

whole. Pragmatic reliance upon existing facts as primary bases of decisions may be gradually clearing the judicial house of antiquated moral and legal conceptions. Unfortunately, it is not providing adequate philosophical substitutes. It is seriously to be doubted whether men in general and judges in particular can live by facts alone. The judicial house, philosophically cleansed of outmoded conceptions, may, like a certain other house scripturally described, become the dwelling place of more and worse demons than the former inhabitants. Since the judicial house is but an upper room in the house of all of us, the custodianship of our nine be-robed brethren is for us as well as for history a matter of deep concern. In any event, the integration of the activities of individual judges with the flow of history has never been more apparent than it is today.

#### JUDGES AS STUDENTS OF AMERICAN SOCIETY

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Judicial biographies of recent years—particularly those written by political scientists—are based on two assumptions: that the social philosophy of the judge will be reflected in his judicial opinions; and that his early life and experiences had a controlling effect on the molding of the philosophy which he read into the law as a judge. The result of a general acceptance of these assumptions has been a set of biographies giving in as much detail as possible the early life of a justice, followed by an analysis of his judicial opinions, his influence on the development of the law, and his position in public life. However, there is one further aspect of a justice's life which ought to be explored: Was the justice a conscientious student of American society, and if so to what extent? In the last analysis we are interested in judicial biographies for the purpose of gaining a fuller insight into the factors which have played an important part in influencing the Supreme Court, and thereby in influencing the development of American government.

The belief that a man's basic predilections, prejudices and biases are fixed in the early years of his life is by now

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well established. But basic theories must be applied to concrete situations. A man may solve essentially similar problems at different times in different ways and still be consistent with his basic belief. For example in 1895 Justice David J. Brewer wrote a short article on the jury system in which he advocated that a juror's day be no longer than a laborer's day.<sup>1</sup> In making his point he wrote, "Eight hours is today the demand of labor, and a wise demand too." And yet ten years later he voted with the majority in *Lochner v. New York*.<sup>2</sup> In 1883, Justice Brewer, while a member of the Supreme Court of Kansas, publicly advocated the prohibition amendment to the Kansas Constitution. Three years later, as a United States Circuit Judge he held, in the case of *State v. Walruff*,<sup>3</sup> that a brewer who had been operating a brewery in Kansas prior to the adoption of the amendment could not, subsequent to the amendment's adoption, be forced to discontinue his business unless compensation were made to him by the state. The apparent inconsistency in virtually nullifying by judicial decision a policy which he had earlier advocated needs explaining.

Such inconsistencies are illustrative of many that can be found in a close analysis of judicial decisions. These may or may not be due to the fact that the judge involved has become conscious of a change in the conditions surrounding the problem to be solved—a change which he thinks dictates a solution to the problem different from the one he made earlier. In the light of these observations, it seems important to know whether or not a member of the Supreme Court was inclined to make a blind application of his prejudices to concrete problems without reference to attendant conditions. Have the members of the Court tended to play by ear, so to speak, or have they been inclined to solve constitutional problems by an application of their basic philosophy to a reasonably thorough study and understanding of the contemporary American scene?

This question must be explored in preparing a judicial biography. For example, during his college years from 1852 to 1856, David J. Brewer had more than a casual interest in current political and social events. In fact his

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1. 12 Washburn Midcontinent 2-3.

2. 198 U. S. 45 (1905).

3. 26 Fed. 178 (1886).

interest was intense and enthusiastic. He was prominent in a debating society at Yale, and his scrapbooks contain copies of several letters of his which were published in the *Middlesex Republican*—long and somewhat scathing letters on such topics as the Dred Scott decision, the end of the Pierce administration, and President Buchanan. These letters show an adequate knowledge of the pertinent facts, but they do not reveal a tendency to careful and penetrating analysis. While Brewer's interest in American politics in later years did not diminish from that of his college days, his attention to political facts did.<sup>4</sup>

If the quality of training in political analysis which Brewer derived from the debating society were of the "cracker-barrel" variety, the fact must not be overlooked that formal college education in politics at that time was not much better.<sup>5</sup> And in terms of modern standards, Brewer's legal training was quite as meager—if not more so. After a year spent as a clerk in the law office of his uncle, David Dudley Field, he took the one-year law course at Albany Law School where the curriculum was typical of legal instruction of those days.<sup>6</sup> Brewer's work at the Albany Law School was limited to a study of the following subjects: Corporations, Contract of Sales, Negotiable Paper, Guaranty and Surety, Equity Jurisprudence, Pleadings, and Criminal Law. Brewer's limited training in the law was described by himself in an interview, in the following words:

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4. This intense interest of Brewer was probably typical of that of his judicial colleagues when they were students. Professor Fairman gives a very clear picture in his book, *MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890* (1939), of Justice Miller in his youth, as an active member of a debating society—a picture quite similar to that of Brewer. It was the day of debating societies.

5. For the most part the study of society in general, and politics in particular, was made under the title "Political Philosophy." According to Miss Haddow's study of *POLITICAL SCIENCE IN AMERICAN COLLEGES AND UNIVERSITIES: 1636-1900* (1939), Brewer's introduction to a study of American society probably came in his senior year and consisted of a two-term course devoted to a study of Wayland's *POLITICAL ECONOMY* (1837), Lieber's *CIVIL LIBERTY AND SELF GOVERNMENT* (1853) (which had just been adopted at Yale), Kent's *COMMENTARIES* (Vol. I 1826), lectures on the Law of Nations, and on the Constitution of the United States. It was not until after Brewer's time that textbooks containing a more elaborate and systematic treatment of politics began to appear and to be used widely.

6. In fact according to Miss Esther Lucile Brown in her *LAWYERS AND THE PROMOTION OF JUSTICE* (1938), as late as 1860 all but a few law schools confined their courses to one year.

I was a raw youth, with a very inadequate legal education, even though I had had a year in my uncle David Dudley Field's office, and another year at the Albany law school, and I had been admitted to the bar at Albany without examination and before I was quite twenty-one.<sup>7</sup>

It is thus apparent that Brewer's formal education included neither a systematic, thorough analysis and understanding of the American scene nor even a cursory introduction to the relationship between the law and society. Even in his later life he seems to have made no conscious effort to study and develop a more complete understanding of American society. According to an interview in 1901 Justice Brewer was asked if he read much fiction, and was reported to have replied, "Very little. . . Last summer I read 'To Have and To Hold.'" Then when he was questioned about his readings in economics and history, he replied, "Bless me, no. It is one of the penalties of those who go on the bench that they can read little of anything except law."<sup>8</sup>

This raises an obvious inquiry: What were the other possible means by which Brewer and other members of the Court<sup>9</sup> could acquire an understanding of the conditions of American society in which the law they were making had to operate? Outside of information contained in magazines and newspaper articles, it would seem that there were only two probable means: practical experience as public officeholder prior to appointment to the bench or as a practicing lawyer, and the arguments of counsel. A person in a non-judicial public office, or a practicing lawyer certainly has an opportunity to get a first-hand understanding of at least some aspects of American society. Such an opportunity was not available to Justice Brewer, for he spent practically the

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7. *Christian Endeavor World*, Oct. 12, 1899.

8. *Topeka State Journal*, June 1, 1901. This picture of the character of the reading he did is reflected in the catalogue of books in what remains of his library. These consist overwhelmingly of court reports, legal encyclopedias, etc. There are a few books in the twenty boxes which do pertain to the American scene. At least half of them were sent to the Justice with the compliments of the author, and most of them showed signs of not having been read: lack of notations and marks, uncut pages, and bindings that were still stiff.

9. On the basis of my perusal of other judicial biographies, I suspect that Brewer's limited reading was typical of the Court of his and earlier times. Brewer may not be representative of his colleagues in this respect, but if he is, then it is clear that Justices with the intellectual curiosity of Brandeis, Holmes and Cardozo have been unusual on the Court.

last forty-five years of his life in a judicial office. When therefore, it became necessary for him to participate in adjusting the law to changing conditions, one may surmise that he frequently had to depend upon members of the bar for factual background, and for an understanding of the social implications of the decision he was being called upon to make.

Of course such a reliance is the premise upon which the "Brandeis Brief" was based.<sup>10</sup> The example of Justice Brewer and the inferences which may be drawn from other judicial biographies afford at least a partial explanation for this reliance. Justice Brewer was surely not congenitally indifferent to contemporary problems, nor was he unsympathetic to the desires of that portion of the American population which hoped for an improvement in its condition. He sincerely believed that there were abuses by the wealthy and by the laborer, but he did not have a sufficiently wide understanding of the essential nature of American problems of his time to be able to make a penetrating and consistent solution. Insofar as Justice Brewer and his colleagues were not active students of American society I have the impression that they were typical of their time and generation. Yet in view of the tremendous influence of the Supreme Court on the development of American government and the concomitant responsibility that rests on the members of that Court, its members were not as well equipped as they should have been.

The recent tendency of some law schools to give increasing emphasis to the study of extra-legal materials should go far toward equipping future justices to be students of American society. It would seem clear that a thorough knowledge of contemporary social and economic problems by the judiciary will become increasingly important if the regular courts of law are to continue to exercise any significant power of review over the decisions of administrative agencies which are intimately concerned with economic and social conditions.

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10. The well-established fact of dependence by the Court upon the bar was demonstrated in another way in the very able study by Benjamin Twiss in his *LAWYERS AND THE CONSTITUTION* (1942).