional elections. Brewer's opinion rested on three bases. The first was that the controlling statute, Section 5507 of the Revised Statutes of the United States[121] (originally part of the Civil Rights Act of 1870), was unconstitutional. Section 5507 made it unlawful for an individual to interfere with the attempt of another to exercise the right of suffrage and was based on the enforcement powers granted to Congress by section two of the fifteen amendment. Consistent with a line of cases beginning at the end of the Reconstruction Era,[122] Brewer held that the so-called Reconstruction Amendments did not authorize Congress to outlaw individual, as opposed to state, acts of discrimination.

However, as Brewer himself had pointed out in his dissent in *Giles v. Jackson*, the previous decisions of the Supreme Court had established that the federal courts possessed jurisdiction over matters involved in the election of national officers (including congressmen), independent of the fifteenth amendment. Brewer nevertheless denied that the challenged statute was a proper method of exerting this power.[123] Although the proscribed conduct had occurred during a congressional election,

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[120] 190 U.S. 127 (1903).

[121] U.S. Comp. Stat. 1901, p. 3712.

[122] *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); Virginia v. Rives, 100 U.S. 313 (1880); United States v. Cruikshank, 92 U.S. 542 (1876); United States v. Reese, 92 U.S. 214 (1876).

[123] Brewer's *Bowman* opinion fails to mention the Court's 1884 decision in *Ex parte* Yarborough, 110 U.S. 651 (1884) which had upheld the federal government's power to pass laws under Article I, section 4 of the Constitution to guarantee the rights of individuals to vote in federal elections.

the statute, according to Brewer, did not *specifically* limit its application to federal elections. Since it applied indiscriminately to all elections, the entire statute was void. Under Brewer's interpretation, Congress had the power to outlaw the acts with which Bowman had been charged, but it had not yet done so in a constitutional fashion. Finally, as if to defend himself against charges of racial insensitivity, Brewer noted "in passing" that the indictment did not allege that Bowman had bribed the particular voters *because* of their "race, color, or previous condition of servitude," but rather that the victims of the alleged crime were "men of African descent, colored men, negroes, and not white men." In his words, "They were not bribed because they were colored men, but because they were voters. No discrimination on account of race, color or previous condition of servitude is charged."[124] Harlan and Brown dissented without opinion.[125]

Once again, Brewer took a case in which the civil rights of African-Americans were the central issue and argued that it was in fact not about civil rights at all. Although such an approach disregarded the reality of the contemporary situation in the South where widespread hostility toward negro suffrage was tacitly endorsed by state governments,[126] it allowed Brewer to continue to straddle the question of what, if any, protections the Constitution actually provided against discrimination based on race. He followed the same approach in the 1904 case, *Jones v. Montague*,[127] in which he refused to overturn the election of congressmen under the provisions of the 1901 Virginia Constitution that had allegedly provided for the widespread disfranchisement of African-American voters. Writing for a unanimous Court, Brewer dismissed the suit in equity on the grounds that the challenged election had already been held, the canvas of the votes conducted, and the elected representatives had taken their

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[124] *Bowman*, 190 U.S. at 139.

[125] Brewer's opinion striking down part of the 1870 Civil Rights Act produced little public outcry. By 1903, the act was largely viewed as a dead letter. J. SEMONCHE, *supra* note 9, at 58.

[126] *See generally*, J. KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE PARTY SOUTH, 1880-1910 (1974); C. WOODWARD, ORIGINS OF THE NEW SOUTH 321-49 (1971).

[127] 194 U.S. 147 (1904).

seats with the tacit approval of their fellow congressmen. Under such circumstances, Brewer reasoned, the Court was powerless to prohibit the counting of votes, as requested by the petitioners, even if the allegations of racial discrimination in the petition were correct.

At the same time that Brewer masked his unwillingness to extend constitutional protections to African-American appellants under a guise of procedural considerations, he continued to be an outspoken defender of the rights of Chinese-Americans. In his dissenting opinion in *United States v. Sing Tuck*,[128] a case decided the same day as *Jones v. Montague*, Brewer refused to endorse the constitutionality of the administrative procedures used by the Immigration Service to deport Chinese aliens who had allegedly entered the United States illegally. (The procedures failed to provide for a judicial appeal of a determination to deport.) Brewer argued at length that any Chinese person selected for deportation should have access to the federal courts and that the challenged system deprived Chinese-Americans of their constitutionally protected liberties.[129] He closed his *Sing Tuck* dissent with the following prophetic warning:

> Finally, let me say that the time has been when many young men from China came to our educational institutions to pursue their studies, when her commerce sought our shores, and her people came to build our railroads, and when China looked upon this country as her best friend. If all this be reversed and the most populous nation on earth becomes the great antagonist of this republic, the careful student of history will recall the words of Scripture, "they have sown the wind, and they

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[128] 194 U.S. 161 (1904).

[129] *Sing Tuck*, 194 U.S. at 170-82. Brewer's concern for the rights of the Chinese in *Sing Tuck* and other cases might be explained by the nature of the right at issue; in *Sing Tuck* and the earlier case of *Fong Yue Ting v. United States*,the issue was access to the federal court system. This would be in line with what arguably could be considered his pro-civil rights dissent in *Giles v. Harris*. However, the language of his dissent in *Sing Tuck* suggested that his sympathies for the Chinese ran deeper than just a concern for procedural due process. The roots of Brewer's sympathetic attitude toward the Chinese probably lay in his missionary heritage and in his long-standing concern for world peace and the fear that United States immigration policy might severely damage its relationship with China, a nation that Brewer believed would some day play an important role in world affairs.

> shall reap the whirlwind," and for the 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.[130]

However eloquent his defense of the Chinese may have been, Brewer's indifference to the corresponding claims of African-Americans continued in his civil rights opinions. In 1905, in *Clyatt v. the United States*,[131] Brewer again delivered an opinion that asserted the rights of African-Americans under the Constitution while simultaneously denying them any legal protection in the immediate case. *Clyatt* involved a white defendant who had been indicted and convicted by a federal jury for violating the Federal Peonage Statute that had been enacted in 1869.[132] The indictment charged that the defendant unlawfully and knowingly returned Will Gordon and Mose Ridley to a condition of peonage, by force and against their will, to work for Samuel M. Clyatt. The record showed that Clyatt had gone from Georgia to Florida to arrest the two African-Americans mentioned in the indictment to take them against their will back to Georgia to work off a debt. The two had been taken into custody under a warrant charging larceny issued by a Georgia magistrate. Such conduct was specifically outlawed by federal law, and violators were subject to fines of between one and five thousand dollars and prison sentences of one to five years.[133]

Writing for the majority, Brewer began by affirming the constitutionality of the peonage laws which had been enacted under the power provided to Congress by the enforcement clause of the thirteenth amendment. To this point, Brewer's decision seemed to signal a rare victory for the African-American position. Clyatt's lawyers had challenged the constitutionality of the Federal Peonage Statute, arguing that just as previous court decisions had held that the fourteenth and fifteenth amendments applied only to state (as opposed to private) action, the Court

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[130] *Sing Tuck*, 194 U.S. at 182.

[131] 197 U.S. 207 (1905).

[132] *Clyatt*, 197 U.S. at 209.

[133] The Federal Peonage Act and this case are discussed in P. DANIEL, THE SHADOW OF SLAVERY 3-17 (1972).

should now hold that the powers granted by the thirteenth amendment were limited by a similar restriction. Since Clyatt was acting as a private individual and not enforcing a state statute, he was, his lawyers argued, not subject to federal law. Brewer rejected this argument completely. Unlike the fourteenth and fifteenth amendment, the thirteenth amendment made no reference to states at all. Instead, it operated as a nationwide ban on slavery and involuntary servitude and gave Congress the authority to enforce its provisions through legislation like the Federal Peonage Act. Brewer then proceeded to define peonage broadly, so that it included any attempt to impose compulsory service to secure the payment of a debt.

Then, in a complete tour de force, Brewer turned to the indictment and found it insufficient because it referred to a "*return* . . . to a condition of peonage." As Brewer viewed the record, there was no evidence that the two victims, Gordon and Ridley, had been in a *previous* state of peonage; consequently, it was not possible for Clyatt to *return* them to a condition of peonage. In focusing on the precise wording of the indictment, Brewer transformed what had begun as a peonage case into a matter of criminal procedure where the Court's attention was focused on the rights of the criminal defendant, Clyatt.

Brewer did this even though the defendant himself had never made this argument. After noting the inconsistency between the language of the indictment and the evidence presented, Brewer launched into a ringing statement of the rights of the accused.

> No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.[134]

Consequently, the decision of the jury was reversed. However

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[134] *Clyatt*, 197 U.S. at 222.

strained and unexpected the result, Brewer's colleagues had little problem with his decision. Only Harlan dissented.[135]

That Brewer might endorse an expansive reading of the thirteenth amendment was put to rest the following year in *Hodges v. United States*.[136] *Hodges* involved three white men who were convicted in federal court of using physical force to prevent a group of black laborers from carrying out a labor contract with the owners of a sawmill. Brewer, again writing for the majority, reversed the convictions on the grounds that the fourteenth amendment gave the federal government no jurisdiction over the action of private individuals and that the thirteenth amendment could not be read so expansively as to prohibit this conduct. The federal government maintained that the defendants' actions had been motivated solely by the race of the victims and that, as such, it imposed a badge of servitude prohibited by the thirteenth amendment. In denying that the race of the victims provided grounds for invoking federal jurisdiction, Brewer insisted that he was affirming the rights of African-Americans as full American citizens. The thirteenth amendment had, he insisted, outlawed all forms of slavery and involuntary servitude. It had not, however, made African-Americans the special wards of the United States government; nor had it made the federal government, rather than the states, the guarantors of individual liberty. To allow a criminal prosecution here would be to authorize the federal government to supplant the states as the protectors of all the individual rights of both races and that, for Brewer (and most of his contemporaries) was clearly beyond the intentions of the amendment's framers. In one opinion, Brewer commented on the federal government's treatment of former slaves:

> [Freed slaves have been dealt with in a manner] which declined to constitute them wards of the nation or leave in a condition of alienage where they would be subject to the jurisdic-

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[135] *Id.* at 223. While the *Clyatt* decision represented a defeat for the Roosevelt Administration's efforts to enforce the Federal Peonage Act, it did at least establish the constitutionality of the act and thereby pave the way for future, more carefully crafted, indictments. P. DANIEL, *supra* note 133, at 17.

[136] 203 U.S. 1 (1906).

> tion of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interest would be served, they taking their chances with other citizens in the States where they should make their homes.[137]

The belief that African-Americans should be left on their own to struggle for their rights in the state rather than federal courts was at the heart of Brewer's most famous decision dealing with issues of race, the 1908 majority opinion in *Berea College v. Kentucky*.[138] At issue in *Berea College* was a Kentucky statute that prohibited private schools from educating black and white students at the same time and place. In spite of the fact that the plaintiff raised several serious constitutional challenges to the statute, including a citation to *Lochner v. New York*[139] (a decision in which Brewer had concurred three years earlier), Brewer chose to resolve the case within the framework of a state's power to regulate its corporations.

At the time it was decided, *Berea College* involved one of the few remaining questions pertaining to the constitutionality of the increasingly intricate system of "Jim Crow" restrictions appearing in the American South. Berea College was a small, independent institution of higher learning that had been founded "in order to promote the cause of Christ,"[140] and was committed to interracial education. Unlike cases involving public schools or common carriers, Berea College was neither a public institution nor a private enterprise historically subject to public regulation. Instead, it was a private institution whose students were free to go elsewhere if they objected to the integrationist policies of the college. In 1904, its policies ran afoul of a recently enacted Kentucky statute that prohibited the teaching of black and white students in the same institution.[141] Berea College was convicted of violating the statute, and its conviction was upheld by the Kentucky Court of Appeals.[142]

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[137] *Hodges*, 203 U.S. at 19-20.

[138] 211 U.S. 45 (1908).

[139] 198 U.S. 45 (1905).

[140] *Berea College*, 211 U.S. at 60.

[141] Ky. Acts 1904, chap. 85, p. 181.

[142] Berea College v. State, 123 Ky. 209, 94 S.W. 623 (1906).

Berea College was a corporation chartered by the state of Kentucky,[143] and the first question to be answered was whether or not the Court could rule solely on the question of the constitutionality of the Kentucky Act as applied to corporations or whether it had to rule on its general constitutionality. The decision of the lower court pointed toward the latter, since section one of the statute in question made it unlawful for "any person, corporation, or association" to teach black and white students together and since the Kentucky Court of Appeals had sustained the validity of the statute as applied to "all individuals, corporations, and associations."[144]

Brewer, predictably, took the more narrow approach, maintaining that "it is unnecessary for us to consider anything more than the question of its validity as applied to corporations."[145] In *James v. Bowman*,[146] Brewer had refused to consider the severability of the provisions of a federal civil rights act, but here he was willing to treat the Kentucky act as though it contained separate provisions relating to individuals, corporations, and associations. Brewer wrote:

> The statute is clearly separable and may be valid as to one class while invalid as to another. Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations. There is no force in the suggestion that the statute, although clearly separable, must stand or fall as an entirety on the ground the legislature would not have enacted one part unless it could reach all.[147]

Since Berea College was a corporation chartered by the state of Kentucky, its charter was subject to revocation, alteration, or amendment by the state, so long as the object of the charter was not substantially impaired. The language of the challenged statute, according to Brewer, operated as a legitimate

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[143] The original charter was approved on March 9, 1854. On June 10, 1899, it was reincorporated.

[144] *Berea College*, 211 U.S. at 46.

[145] *Id.* at 54.

[146] *Bowman*, 190 U.S. at 127.

[147] *Berea College*, 211 U.S. at 54-55.

amendment to the school's charter, even though the act itself made no reference to corporate charters. Brewer made the last assertion without any citation to precedent, stating only that to decide otherwise would be "resting too much on mere form."[148] Having redefined the issue, Brewer was able to decide the case in such a way that was consistent with his general constitutional principles but which did not require him affirmatively to approve of the power of the state to discriminate against individuals solely on the basis of their race. Throughout his career Brewer had drawn a sharp constitutional distinction between private individuals and corporations. Because the latter were creations of the state, they were therefore subject to a degree of public regulation that Brewer found unacceptable when applied to private individuals.[149] In fact, Brewer went to great lengths to distinguish the property rights of individuals from those of corporations because his constitutional and economic philosophy was based on the individual economic actor, not the modern business corporation.[150]

On the Court, Brewer proved to be less sympathetic to the claims of corporations (and railroads in particular) than many of

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[148] *Id.* at 57.

[149] That Brewer drew such a distinction has not always been appreciated. The view popularized by progressive historians that Justices like Brewer were merely agents for corporate interests has been generally abandoned in favor of a more sophisticated interpretation that places them within the nineteenth century liberal tradition. There are several progressive interpretations of Brewer. *See* H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 138 (1974); A. PAUL, *supra* note 4, at 54. There are also more moderate evaluations. *See* Bergan, *supra* note 4, at 53; Gamer, *supra* note 4, at 53; J. SEMONCHE, *supra* note 9, at 24, 54; *see also* O. FISS, *supra* note 4, at 69.

[150] For a concise statement of this position by Brewer, see his concurrence in Northern Sec. Co. v. United States, 193 U.S. 197, 360 (1905) (Brewer, J., concurring). It was his adherence to this distinction that had led both the opponents and supporters of business interests to applaud his nomination to the Court in 1889. One anti-corporation newspaper proclaimed that his record showed that he was "hostile to corporations and monopolies." New York World (undated clipping included in Brewer's scrapbook in collection of Brewer Family Papers). Another praised him for a recent decision "against railroads which shippers consider not only sound law but favorable to their interests." Burlington (Iowa) Hawkeye (undated clipping included in Brewer's scrapbook in collection of Brewer Family Papers). On the other hand, one pro-business paper saw him as a nominee likely to protect the interests of railroads from state railroad commissions. Wall Street Daily News (undated clipping included in Brewer's scrapbook in collection of Brewer Family Papers).

his colleagues. In numerous public addresses while on the bench, Brewer openly criticized the excesses of American corporations. According to Brewer, corporate action was "often selfish, remorseless, and cruel";[151] efforts of corporations to "crush out opposition" were to be denounced as violations of "the first principles of the Declaration of Independence";[152] and combinations of capital were to be derided for destroying their financially insecure competitors.[153]

Brewer also believed that states should be permitted great latitude in controlling their corporations, so long as they guaranteed them a fair return on their investment. In *Smiley v. Kansas*,[154] Brewer rejected a challenge to a Kansas antitrust law that prohibited price-fixing arrangements. Although the appellant grain dealers argued that the Kansas statute was an unconstitutional limitation on the liberty to contract, Brewer found no merit to this argument under the circumstances. He also wrote a number of dissents in cases in which he believed the Court had improperly interfered with the power of the states to force railroads to fulfill their duty to the public.[155] In *Atchison, Topeka, and Santa Fe Railroad v. Matthews*, he authored the majority opinion which upheld a Kansas law that required railroads to pay the attorney fees of successful plaintiffs whose property had been damaged by fires caused by trains.[156] Although he had joined the majority in limiting the application of the Sherman Antitrust Act in the *E. C. Knight* decision, he was also generally sympathetic to the Justice Department's prosecutions of large corporations under the Act.[157] He sided with the progressive ma-

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[151] *See* Brewer, *supra* note 34, at 69.

[152] Address to the Association of Agents of the Northwestern Mutual Life Insurance Company (1908), *quoted in* L. Lardner, *supra* note 4, at 53.

[153] Brewer's dislike of the predatory practices of large corporations is elaborated in several works. *See* Brewer, *Organized Wealth and the Judiciary*, 57 THE INDEPENDENT 301 (1904); L. Lardner, *supra* note 4, at 53.

[154] 196 U.S. 447 (1905).

[155] Northern Pac. R.R. v. Washington Territory *ex. rel*, Dustin, 142 U.S. 492 (1892); Missouri Pac. Ry. v. United States, 189 U.S. 274 (1903).

[156] 174 U.S. 96 (1899).

[157] It has been argued that *United States v. E.C. Knight* itself was not simply an attempt to insulate American corporations from national regulation, but an effort by the Supreme Court to compel the states to enforce their corporate laws. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporate Law,*

jority in *Addystone Pipe and Steel Co. v. United States*[158] (a decision that substantially undercut the impact of *E. C. Knight*[159]), and he provided the critical fifth vote in *Northern Securities Co. v. United States*,[160] which upheld the application of the Antitrust Act to a powerful railroad holding company.[161] In Brewer's view, large combinations of capital and meddlesome legislatures were equally objectionable, because both threatened the economic freedom of the individual, the hallmark of his constitutional philosophy.

Although Berea College was hardly a major corporation, to emphasize its corporate form was to emphasize the power of the state to regulate and to downplay any protections the fourteenth amendment might provide. Certainly, Brewer was correct that states had the power to reserve the right to amend corporate charters. (The recognition of this power dated back to Justice Story's concurrence in the case of *Trustees of Dartmouth College*[162] and the Constitution of the State of Kentucky specifically reserved this right for the legislature).[163] However, Brewer's opinion, while acknowledging that the act *might* be unconstitutional as applied to individuals, ignored the possibility that the fourteenth amendment placed limitations on this particular power, especially when the state sought to impose racially motivated modifications. As had been the case many times before,

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1869-1903, 53 BUS. HIST. REV. 304 (1979).

[158] 175 U.S. 211 (1899). The significance of *Addystone* is discussed in several works. *See* M. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916, at 130-33 (1988); M. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 532 (1988).

[159] In his concurrence in the *Northern Sec. Co.* case, Brewer drew a distinction between the rights of state-created corporations and the rights of individuals, suggesting that not all constitutional protections available to the latter applied to the former. Northern Sec. Co. v. United States, 193 U.S. 197 (1904) (Brewer, J., dissenting); *see also* O. FISS, *supra* note 4, at 54.

[160] 193 U.S. 197 (1904).

[161] Brewer also voted to uphold Sherman Act prosecutions in Montague & Co. v. Lowry, 193 U.S. 38 (1904), Swift & Co. v. United States, 196 U.S. 375 (1905), and Loewe v. Lawlor, 208 U.S. 274 (1908).

[162] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[163] Section 3 of the Bill of Rights of the 1850 Kentucky Constitution (in force at the time of this case and still in force today) provides that "every grant of a franchise, privilege, or exemption shall remain, subject to revocation, alteration, or amendment." KY. CONST. § 3 (1850).

Harlan was not persuaded by Brewer's distinctions. In his dissent, joined by Justice William Day, Harlan rejected Brewer's assertion that the statute was severable and went on to argue that the actions of his home state's legislature were "an arbitrary invasion of the rights of liberty and property guaranteed by the fourteenth amendment against hostile state action, and is, therefore, void."[164]

Brewer's opinion in *Berea College* followed the same pattern as all his majority opinions in cases involving the civil rights of African-Americans. He affirmed the general rights claims by appellants and even acknowledged that legal remedies might be available in different circumstances, but in the case at hand, he determined that other considerations governed. In his opinion, he scrupulously avoided any reference to *Plessy v. Ferguson*, and he left open the possibility that the fourteenth amendment might protect private individuals who sought integrated schooling. In reality, Brewer's opinion had the practical effect of legitimizing such statutes until well after World War II.

JUSTICE BREWER: AN EVALUATION

Berea College was the last case dealing with the civil rights of African-Americans decided by the United States Supreme Court before Brewer's death in March 1910. From the perspective of modern notions of constitutionally guaranteed civil rights, his record was hardly an impressive one. Of course, the fact that a Northern judge in the late nineteenth century, even one who had held strong abolitionist views in his youth, would adopt an attitude of indifference toward the civil rights of African-Americans was not in itself remarkable. Large numbers of formerly anti-slavery Northerners "gave up" on the cause of African-American civil rights in the aftermath of Reconstruction and acquiesced in the restoration of white supremacy in the South. Beginning in the late 1870's, Northern liberals began a

[164] Berea College v. Kentucky, 211 U.S. 45, 67-68 (1908). As authority, Harlan cited the substantive due process cases, Allgeyer v. Louisiana, 165 U.S. 578 (1897) and Adair v. United States, 208 U.S. 161 (1908), decisions in which Brewer had enthusiastically joined.

steady retreat on the race issue.[165] As white Southerners abandoned earlier pledges to protect the constitutional rights of African-Americans, Northern opinion began to emphasize conciliation with the South rather than the defense of civil rights. In the words of historian C. Vann Woodward:

> It was quite common in the 'eighties and 'nineties to find in the *Nation*, *Harper's Weekly*, the *North American Review*, or the *Atlantic Monthly* Northern liberals and former abolitionists mouthing the shibboleths of white supremacy regarding the Negro's innate inferiority, shiftlessness, and hopeless unfitness for full participation in the white man's civilization. Such expressions doubtless did much to add to the reconciliation of North and South, but they did so at the expense of the Negro.[166]

Although this acquiescence was initially coupled with an understanding that African-Americans would not be deprived of their formal legal rights, by the end of the nineteenth century it had come to include an acceptance of legalized segregation and disfranchisement.[167]

While Brewer declined to use his position of authority as a Justice of the United States Supreme Court on behalf of the civil rights of African-Americans, his overall views on race did not harden to the degree described by Woodward. In fact, if one looks only at the pronouncements Brewer made off the bench between 1890 and 1910, he comes across as a crusader for equal treatment of the black race at a time when educated Americans, in the North as well as the South, were becoming increasingly persuaded by scientific theories of racial inferiority.[168] Certainly,

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[165] C. WOODWARD, THE STRANGE CAREER OF JIM CROW 69-74 (2d ed. 1966).

[166] *Id.* at 70.

[167] For other discussions of Northern racial attitudes in the late nineteenth century, see G. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914, at 283-325 (1971); C. LOFGREN, *supra* note 1, at 51; W. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 62-81, 133-40 (1982); L. SIMPSON, MIND AND THE AMERICAN CIVIL WAR: A MEDITATION ON LOST CAUSES (1989) (for racial views of greater New England culture specifically); *see also* Nelson, *The Impact of the Antislavery Movement Upon Styles of Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

[168] *See generally* J. HALLER, OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900 (1971) (noting that Brewer never became as callous to

Brewer never believed that he had abandoned the cause of his youth. In a fourth of July oration in 1893, he spoke glowingly of the importance of the anti-slavery movement, of John Brown, and of the thirteenth amendment for their role in helping "personal liberty" become "the universal affirmation of the law."[169] The progress of the black race was a topic he returned to with regularity, and he welcomed the opportunity to address African-American audiences.[170] At the time of his death, he was eulogized for his sympathy "with the oppressed of all races and classes."[171]

How then, does one explain the apparent inconsistency between Brewer's professed support for the rights of African-Americans and the lengths to which he went while on the Court to avoid endorsing that position? At least part of the answer can be found in an address on the cause of black education Brewer delivered to the American Missionary Association shortly after the turn of the century. In this address, Brewer took aim at those who used the claim of alleged black inferiority to justify a reduction in support for black education. Lavishing praise on Hampton Institute (which he had recently visited) and Booker T. Washington's Tuskegee Institute and its offspring, Brewer

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plight of African-Americans as his uncles Stephen and Henry Field); C. LOFGREN, *supra* note 1, at 51 (discussion of racial attitudes of Henry Field); C. MCCURDY, *Stephen J. Field and the American Judicial Tradition*, in THE FIELDS AND THE LAW 17 (1986) (discussion of racial attitudes of Stephen Field).

[169] Address by Justice Brewer at Woodstock, Connecticut (July 4, 1893) (included in collection of Brewer Family Papers).

[170] Writings by Brewer that reflect a sympathetic attitude toward race include Brewer, *Address of Mr. Justice Brewer*, in MINUTES OF THE SIXTY-SIXTH ANNUAL MEETING OF THE AMERICAN HOME MISSIONARY SOCIETY 95 (1892); Brewer, *Plain Words on the Crime of Lynching*, 97 LESLIE'S WEEKLY 182 (1903); Brewer, *Address at 30th Anniversary of Hampton Institute*, 35 THE SOUTHERN WORKMAN 359 (1906); Letter to editors of the Paladium (n.d.) (unidentified letter included in collection of Brewer Family Papers); Address Delivered at the Fiftieth Annual Meeting of the American Missionary Association (Nov. 21, 1896) [hereinafter Jubilee Address] (future equality of the races forseen); Address at the Commencement Exercises of the University of Wisconsin Law School (deploring disfranchisement of African-American voters); Address on the Black Race Delivered to Black Students at an Unidentified College or University (n.d.) (unidentified address included in collection of Brewer Family Papers); Address on the Education of Black People Delivered to an Unidentified Association (n.d.) (unidentified address included in collection of Brewer Family Papers).

[171] H. KARRICK, *supra* note 8, at 57.

compared African-Americans to the Hebrew slaves of the Old Testament who had been delivered out of bondage in Egypt by Moses. It had been necessary for the ancient Hebrews to wander for forty years in the wilderness before reaching the promised land, and, in Brewer's view, only time was required for African-Americans to achieve their proper role in society. In pleading the case for continued white support of black education, Brewer proclaimed: "They are here as citizens. Whatever temporary restrictions may be placed upon their approach to the ballot box, the time will come when all barriers will be broken down and they will enjoy everywhere the full rights of citizenship."[172] In the short run, however, there were problems that the "race" had to overcome—ignorance, susceptibility to demagoguery, the inability to "distinguish between liberty and license," and the failure to understand "the obligations of morality and purity."[173] Similarly, in an address to African-American college students (probably at Hampton Institute), Brewer rejected the idea that the black race would always be at the bottom of society, comparing the status of African-Americans in 1900 with that of Anglo-Saxons in the Roman world of 2000 years before. He emphasized the absolute necessity of self-help and suggested that the "failure" of Reconstruction was related to the fact that "no race is ever lifted up into a higher life simply through outside forces." He also made it clear that he viewed the responsibility for black advancement to lie with the educated men in his audience.[174]

Such statements reveal that although Brewer repudiated the idea that the proper role of government could ever be one of paternalism, his attitude toward African-Americans was colored by the very same paternalistic impulse that had led him to accept the legitimacy of separate schools in *Tinnon*. The status of African-Americans was essentially that of minor children. Ultimately their entitlement to the full rights of citizenship was not a matter for dispute. However, until they were ready to assume the citizenship's mantle, they, like minor children, might have to

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[172] Jubilee Address, *supra* note 170, at 139-40.

[173] *Id.* Although undated, the address makes reference to the recently published 1900 United States Census.

[174] Address to Black Students of Unidentified College or University by Justice Brewer (n.d.) (unidentified address included in collection of Brewer Family Papers).

accept some limitations on the full exercise of their rights.

On the other hand, Brewer's aversion to *governmental* paternalism dictated that the responsibility of attaining the right to full citizenship lay with blacks themselves and their white supporters and not with the state. As a practical matter, this meant that African-Americans would have to accept the indignities of the emerging "Jim Crow" system. However, according to Brewer, they could take consolation in the fact that their current status was only temporary because their progress as a race was inevitable. The day would come when racial distinctions would be unnecessary. Consequently, while it would be improper for the Supreme Court to afford any special status to their claims, it would also be inappropriate for the Court to imply that African-Americans were locked into a permanently inferior position in American society. It was a situation in which the most desirable approach was to evade the issue whenever possible. When the creed of individual liberty clashed with the social reality of race, Brewer chose to take refuge in the very sort of technical niceties that he normally eschewed.

While Brewer should not be exonerated for his failure to acknowledge the meritorious claims of African-Americans to constitutional protections, his experience does illuminate how narrow the options were for the men who sat on the Court in the era of "Jim Crow." If Brewer found it impossible to embrace the cause of African-American civil rights in his opinions, then it should not be surprising that his colleagues, who lacked his abolitionist heritage and interest in the race issue, found little problem with the constitutional standard of separate but equal. In this light, the racial egalitarianism of John Marshall Harlan is even more remarkable.

Ironically, Brewer's most important legacy in the realm of civil rights was the ambivalent character of his opinions and the scrupulous way in which he avoided addressing the question of race directly. At a time when "scientific" theories of negro inferiority had their greatest popular acceptance, and the reasonableness of racial separation seemed least controversial, it was possible that the Court could have elected to read contemporary white racial views directly into the Constitution in much the same manner that it did with the then fashionable economic

doctrines of liberty of contract and substantive due process. There were more than hints of this in the *Plessy* opinion—a decison that Brewer never cited in any of his opinions involving civil rights.[175] For Brewer, however, the proper response was not an endorsement of white racial superiority or of the natural incompatibility of the races, nor a reiteration of the *Plessy* holding that reasonable racial distinctions could withstand constitutional challenge. Rather, Brewer adopted the position that the Court need not directly address the issue of what rights the Constitution guaranteed to African-Americans.

In his *Berea College* dissent, Justice Harlan demanded to know:

> Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?[176]

Unfortunately, the contemporary answer to Harlan's question was "yes." Although the question clearly troubled Brewer, he could not, like Harlan, bring himself to answer in the negative. In his mind, African-Americans would simply have to wait until the time was right for them to participate fully as American citizens. However, contrary to many of his white contemporaries, he did at least believe that such a time would come.

In the meantime, the best that Brewer could do was to avoid writing the legitimacy of racial distinctions directly into the body of American constitutional law. By pretending repeatedly that the issue before the Court was not one of race, however disingenuous the assertion may have been, Brewer at least avoided having to answer Harlan's question in the affirmative, and when the Court's attitudes toward the rights of African-

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[175] *See* C. LOFGREN, *supra* note 1, at 51; Miller, *Constitutional Law and the Rhetoric of Race*, in LAW IN AMERICAN HISTORY 147, 170-71 (B. Bailyn & D. Fleming eds. 1971).

[176] *Berea College*, 211 U.S. at 69 (Harlan, J., dissenting).

Americans did finally change, Brewer's opinions posed no real obstacle to the implementation of a more racially egalitarian constitutional vision.