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DAVID JOSIAH BREWER AND THE CHRISTIAN CONSTITUTION

J. GORDON HYLTON*

Professor Berg does a great service by reminding us that religion has been an important factor in the lives of many of the men and women who have served on the United States Supreme Court. Unfortunately, historians, legal scholars, and judicial biographers have paid scant attention to this aspect of our constitutional experience. I hope to illustrate the advantage of exploring the connections between religious belief and constitutional theory through a brief examination of the life and career of Justice David Josiah Brewer, who figures prominently in Professor Berg's paper.

Brewer was born in Smyrna, Asia Minor, to missionary parents in 1837. He was raised in New England, but in the late 1850s, he migrated to Kansas where he later served on the state supreme court and the federal circuit court. He was appointed to the United States Supreme Court in 1889 and served until his death in 1910. As Professor Berg suggests, Brewer was one of the most unabashedly religious men ever to sit on the Court. His father, Josiah Brewer, was a Congregationalist minister who was also an abolitionist, an educator, a prison reformer, and a missionary. Although the younger Brewer did not follow his father into the ministry, he was an active member of the Congregational Church throughout his entire adult life. As a Supreme Court Justice, he delivered countless public addresses to religious groups; he taught Sunday School on a weekly basis; he was an active member of the American Bible Society, the American Home Missionary Society, and the American Board of Commissioners for Foreign Missions; and he regularly contributed articles on religious themes to periodicals like *Young People's Weekly*, *Sunday School Times*, and *Christian Endeavor World*. He also published three short books on explicitly religious topics: *The Pew to the Pulpit: Suggestions to the Ministry from the Viewpoint of a Layman* (1897); *The Twentieth Century From Another Viewpoint* (1899); and his best known and most controversial work, *The United States: A Christian*

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Nation (1905).¹

He also supported a wide variety of social causes associated with reformist Christianity. He was an advocate of women's suffrage, Asian-American rights, the initiative and referendum, prison reform, the rights of the handicapped, the conservation of natural resources, and the education of African-Americans. He was also a staunch anti-imperialist and an opponent of militarism who gained national attention as a supporter of international arbitration and disarmament. During the administration of Theodore Roosevelt, he risked the approbation of his fellow Republicans by publicly criticizing the president for his militaristic foreign policy.²

Moreover, there is absolutely no evidence that David Brewer ever wavered from his religious convictions. He never suffered a crisis of faith of the sort that afflicted many of his contemporaries. Had he stood on Dover Beach with his contemporary Matthew Arnold, he would have seen, not Arnold's "darkling plain swept with confused alarms of struggle and flight," but a "sea of faith . . . [girded] . . . round earth's shore."³ When he died in 1910, he was eulogized by the religious press as a man of faith and a staunch advocate of traditional religion.

However, merely to acknowledge Brewer's religiosity and his willingness to align himself with Christian causes does not tell us what, if any, effect these beliefs had upon his performance as a Supreme Court justice, or how they shaped his views on the Constitution. If one is concerned about the relationship between religious belief and judicial behavior, one must look deeper than overt statements of religiosity in Supreme Court opinions and public addresses. Because of the complexity of the American religious experience and the rich, textured nuances of American Christian theology, we do the judges of the past and present a

1. Unless otherwise noted biographical materials in this essay are taken from sources cited in my two earlier writings on David Josiah Brewer: J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 *MISS. L.J.* 315, 324-26 (1991) and J. Gordon Hylton, *David Josiah Brewer: A Conservative Justice Reconsidered*, 1994 *J. SUP. CT. HIST.* 45. The Brewer Family Papers at Yale University are the principal source of biographical information pertaining to David Brewer. The only full length studies of Brewer's career are MICHAEL J. BRODHEAD, *DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837-1910* (Southern Ill. Univ. Press 1994) and Lynford A. Lardner, *The Constitutional doctrines of Justice David Josiah Brewer* (1938) (unpublished Ph.D. dissertation, Princeton University).

2. For Brewer's off-the-bench activities, see, W. H. Baldwin, *Justice Brewer and Organized Charity*, 24 *THE SURVEY* 119 (1910); Michael J. Brodhead, *Justice David J. Brewer: A Voice of Peace on the Supreme Court*, *YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY* 93 (1985).

3. *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE, 1378-79* (4th ed. 1978).

disservice if we measure them by a too general notion of what it means to be a religious judge.

In searching for the specific tenets of Brewer's theological beliefs, his formal religious writings are disappointingly short on details. Brewer was no theologian and he knew it; in fact, he often seemed uninterested in formal theological debates. In an 1897 speech to the students at the Yale Divinity department, he encouraged the future ministers in the audience to avoid theological discussions and abstractions when in the pulpit. "Do not give a lecture, but preach,"⁴ he told his audience. "[L]eave your manuscript at home and talk to us."⁵ In his own public speeches and religious writings he typically emphasized that God was an infinite being behind the material world and that Christ was the incarnation of the infinite; that there was no greater cause than Christian unity; and that the law and the gospel had always to be read together. Beyond this, he rarely offered much of theological substance.

Nevertheless, it is possible to reconstruct Brewer's deeper beliefs about the nature of God, God's relationship to man, and the state's relationship to both from other sources available to the biographer. Such an analysis begins with the rich protestant religious culture of antebellum New England of which Brewer was a product. While the New England of Brewer's youth produced individuals as diverse in their religious views as William Lloyd Garrison, Joseph Smith, Charles Finney, Margaret Fuller, Orestes Brownson, Henry David Thoreau, Nathaniel Hawthorne, Mary Baker Eddy, Philip Brooks, and John Brown, at its core the religious life of the region was dominated by Congregationalists trying to come to grips with the Second Great Awakening and Jacksonian democracy. It is in Brewer's relationship to this particular strand of Christianity that one discovers the linkage between theological belief and political theory.

Other than his father's influence, nothing did more to shape the world view of the young David Brewer than his student years at Yale College in the mid-1850s. (Brewer began his collegiate studies at Wesleyan in 1853, but transferred to his father's alma mater in 1855.) At Yale, he studied under the guidance of a distinguished faculty, all protestant and mostly trained as ministers, who collectively were engaged in an effort to reconcile the Calvinist tradition with contemporary notions of democratic society. They were about, as one of Yale's histo-

4. DAVID J. BREWER, *THE PEW TO THE PULPIT* (New York, Fleming H. Revell Co. 1897).

5. *Id.* at 44.

rians has put it, "scholarly means to evangelical ends."⁶ No member of the Yale faculty had greater influence on Brewer than Theodore Dwight Woolsey. Woolsey was an ordained Congregationalist minister who served for a quarter century as Yale's president and is often credited as the founder of American political science. In 1855-56, Brewer attended Woolsey's lectures on history and political science as a 19 year-old college senior.⁷

Although it is possible that Woolsey's lectures only confirmed what Brewer had been taught by his minister father, Woolsey's influence on Brewer was undeniable. One cannot leaf through the pages of Woolsey's writings without being struck by their similarity to Brewer's later judicial opinions. Certainly Brewer did nothing to disguise his admiration for Woolsey. In 1871, he initiated a movement to establish a "Woolsey Professorship of International Law" at Yale to honor the recently retired Woolsey, and after his death two decades later, Brewer lauded him as one of the nation's greatest educators and political theorists.⁸

Woolsey's theory of the state was founded on the belief that there was a divinely authored moral order and that man was a free moral being.⁹ Every individual had certain God-given rights—the "powers and prerogatives with which the individual is invested" which were to be used "for the purpose of developing his nature, [and which] other individuals are bound to leave undisturbed."¹⁰ The function of the state was to aid in the moral self-development of the individual by protecting these rights, and by maintaining a climate in which moral development could occur, since it was "in the natural order of things, God's method

6. LOUISE L. STEVENSON, *SCHOLARLY MEANS TO EVANGELICAL ENDS: THE NEW HAVEN SCHOLARS AND THE TRANSFORMATION OF HIGHER LEARNING IN AMERICA, 1830-1890* (1986).

7. Catalogue of the Officers and Students of Yale College, 1855-56.

8. Charles Fairman, *The Education of a Justice: Justice Bradley and Some of His Colleagues*, 1 *STAN. L. REV.* 217, 244 (1949); David J. Brewer, Undated Remarks to Yale Alumni Association (1892) (Brewer Family Papers) (on file at Yale Law School).

9. THEODORE D. WOOLSEY, *POLITICAL SCIENCE OR THE STATE THEORETICALLY AND PRACTICALLY CONSIDERED* 1 (1877). Woolsey's treatise repeated most of the points made in his lectures delivered in the 1840's and 1850's, the texts of which are in the Woolsey Family Papers at Yale University. On the similarity of the lectures and Woolsey's later treatise, see Stevenson, *supra*, note 5, at 189 (discussing the similarity between Woolsey's lectures and his later treatise).

10. Woolsey, "Particular Rights" (lecture), quoted in Stevenson, *supra*, note 5, at 106. The first two chapters of Woolsey's treatise are devoted to the subject of rights. See Woolsey *supra* note 8, at 1-119.

of helping men towards a perfect life.”¹¹ To this end, the state could guard the morality of the people by outlawing public behavior counter-productive to self-development, and it could enact laws to promote the general well being, so long as the power was not exercised in such a way as interfere with the individual right of moral self-development.

The state could levy taxes, regulate the use of property (including absolute prohibitions of certain uses), establish public schools, adopt compulsory attendance laws for minors, promote industry, transportation, and health, define acceptable noise levels and sanitary practices, establish regulations regulating marriage, divorce, and descent, promote religion, and even establish a church, if the freedom to worship was not impaired.

On the other hand, the state could not substitute its own judgment for that of the individual in matters that affected the process of moral development. “Society,” Woolsey maintained,

was never meant to be the principal means by which the perfection of the individual was to be secured, but only the condition without which that perfection would be impossible . . . If he [the individual] thinks that the end of government is to support him, to point out to him ways of industry, to lead the way in every enterprise, he remains a dependent, undeveloped citizen; he is not a freeman in his spirit.¹²

In other words, the obligation to facilitate moral development meant that the state would be active in certain areas, but passive in others. Ultimately, this led Woolsey to enumerate a list of rights which no just government ought to take away.¹³

Like Woolsey, Brewer believed that moral choices were genuine only if freely made by the individual.¹⁴ Consequently, to interfere with the right of choice on the grounds that the state (or the majority) knew better than the individual was to frustrate God’s design. According to Brewer, Christ’s emphasis on the individual rather than the state had “laid the foundation of a truer and nobler republic”¹⁵ and that majorities

11. Woolsey, *supra*, note 8, at 195.

12. *Id.* at 4.

13. Theodore D. Woolsey, *Relation of Christianity to the Doctrine of Natural Rights*, 15 NEW ENGLANDER 631 (1857); Woolsey, *supra*, note 8, at 211.

14. Brewer developed his argument in regard to the connection between Christianity and individualism in *THE PEW TO THE PULPIT* and *The Religion of a Jurist*, 80 THE OUTLOOK 533 (1904).

15. Lynford A. Lardier, *The Constitutional Doctrines of Justice David Josiah Brewer* 59 (1938) (unpublished Ph.D. dissertation, Princeton University) (quoting David J. Brewer, *The Scholar in Politics*, TOPEKA DAILY CAPITAL, June 13, 1883).

could not be trusted to be wiser than individuals, since "the Almighty is wiser than even such majority, and He has decreed it best for man to leave each free to work out his own salvation."¹⁶ Like Woolsey, he also saw a potential conflict between individual accountability and a paternalistic state. As he noted in 1906, "[T]oo much and too frequent interference by government blunts the sense of individual responsibility, and the danger is that we drift to a condition where the individual abandons his own duty and simply appeals to government."¹⁷

Nevertheless, Brewer did not believe in an inactive state. Thoreau's maxim that the government that governs best governs least had no appeal to him. Although the pursuit of salvation was ultimately the responsibility of the individual, the state had a responsibility to facilitate that process. When it legislated for the purposes of assisting the process of moral self-development, it was well within its constitutional authority.

While Woolsey viewed the support of individual moral development as the test of legislative legitimacy, Brewer elevated the concept to a constitutional standard. Through its guarantee of the rights to life, liberty, and the pursuit of happiness, the Declaration of Independence had, Brewer maintained, made the protection of the individual's right to pursue his own destiny the cornerstone of American constitutionalism. The Constitution, he insisted, also embodied this same principle, even though it was not so clearly articulated in its text. The failure to honor this principle had necessitated the Fourteenth Amendment which had been adopted to insure that state governments honored the same fundamental principle.¹⁸ Consistent with this principle, Brewer believed that the task of the judge was to draw the line between legislation that served the legitimate interests of the state and its citizens and that which, for whatever motives, impaired the individual's right of moral self-development. Knowing where to draw this line was no easy matter—Woolsey had acknowledged that it was often impossible to draw "a clear line between the grounds on which particular regulations for the public welfare may be made."¹⁹ However, Brewer never seemed to doubt that his duties as a Supreme Court Justice obligated him to evaluate legislation by this standard.

16. David J. Brewer, *The Scholar in Politics*, TOPEKA DAILY CAPITAL, June 13, 1883, David J. Brewer, *Some Thoughts About Kansas*, 12 KAN. BAR ASS'N REP. 61, 70 (1895).

17. David J. Brewer, *Two Periods in the History of the Supreme Court*, 19 REP. VA. BAR ASS'N 133, 153 (1906).

18. David J. Brewer, *The Protection of Private Property from Public Attack*, 55 NEW ENG. AND YALE REV. 97, 109-10 (1891).

19. Woolsey, *supra*, note 8, at 220.

In this light, certain features of Brewer's voting record on the Supreme Court become more understandable. As Professor Berg noted, Brewer is commonly remembered as one of the Supreme Court's staunchest defenders of laissez-faire. Though he wrote neither opinion, Brewer was part of the majority in the infamous *Lochner v. New York*,²⁰ which struck down a maximum hours law for bakers²¹, and in *Adair v. United States*,²² which overturned a federal prohibition of "yellow dog" contracts. He also dissented (without opinion) in cases involving statutes limiting the number of hours that could be worked per day in underground mines, smelters, and refineries²³ and by public works employees;²⁴ the payment of wages in scrip or vouchers rather than cash;²⁵ and the payments of miners on the basis of the weight of coal as mined rather than its weight after screening.²⁶ He also dissented from a decision of the Supreme Court upholding the power of a state to require mandatory inoculation for smallpox.²⁷

It is a mistake, however, to conclude from such decisions that Brewer was an irresolute foe of state regulatory authority. Claims that he was have always been based upon his decisions in a small number of cases. In fact, in the vast majority of cases involving challenges to the state police power, Brewer came down on the side of regulatory authority. In over 500 cases decided by the Supreme Court between 1890 and 1910 involving Fourteenth Amendment challenges (like *Lochner*), Brewer sided with the state 86.2% of the time.²⁸ Although he expressed reservations about the possibility of achieving individual moral reform through legislation, Brewer was willing to grant the state broad authority to regulate morals.²⁹ Bans of gambling, lotteries, and prostitution

20. 198 U.S. 45 (1905).

21. *Id.* at 64.

22. 208 U.S. 161 (1908). A "yellow dog" contract made the employee's agreement not to join a labor union a condition of the employment contract. *Id.* at 180.

23. See *Holder v. Hardy* 169 U.S. 366, 380 (1898).

24. See *Atkin v. Kansas*, 191 U.S. 207, 207-08 (1903).

25. See *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 17 (1901).

26. See *McLean v. Arkansas*, 211 U.S. 539, 543 (1909).

27. See *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905).

28. For a detailed discussion of Brewer's voting record in police power cases, see Hylton, *David Josiah Brewer supra*, note 1, at 48.

29. In *L'Hote v. New Orleans*, he observed, "[N]either the [Fourteenth] Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people." 177 U.S. 587, 596 (1900) (quoting *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); see also, DAVID J. BREWER, THE TWENTIETH CENTURY FROM ANOTHER VIEWPOINT 51-52 (New York, Fleming H. Revell

were legitimate exercises of state power, as was the prohibition of the sale of alcoholic beverages, the criminalizing of polygamy, and the enactment of Sunday closing laws.³⁰ Nor was he automatically inclined to invalidate all labor legislation. He was a supporter of occupational licensing,³¹ and he voted to uphold statutes that prescribed the way in which back wages were to be paid to discharged railroad workers.³² He also approved a maximum eight-hour day for workers employed on federal public works projects³³ and a statute which regulated the advance payment of seamen's wages.³⁴ He was also the author of the landmark opinion in *Muller v. Oregon*,³⁵ which upheld the constitutionality of a maximum-hours statute for female workers against a liberty of contract challenge.

This seeming contradiction in Brewer's approach to police power cases can be understood when reexamined in light of the theological assumptions he shared with his former teacher. Statutes that facilitated the right of moral self-development were valid because they made it more likely that man, or woman, could obtain the salvation which was the purpose of their earthly existence. On the other hand, paternalistic legislation was unacceptable if it did not advance the cause of moral self-development and instead sent the message that the state rather than the individual was the proper agent for moral choice. To draw such a distinction was not to simply substitute the judge's views for those of the legislature, because, in Brewer's view, the right to moral self-development was the most fundamental of constitutional rights. This is not to say that Brewer necessarily drew that line in the logically correct places, but it does explain why he was convinced of the constitutional necessity of line drawing.

This is just one example of how Brewer's religious beliefs shaped his constitutional views in cases that on the surface had little to do with formal religion. A product of particular tradition in a particular time, Brewer's religious views were an integral part of his intellectual makeup. Because he started with his religious beliefs and then worked out a compatible theory of the Constitution, he was literally incapable of

Co. 1899); DAVID J. BREWER, *supra*, note 15, at 133.

30. For a discussion of Brewer's views on the regulation of vice, see DAVID J. BREWER, *THE UNITED STATES: A CHRISTIAN NATION* 56 (1905).

31. See *Reetz v. Michigan*, 188 U.S. 505, 506 (1903).

32. See *St. Louis, Iron Mountain, & St. Paul Ry. Co. v. Paul*, 173 U.S. 404, 405 (1899).

33. See *Ellis v. United States*, 206 U.S. 246, 255 (1907).

34. See *Patterson v. The Bark Eudora*, 190 U.S. 169, 170 (1903).

35. 208 U.S. 412, 416 (1908).

deciding any case without being influenced by those views. To describe David Brewer's view of the United States Constitution without taking into account his religious beliefs would be to describe a book without looking inside its covers.

