



DAVID JOSIAH BREWER
ADDRESSES
YALE LAW SCHOOL

Richard A. Epstein

ON JUNE 23RD, 1891, David Josiah Brewer, who had taken his seat on the Supreme Court of the United States the previous year at age fifty-seven, delivered an address before the graduating class of Yale Law School. The speech was given during what Brewer characterized as difficult times marked by a sustained “attack” on the institution of private property, of which he was a staunch defender. The stakes were high as the unprecedented industrial expansion of the late nineteenth century placed government regulators on a collision course with the captains of industry. The key question for Brewer was the extent to which government at all levels could regulate these private firms, without paying them compensation. Obviously exercised over what he perceived were overextensions of state power, Brewer was determined to set out the intellectual case for private property in a public forum, which Yale presented to him. In

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Justice David Brewer.

tackling his self-imposed challenge, Brewer quickly broached some of the most enduring questions of political morality and constitutional law.

The purpose of this brief introduction is to critique Brewer's instructive argument with the care it deserves. The bottom line is fa-

vorable, but mixed. At some places Brewer is in full command of the principles that explain how and why limited government works. But in others, he falls prey to intellectual mistakes that alternately expand and contract the case for state power in misguided ways. Ultimately and ironically, Brewer yields too much to the apologists of state power. Let me address his argument point by point.

THE DECLARATION OF INDEPENDENCE

Brewer's initial foray is self-consciously rhetorical. He starts with the famous opening passage from the Declaration of Independence:

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.

As Brewer shrewdly notes, the Declaration offers no clue as to how these rights should be enforced within civil society. He then notes that this gap is filled in part by the famous opening article of the Massachusetts Constitution of 1780, penned by John Adams,¹ which with its every word reveals the heavy influence that natural rights theory exerted on constitutional discourse.

All men are born free and equal, and have certain natural, essential, and unalienable rights: among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Natural rights are of course passé today, and for the very reason that they were in fashion at the time of the American Revolution. A defense of natural rights (of divine origin in the Declaration, as in

¹ In 1776, Adams served as chairman of the committee to which the Continental Congress delegated responsibility for drafting the Declaration of Independence for the thirteen rebellious colonies. He then surfaced again as the key draftsman of the 1780 Massachusetts Constitution.

the work of John Locke) necessarily denies a proposition that Brewer, rightly in my view, regards as the most dangerous to civil society – namely, that all rights to property only come into being after they are created by the affirmative actions of the state. That proposition allows the state that creates property by legislative fiat to remove it by legislative fiat, so that in the end the property, and thus the liberty, of all individuals is abjectly dependent on state largess, not strong entitlement. Brewer insists that unless rights are antecedent to government, they cannot be shielded from it. That much we do know from the Declaration, which notes that “to *secure* these rights” – not to *create* these rights – “Governments are instituted among men.” On this view, the Constitution becomes the means to implement the Declaration, using the “cold phraseology” of government powers and limitations to secure the grand aims of the Declaration.

And to what end are these institutional arrangements made? For Brewer the answer follows from the passages already quoted: the protection of the rights of property acquired by initial possession of some discrete and unowned material thing by an agent who, although Brewer does not quite say it, exercises his own natural liberty. In articulating that right, Brewer is keenly aware that the system of property so created does not rely on individual benevolence, but necessarily takes advantage of the impulse toward self-interest – what he terms “the joy of possession” – in order to create the conditions for material progress. In so doing, he is squarely in line with the classical thinkers of the founding period, including Adam Smith and his defense of the “invisible hand” and David Hume, who believed “confin’d generosity” might temper the forms of self-interest but never overwhelm them. Precisely because these property rights antedate government, the state always has an uphill battle to destroy or limit them. Brewer observes that these property rights of course can be taken away by individuals for the punishment of various crimes. But if the prevention of harm elicits one response, the taking of private property for public use and benefit elicits quite a different one. No compensation in the first instance. Full compensation in the second.

PUBLIC ATTACKS

Brewer's initial remarks are intended to set the stage for a closer and more systematic examination of the various "majority assaults" that governments can make against the rights of the minority: taxation, eminent domain, and the police power. His instructive organization rightly considers all three forms of government action as part of a comprehensive system. The devil, however, lies in the details, and on these Brewer sometimes goes astray.

Taxation

His short passage on taxation starts with the sensible proposition that taxation works best when it returns to each individual a level of benefit, in the form of increased government services, "equivalent" to what he has lost. The term "equivalent" is not quite right, for it suggests that the individuals who are taxed are at best indifferent between the wealth surrendered and the state benefits supplied. Yet in fact, as Brewer senses, a good system of taxation, whether general or special, should not aim just to preserve the status quo, but to *improve* the position of all citizens by taking steps to achieve collective goals (such as order and infrastructure) that ordinary private individuals could not achieve by private consensual means. But the modern vocabulary of public goods and high transaction costs was not available to him, so his basic account of taxation does not stress its potential gains, but is designed, prophylactically, to guard against its potential abuses, to the extent that this can be practically done. Accordingly, once the notion of equivalence is lost, taxation becomes confiscation, which is worthy of only an "irresponsible and despotic power."

At this point, however, Brewer veers off in an odd direction, by entertaining, but never endorsing, two alternative theories for taxation. He first notes – doubtless thinking of Henry George's *Progress and Poverty* (1879) – that land should be regarded as held in common and hence be the subject of the entire burden of taxation. He apparently rejects this position, as well he might, given that it is in subtle tension with his view that all persons take ownership of land by its

first possession. He then notes, with greater receptivity, a second view that all property should be held only for the lifetime of its owner, and hence should pass to the state at death. This line has been taken by others, and opens the door for a heavy estate tax. But it is again inconsistent with the first possession rule that allows the occupier to claim title in fee simple. Otherwise no transferee of property could hold title that survived the death of the original owner – a rule that utterly upsets the stability of possession that is critical to the classical systems of limited government that Brewer championed.

Brewer's uneasiness on this point is reflected in his one-sentence concurrence in *Knowlton v. Moore*,² which, without explanation, accepts an inheritance tax in theory, but rejects its progressive rates. Strong defenders of property rights could see no equivalent benefit to either the decedent or his heirs that would justify any tax on transmissions at death, for the stability of possession is critically dependent on an indefinite time horizon for property rights. Otherwise we have the odd situation in which the law either benignly allows the restriction to be evaded by sales or gifts of property prior to death or aggressively taxes the property so sold or donated in the hands of its buyer or donee. Brewer sought, in a word, to square the circle by creating a strong system of property rights with a hard stop at death. The conclusion is no accident, for as Brewer writes, "there should be no other aristocracy than that of personal toil and accumulation."

Lastly, Brewer's writing on taxation is ambiguous about the use of tax revenues to provide for the poor. To be sure, when Brewer wrote there was not even a feeble judicial objection to various welfare programs, which were widely regarded as an accepted function of government. But widespread acceptance does not explain how the rule squares with the benefit theory of taxation that Brewer championed. One possible line is that the expenditures in question produce offsetting benefits in the form of crime reduction. But that argument was not articulated in Brewer's time, nor does it seem

² 178 U.S. 41, 110 (1900).

likely that today's massive transfer programs to older persons could ever be justified by that argument, even if more limited transfer programs might be. It is quite clear that Brewer hesitates to embrace the modern judicial view that allows Congress and the states carte blanche on taxation. But at the same time he would impose fewer limitations on the state than some small-government types (like me) would support.

Eminent Domain and the Police Power

After this brief but provocative discussion of taxation, Brewer turns to his central task, a discussion of the uses and limits of the power of eminent domain. On this point, he takes a more hard-line view against the use of government powers. But again there are discordant elements. Initially, he notes the close association between the use of that power and the use of the police power, which allows the state to regulate for reasons of public health, safety, morals, and general welfare. But the moment he defines these two powers, he confuses the relationship between them. All the cases he talks about involve questions of what is commonly called "public necessity" – that is, situations where one person's property is sacrificed for the benefit of others, as when a house is ripped down in order to prevent a great conflagration. Brewer's position is, quite commendably, that one person should not be required to sacrifice his property for the benefit of the public at large unless he receives compensation for his loss. That position, however, is quite distinct from the usual police power situation, well known in his time, where the state wishes to enjoin a landowner from creating a nuisance, and to do so without compensation.³

There are important reasons for distinguishing between these two powers. In the fire situation, the property owner is an innocent whose property is taken to solve a problem that is not of his own making. It requires an ingenious argument to see why he should be left with a loss while others profit at his expense. The position quite

³ *Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

simply is that if his property is worth more than his neighbor's no public official should impose the sacrifice. But if it is worth less than the properties that could be saved, he will make the correct decision even if compensation will be required. Either way, therefore, we get the right outcome in terms of personal equity and in terms of the incentives faced by public officials – at least as long as they are not personally answerable for the costs and benefits that they confer on others.

The nuisance case is far more complex because it involves a raft of questions, all of which have precise analogies in the private law. We must first figure out what counts as a nuisance, which is no mean task. We must then figure out what, if anything, should be done before the harm occurs. It is therefore incumbent to figure out the interaction between private injunctions and direct forms of regulation, and to see if the means chosen are congruent with the ends in question. I will not develop this point here because Brewer does not address the topic at all. But the omission makes him seem unduly anti-statist in this regard, just as he comes across as unduly pro-statist in dealing with the taxation issues.

Rate and Use Regulation

Brewer finally comes into his element when he deals with the question of how the state may regulate the use of property. As is evident from his discussion of the *Munn v. Illinois*⁴ line of cases, Brewer's analysis of this issue focuses mainly on rate regulation of industries that are "affected with the public interest," which surely included not only the vast railroad networks that were assembled in the last part of the nineteenth century, but also the more nascent electrical, telephone, and power industries. And his objection to this form of regulation is entirely correct. The standard definitions of property that have worked from Roman times forward always stressed a trinity of rights that included exclusive possession, use, and disposition. He therefore is right on the money when he notes

⁴ 94 U.S. 113 (1876).

the peril that *Munn* poses to the investment of capital by tolerating the restriction of rates. The effect of those restrictions is, as he notes, a confiscation of invested capital, which should be resisted. As was the habit of his time, Brewer does not couch his arguments in terms of the disastrous long term consequences for investments. But the message was surely not lost on him, nor on any investor of the period. Engage in ruinous rate regulation and there will not be a next generation of investment to regulate. But how rates should be regulated in cases of monopoly (a word that he does not use in this connection) is something that he does not discuss in any great detail, though his reference to a “reasonable profit on . . . investment” cryptically adumbrates *Smyth v. Ames*,⁵ a case in which Brewer concurred in the decision of Justice Harlan, having himself written several of the earlier decisions that followed the same property-protective line.⁶

Use

The point on which Brewer’s positions clash most mightily with the modern law are those which involve restrictions on use. The modern law takes the position that the right to exclude is the hallmark of property, such that the “mere” deprivation of use rights should be judged by the lenient standards propounded by Justice Brennan in *Penn Central v. City of New York*,⁷ under which any plaintiff has a hard row to hoe to gain compensation for restrictions imposed on land use. In stating his position, Brewer also takes dead aim against the modern view that the essence of private property is the right to exclude⁸ by noting correctly that only use allows an owner to unlock the value inherent in property. To be sure, Justice Brewer did not have to face the complexities of modern zoning statutes, including those specifically directed to landmark preserva-

⁵ 169 U.S. 466 (1898).

⁶ See, e.g., *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362 (1894); *Chicago & N.W. Railway Co. v. Dey*, 35 F. 866, 878 (C.C.S.D. Iowa 1888).

⁷ 438 U.S. 104 (1978).

⁸ See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Tele-Prompter*, 458 U.S. 419 (1982).

tion, but he made his point of view clear in unambiguous language, which the current Supreme Court would do well to note. "Property is as certainly destroyed when the use of that which is the subject of property is taken away, as if the thing itself was appropriated, for that which gives value to property is its capacity for use. If it cannot be used, it is worth nothing; when the use is taken away the value is gone." In one sense this quotation represents the current law, which holds that the deprivation of *all* viable economic use constitutes a taking, even if the government does not enter into the land (or authorize private parties to enter into the land) whose use it has restricted.

The acid test therefore is that of a *partial* restriction on land use, where some value is lost to regulation while some value remains. On this point, the then-recent decision of Justice Harlan in *Mugler v. Kansas*⁹ offered Brewer an instructive example, because it involved a situation where the regulation in issue prohibited the only use which gave the property value: the manufacture of beer. Brewer criticizes the decision for its want of compensation, even though the value of *Mugler's* plant declined by only 75 percent but was not totally wiped out. Like *Penn Central*, *Mugler* too is not exactly on point, for it does not involve a regulation in which the regulation left the owner with some other valuable uses. But to his credit, Brewer was prepared, when he heard the case on the Kansas Supreme Court, to award compensation for the partial value that was lost through regulation:

Further, prior to the constitutional amendment, the manufacture of beer was free and unrestricted. No license, permit or condition was required. Under that state of the law this defendant invested his means in building and machinery suitable for the purpose of manufacturing beer, and unsuitable for any other purpose, worth \$10,000 for the former use, and not to exceed \$2,500 otherwise. The denial of the use has thus practically deprived him of \$7,500. Is not this taking private property for public use, without any com-

⁹ 123 U.S. 623 (1887).

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pensation? If the public good requires the destruction of the value of this property, is not prior compensation indispensable?¹⁰

At no point, however, does Brewer make the key declaration that any diminution in value attributable to partial loss of use is a compensable event, which is the key step that is needed to close the circle. My sense is that he believed just that, given that his quotation from Justice Field's dissent in *Munn* is not directed toward those instances of full deprivation of use. My own strong guess therefore is that Justice Brewer (like Justice Field) would have been far less receptive than the modern Court to the myriad of partial land use restrictions that routinely withstand takings challenges today. His approval of the protection against partial losses in *Pumpelly v. Green Bay Co.*¹¹ is evidence on the question, but it is not conclusive because *Pumpelly* regarded flooding consequent to the building of a dam as a kind of permanent occupation, not a formal restriction on use. In addition, he takes the position that the state may restrict particular uses without having to pay compensation, so long as it gives adequate notice in advance. He is surely correct that invalidation of existing uses is a greater evil because it involves greater losses in value. But it hardly follows that smaller losses due to the regulation of particular future uses are not also worthy of compensation. His position suggests that notice of future restrictions is *justification* for what the state does, when the more accurate analysis is that notice can *mitigate* private losses by enabling shifts in future uses but does not remove the duty to compensate for any losses that remain. At this critical juncture, Brewer switches from the natural law account of private property as prior to the state to a positivist account that treats property as a creature of the state, which justifies a vastly increased degree of government control.

It is of course impossible to know exactly how Brewer would have come out on the modern questions of zoning and environ-

¹⁰ *State v. Mugler*, 29 Kan. 252, 274 (1883). Brewer only dissented for the manufacture but not the selling of beer.

¹¹ 80 U.S. 166 (1871).

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mental land use restrictions. To be sure, he had the right instincts on many questions, but failed to close the circle. In this regard, I think that he was like many of the other “conservative” Justices of the period. Their views were by no stretch of the imagination designed to give legal protection to privilege. Rather, they rested on a clear sense of the importance of private property (and freedom of contract) for good and sufficient social reasons. But a generalized commitment is not the same as a fully worked out system, which is needed to withstand the countless challenges that hard cases will put in its way. In this connection, Brewer’s short Yale address is highly instructive of the strengths and weaknesses of the Old Court, which in the end was unable to withstand the Progressive assault that was to follow. Part of the reason was the powerful political forces that arrayed against Brewer and those like him. But part of the reason was the inability to articulate a complete and systematic defense of the principles of limited government and private property that were the subject of Brewer’s address at Yale Law School.





PROTECTION OF PRIVATE PROPERTY FROM PUBLIC ATTACK

Hon. D.J. Brewer, LL.D.

MR. PRESIDENT AND GENTLEMEN OF THE GRADUATING
CLASSES:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” This was the natal cry of a new nation. It is the illuminating and interpreting voice of the Constitution. I know it is by some thought clever to speak of the Declaration as a collection of glittering generalities. The inspired apostle said, “And now abideth faith, hope, charity – these three; but the greatest of these is charity.” This affirmation is only a glittering generality; but subtract from Christianity all that it implies, and what is left is as barren as the sands of Sahara. The Declaration passes beyond the domain of logic – it argues nothing. It appeals to the intuitions of every true man, and relying thereon, declares the

Hon. D.J. Brewer, LL.D., Justice of the Supreme Court of the United States, delivered this address before the graduating class at the sixty-seventh anniversary of Yale Law School on June 23, 1891. It was originally printed by Hoggson & Robinson, printers to the Law Department of Yale University, New Haven, Conn. 1891.

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conditions upon which all human government, to endure, must be founded.

John Adams was a member of the committee which drafted this declaration, and in 1780, he prepared the Bill of Rights for the new Constitution of the State of Massachusetts[.] Its first article is in these words: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." There is no additional truth in this article. Its last clauses simply define what is embraced in the phrase, – "the pursuit of happiness." They equally affirm that sacredness of life, of liberty, and of property, are rights, – unalienable rights; antecedent human government, and its only sure foundation; given not by man to man, but granted by the Almighty to every one: something which he has by virtue of his manhood, which he may not surrender, and of which he cannot be deprived.

In the Constitution, as originally adopted, there was no re-affirmation of these fundamental truths. Why this omission? The men who had joined in the Declaration of Independence were the framers of the constitution. In the lapse of years had they grown wiser[?] Were they repudiating that Declaration, or were they still filled with its spirit? While putting into the cold phraseology of the constitution the grants and limitations of governmental power, did they forget or repudiate the truths which only eleven years before they had affirmed to be self-evident? I shall not stop to argue before you that the constitution was no departure from the Declaration. On the contrary, I assert and appeal to history in support of the truth thereof, – that the spirit of 1776 was present with and filled the convention of 1787, and that the corner-stone of the foundation upon which the constitution was built, and upon which it rests today, was and is the Declaration of Independence. I read into the one the affirmation of the other, that some truths are self-evident, existing before and superior to constitutions, and, therefore, unnecessary of mention therein. Life, liberty and the pursuit of happiness

are lifted beyond the touch of any statute or organic instrument. From the time in earliest records, when Eve took loving possession of even the forbidden apple, the idea of property and the sacredness of the right of its possession, has never departed from the race. Whatever dreams may exist of an ideal human nature, which cares nothing for possession and looks only to labor for the good of others, – actual human experience, from the dawn of history to the present hour, declares that the love of acquirement, mingled with the joy of possession, is the real stimulus to human activity. When, among the affirmations of the Declaration of Independence, it is asserted that the pursuit of happiness is one of the unalienable rights, it is meant that the acquisition, possession, and enjoyment of property are matters which human government cannot forbid, and which it cannot destroy, that except in punishment for crime, no man's property, nor any value thereof, can be taken from him without just compensation. Instead of saying that all private property is held at the mercy and judgment of the public, it is a higher truth, that all rights of the State in the property of the individual are at the expense of the public. I know, that, as punishment for crime, the State may rightfully take the property of the wrongdoer. Fine and confiscation have been always recognized as suitable means of punishment. The object of punishment, as well as its justification, is to protect society and deter from crimes against it. The public must use the best means therefor, – Death, imprisonment, stripes, or fine and confiscation. Whatever may theoretically be said as to the idea of pecuniary compensation for crime, it must be recognized that there are many offences against human law, particularly those which are in the nature of *malum prohibitum*, and not *malum in se*, in respect to which physical punishment seems a cruelty, and the only other available recourse is a pecuniary infliction. But this seizure of a criminal's money or property is only by way of punishment, and not because the public has any beneficial claim upon it. It is not an appropriation of private property for public uses or public benefits. It is therefore in no manner inconsistent with that security of property which is among the unalienable rights of man.

I come now to the theme of my remarks, and that is;

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The long struggle in monarchical governments was to protect the rights of [the] individual against the assaults of the throne. As significant and important, though more peaceful in the struggle is this government of the people, to secure the rights of the individual against the assaults of the majority. The wisdom of government is not in protecting power, but weakness; not so much in sustaining the ruler, as in securing the rights of the ruled. The true end of government is protection to the individual; the majority can take care of itself.

Private property is subject to governmental attack in three ways: First, through taxation: Second, by eminent domain: and, Third, in the exercise of the police power.

So far as the first is concerned, the idea of taxation is the support of the Government by those who are protected by it, and no one can complain of a tax which responds to that obligation. While there is no return of money or property to the tax-payer, there is no arbitrary taking of property without compensation. It is always understood that the government, the public, returns a full consideration. In fact, taxation, whether general or special, implies an equivalent: if, special, increased value to the property by the contiguous improvement; if general, protection to person and property, security of all rights, with the means and machinery for enforcing them and redressing all wrongs. Taxation on any other basis cannot be justified or upheld. Whenever it becomes purely arbitrary, and without an implication of an equivalent in one way or another, so that the public takes the property of the individual giving nothing in return, or when the burden is cast wholly upon one or two, and all others similarly situated are relieved, the act passes beyond the domain of just legislation, and rests with the rescripts of irresponsible and despotic power. It is not to be expected that any law of taxation can anticipate or adjust itself with mathematical accuracy to all the various conditions of property. It must always be adjudged sufficient, if the general scope of these statutes is uniformity and justice. Errors

which may and do arise in the enforcement of the general rules of such a statute, are not available to deny its validity or impugn its justice. We stand today at the threshold of two thoughts and two demands; one is, that land is the common property of all, — as air and light: that ownership of land is as much against common right and justice, as an appropriation of the free light and air of heaven: that, in view of existing social and economic relations, and to sugar-coat the pill by which title in land shall be destroyed, the burden of taxation should be wholly cast upon land, a burden growing until not only the needs of government be satisfied, but the support and education of all the poor be provided for; and in that way the owners of such property be despoiled thereof not directly, but indirectly and through taxation. The other door, which is as yet but slightly ajar, opens to the proposition which, ignoring all differences of property, says that he who toils and accumulates, and is protected by the State in that toil and accumulation, has all the obligations of protection discharged at his death; and that then all his accumulations should pass to the State, — leaving only to his heirs the same freedom of toil and accumulation, and the like protection which he has enjoyed. I do not care to enter into any discussion of the merits of these measures; but pass with the single observation, that in a democratic government, which means the equality of the individual from his cradle to his grave in all matters of common right, the latter proposition is more just, and more in accord with the principles of human equality. Indeed, I think it is worthy of most serious consideration, whether a partial enforcement of this rule is not demanded in a government of the people; — a government based on person and not on property, whose theory is not of class by accident of birth, but of original equality in the individual, and no other aristocracy than that of personal toil and accumulation.

With regard to the second attack, that through the exercise of the power of eminent domain, the established law is, that where the exigencies of the government demand the appropriation of private property to public use, full compensation in money must be paid. This is generally enforced by constitutional provisions; but even if there be no such provision, I endorse the thoughtful words of the

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great commentator of American law, when he says: "A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."^{*}

But the matter to which I wish to call your special attention, and which is the main subject of my talk, is the spoliation and destruction of private property through the agency of that undefined and perhaps indefinable power, the police power of the State. I say undefined and perhaps indefinable, for no man has yet succeeded in giving a definition which, in anticipating future contingencies, has prescribed exact limits to its extent. It is that power by which the State provides for the public health, and the public morals, and promotes the general welfare. It is the refuge of timid judges to escape the obligations of denouncing a wrong, in a case in which some supposed general and public good is the object of legislation. The absence of prescribed limits to this power, gives ample field held for refuge to any one who dares not assert his convictions of right and wrong. For who, against legislative will, cares to declare what does or does not contribute to public health or public morals, or tend to promote the general welfare? *Omne ignotum pro magnifico*. I am here to say to you, in no spirit of obnoxious or unpleasant criticism upon the decision of any tribunal or judge, that the demands of absolute and eternal justice forbid that any private property, legally acquired and legally held, should be spoliated or destroyed in the interests of public health, morals, or welfare, without compensation.

Private property is sacrificed at the hands of the police power in at least three ways: first, when the property itself is destroyed; second, when by regulation of charges its value is diminished; and third, when its use or some valuable use of it is forbidden. Instances of the first are these: when in the presence of a threatening conflagration a house is blown up to check the progress of the flames:

^{*} Editors' note: Justice Brewer is quoting Chancellor Kent. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 275 (O. Halstead 1827)

when a house has been occupied by persons afflicted with small-pox or other infectious disease, and so virulent has been the disease, and so many afflicted, that the public health demands the entire destruction of the house and contents by fire to prevent the spread of that disease: when to prevent an overflow in one direction, by which large and valuable property would be destroyed, a break is made in a dyke or embankment, and the water turned elsewhere and upon less valuable property, and crops swept away in order to save buildings and lives. In these and like cases, there is an absolute destruction of the property, — the houses and crops. The individual loses for the public weal. Can there be a doubt that equity and justice demand that the burden of such loss shall not be cast upon the individual, but should be shared by those who have been protected and benefited. It may be, that at common law no action could be maintained against the State or municipality by the individual whose property has been thus destroyed. But the imperfections of the law do not militate against the demands of justice. *Salus populi suprema lex* justifies the destruction. But the equity of compensation is so clear that it has been recognized by statutes in many States, and provisions made for suit against a municipality to distribute upon the public the burden which it is inequitable that the individual should alone bear. And in enforcing such an equity, no regard is or ought to be paid to the character of, or the use to which the building or property is appropriated. It is enough, that property held by an individual under the protection of the law, is destroyed for the public welfare.

Second, under the guise of regulation, where charges for the use are so reduced as to prevent a reasonable profit on the investment. The history of this question is interesting: certain occupations have long been considered of a quasi public nature, — among these, principally, the business of carrying passengers and freight. Of the propriety of this classification, no question can be made. Without enquiring into the various reasons therefor, a common carrier is described as a quasi public servant. Private capital is invested, and the business is carried on by private persons and through private instrumentalities. Yet, it is a public service which they render, and by

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virtue thereof, public and governmental control is warranted. The great common carriers of the country, the railroad companies, insisted that, by reason of the fact that they were built by private capital and owned by private corporations, they had the same right to fix the prices for transportation that any individual had to fix the price at which he was willing to sell his labor or his property. They challenged the attempts of the State legislatures to regulate their tariffs. After a long and bitter struggle, the Supreme Court of the United States, in the celebrated "Granger" cases, reported in the 94 U.S., sustained the power of the public, and affirmed legislative control. The question in those cases was not as to the extent, but as to the existence of such control. Those decisions, sustaining public control over the tariffs of railroads and other common carriers as a part of the police power of the State, were accompanied by the case of *Munn vs. Illinois*, 94 U.S., 113, putting warehouses in the same category. The scope of this decision, suggesting a far-reaching supervision over private occupations, brought vigorously up the question as to its extent. If the tariff of common carriers and warehousemen was a matter for public control, could the public so reduce the charges that the receipts of the carrier or the warehouseman would not only furnish no return to the owners, but also not equal the operating expenses; — so that the owner having put his property into an investment, permanent in its nature, and from which he could not at will withdraw, might be compelled to see that investment lost, and his property taken from him by an accumulation of debts from operating expenses?

On this line the struggle was again renewed and carried to the Supreme Court, which in the recent case of *Railway Company vs. Minnesota*, 134 U.S., 418, decided that regulation did not mean destruction; and that under the guise of legislative control over tariffs it was not possible for the State or Nation to destroy the investments of private capital in such enterprises; that the individual had rights as well as the public, and rights which the public could not take from him. The opinion written in that case by Mr. Justice Blatchford, sustained as it was by the Court, will ever remain a strong and unconquerable fortress in the long struggle between in-

dividual rights and public greed. I rejoice to have been permitted to put one stone into that fortress.

The other class of cases, is where, in the exercise of the police power, some special use is stopped, and the value flowing from that use is thus wholly destroyed. In principle, there is no difference between this and the preceding cases. Property is as certainly destroyed when the use of that which is the subject of property is taken away, as if the thing itself was appropriated, for that which gives value to property, is its capacity for use. If it cannot be used, it is worth nothing; when the use is taken away, the value is gone. If authority were wanting, reference might be had to the decisions of the Supreme Court of the United States, and the language of some of its most eminent judges. In the leading case of *Pumpelly vs. Green Bay Co.*, 13 Wall., 166, which was a case where land was overflowed in consequence of the erection of a dam, the Supreme Court thus disposed of this matter.

“It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.”

In the case of *Munn vs. Illinois*, 94 U.S., 141, Mr. Justice Field used this language:

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“All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them, deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received.”

But surely authority is not needed for a proposition so clear. If one of you own[s] a tract of land usable only for farm purposes, and the fiat of sovereign power forbids its use for such purposes, of what value is the naked title? No profit or advantage comes to you from the possession of that which you cannot use, and no one will buy that which in like manner he cannot use. So whether the thing be taken or its use stopped, the individual loses, he is deprived of his property; and if this is done in the exercise of the police power, because the public health, morals, or welfare demand, his property is sacrificed that the public may gain. When a building is destroyed that a fire may not spread, the individual's property is sacrificed for the general good. When the use of his property is forbidden because the public health or morals require such prohibition, the public gains while he loses. Equal considerations of natural justice demand that he who is thus despoiled for the public good, should not alone bear the burden, but that the public which is benefited should share with him the loss. It is unfortunate that this question came into the courts along the line of deep feeling, and in the furtherance of a lofty and noble effort to suppress the enormous evils of intemperance. I reluctantly refer to this, for having had some judicial experience in connection with it, I know how angry was the feeling, how biased the judgment, and how bitter were the denunciations. It is unfortunate, I say, that this question came into the courts along the line of such controversy, for it is a familiar saying, “hard cases make bad precedents,” and it is seldom easy, under the pressing burden of a great evil, to examine questions in the calm light of simple justice. We look back to the execution of the witches in Massachusetts by judicial decrees as a sad blot on the records of its courts. No one doubts the integrity of the judges by whom those decrees were en-

tered, or does not feel, by way of apology, that the burden of the awful danger supposed to rest upon the community swayed the judicial mind, and bent its judgment.

When the great State of Kansas, in whose past I glory, and in whose future I believe, proclaimed by the voice of its people through constitutional amendment, that the manufacture and sale of intoxicating liquors as a beverage should cease within its borders, humanity rejoiced, and I am glad to have written the opinion of the Supreme Court of that State, affirming its validity and rightfulness. I regret to be compelled to add, that in the glory of success and the furtherance of a good cause, the State forgot to be just. There were four or five breweries, with machinery and appliances valuable only for one use, worth a few thousand dollars, a mere bagatelle in comparison with the wealth of the State, built up under the sanction of the law, owned by citizens whose convictions were different from those of the majority, and who believed the manufacture and sale of beer to be right and wise. As good citizens, it was fitting that they should yield to the judgment of the majority. As honest men, it was fitting for the majority not to destroy without compensation; and to share with the few the burden of that change in public sentiment, evidenced by the constitutional amendment. It will be said hereafter to the glory of the State, that she pioneered the way of temperance; to its shame, that at the same time she forgot to be honest and just, and was willing to be temperate at the expense of the individual. Had this question come to the courts along other lines, who can doubt that a different result would have followed.

Powder is a confessedly dangerous article. The police power, caring for the public safety, may regulate its storage, its use, its manufacture, and regulating, may prohibit. In the State of Delaware are the Dupont Powder Mills, a large manufacturing property. Had the State of Delaware, by its legislation, prohibited the manufacture and sale of powder as it had a right to do, and thus put an end to this great manufacturing industry and destroyed its value, who can doubt that in proceedings along that line of absolute justice which all men feel, the Courts would have hastened to declare that such destruction of property, at the expense of the Duponts alone, could

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not be tolerated; that the State that enforced such destruction should share with them the burden. Would they not have promptly reaffirmed the thought of Chancellor Kent, — that what the State takes it must pay for; and, paraphrasing, added, — what the public destroys, it must also pay for?

There is not only justice, but wisdom in this rule, that, when a lawful use is by statute made unlawful and forbidden, and its value destroyed, the public shall make compensation to the individual. It restrains from hasty action. It induces a small majority to hesitate in imposing upon an unwilling and large minority its notions of what is demanded by public health, or morals, or welfare. The pocket-book is a potent check on even the reformer. If this rule had been always recognized as in force, would the State of Pennsylvania have enacted that foolish law, forbidding the manufacture and sale of oleomargarine, and thus destroying a legitimate and beneficial industry? [O]r if it had, would the judicial eye have been so blind as not to see through the thin disguise of a pretended regard for public health, to the real purpose of the act, — the protection of another and no more deserving industry, that of the dairy? When a law which is obnoxious to the beliefs of a large minority is forced upon them by a small majority, and that law infringes upon their habits, and destroys their property, all experience demonstrates the difficulty of enforcing such a law. Witnesses commit perjury, jurors forget the obligations of their oaths, public peace is disturbed, animosities are engendered, and every instance of the defeat of the law is welcomed with applause by the sullen and angry minority.

But it is said, and said by high authority, that when, by legislative act, a particular use of property is forbidden, its subsequent use is unlawful, and a party thereafter attempting such use, may rightfully be deprived of the value of property as a punishment for his crime. This ringing changes on the words immoral, unlawful, crime, and punishment is the mere beating of Chinese gongs to conceal the real question. No one doubts, that if, after the legislature had prohibited a particular use of property, any individual devotes his property to that use, he is guilty of a criminal act and invites and deserves punishment, even to the destruction of the value of that use which he

has attempted to create in defiance of the law. But it is a very different proposition, — that, when a party has created the use in obedience to and with the sanction of the law, a legislature has a right to prohibit such use in the future, and by making it unlawful, destroy without compensation the value which was created under the sanction of the law. In criminal matters, *ex post facto* legislation is always denounced. If one does an act which today is within the sanction of the law, no legislature can, tomorrow, by a statute prohibiting such acts, reach backward and make that unlawful which was lawful when done, or punish him as a criminal for that which when done he had a right to do. Neither can it, in civil matters, disturb vested rights. If there be no law against usury, and a person loans money upon a contract to pay ten per cent. interest, no subsequent legislation making five per cent. the extreme lawful rate, and forfeiting all principal and interest in case more is taken can destroy that contract, or release the borrower from his obligation to pay the lender principal and ten per cent. interest. No more can the value of a use created under sanction of the law be taken away from its owner, by a mere arbitrary declaration of the legislature that such use must stop. Legislation looks to the future and directs its conduct. It does not look backward, or turn a lawful act into a criminal one; nor may it, under the guise of the police power, rob an individual of any lawfully acquired property or value.

So, out from these considerations I work this thought: That while the government must be the judge of its own needs, and in the exercise of that judgment may take from every individual his service and his property, and, in the interests of public health, morals, and welfare, may regulate or destroy the individual's use of his property, or the property itself, yet there remains to the individual a sacred and indestructible right of compensation. If, for the public interests and at the public demands, he sacrifices his time, his labor or his property, or any value therein, he has a right to demand and must receive at the hands of the public compensation thereof. The full, absolute and unqualified recognition and enforcement of this right are essential to the permanence of all governments, especially of those by, of, and for the people. In the picture drawn by the

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prophet of millennial days, it is affirmed that, "They shall sit every man under *his* vine and under *his* fig tree, and none shall make them afraid; for the mouth of the Lord of hosts hath spoken it." If we would continue this government into millennial times, it must be built upon this foundation. To accomplish this, we 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 peremptory that no judge can doubt or hesitate, and no man, not even a legislator, misunderstand. I emphasize the words clear and peremptory, for many of those who wrought into the Constitution the Fourteenth Amendment believed that they were placing therein a national guarantee against future State invasion of private rights, but judicial decisions have shorn it of strength, and left it nothing but a figure of speech.

Young gentlemen, you stand at the open door of a great profession, – at the morning hour of an era of great social changes. The motto of that profession is "justice." Justice not alone to the public, but equally to the individual. Not alone to the strong and wealthy, but also to the feeble and poor. Not alone to the popular, but to the unpopular side. The men whose names shine illustrious on the rolls of that profession, – Hale, Mansfield, Erskine, Marshall, Chase and Lincoln, voice their great appeal to you not alone by the magnificence of their ability and the wealth of their learning, but as much by their devotion in times of trial, and in the midst of threatening and popular feeling, to the demands of absolute and unflinching justice. From the halls of Westminster, Lord Mansfield looked out on the swelling mass of an angry mob, and, gazing beyond the present to the heights of the future, boldly declared, – "I wish popularity; but it is that popularity which follows, not that which is run after. It is that popularity, which sooner or later never fails to do justice to the pursuit of noble ends by noble means." In this coming era, great social changes will take place. A more equal distribution of the wealth of the world, and the elimination of the pauper from our midst will be secured. Many and various will be the means suggested for accomplishing these desired and glorious changes. To the lawyer will come the sifting and final judgment on the righteousness

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and justice of these various schemes. Into that profession, and into this era, I welcome you; – and welcoming, I bid you remember that not he who bends the docile ear to every temporary shout of the people; but he only who measures every step, – even in defiance of angry passions, by the unchanging scale of immutable justice, will win the crown of immortality, and wear the unfailing laurels. In all your lives, and in all your acts, bear with you the motto of our profession: *Fiat Justitia*.

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