



THE KANSAS JUSTICE, DAVID JOSIAH BREWER

Stephen R. McAllister

We have been holding Professor McAllister's fine article for the release of our David J. Brewer bobblehead doll, because it is the ideal scholarly companion to our ceramic portrait of the Justice. The annotation of the bobblehead is at the end of this article.

— *The Editors*

SUPREME COURT JUSTICE David Josiah Brewer was as Kansan as they come. Brewer was born in 1837 to American missionary parents in the city of Smyrna in the Ottoman Empire (now Izmir, Turkey). Most of his childhood was spent in the eastern United States, where, eventually, he read law with one of his famous lawyer uncles and graduated from Albany Law School when only 20 years old. In 1859, he came west. After an unsuccessful gold-prospecting attempt in southeastern Colorado, he settled in Leavenworth, Kansas, both the oldest and the largest city in the State at that time.

For the next 30 years, Kansas was home to Brewer. During his time in Kansas, Brewer embraced his adopted state, the prairie folk, the legal system of which he became a prominent part, and the thriving local community

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he called home. Brewer was a remarkably active and prominent citizen of Leavenworth and Kansas, becoming a local judge, county attorney, Kansas Supreme Court Justice, and U.S. Circuit Judge, while also shepherding the affairs of his church, giving public lectures on a wide variety of topics, and fully engaging in the legal, intellectual, public, and religious life of Kansas.

This article focuses primarily on Brewer's time as a Kansas Supreme Court Justice from 1870 to 1884. It also highlights his many contributions to Kansas (including some entertaining anecdotes of his life as a lawyer and judge in Leavenworth), his continuing connections to Kansas after his transition to the U.S. Supreme Court in 1889, and his love for Kansas. The article also comments on Brewer's final homecoming in 1910 when he was buried in Lansing, Kansas, literally overlooking one correctional facility and within a short horse-ride of several others. David Brewer truly and fairly can be called "The Kansas Justice."¹

I.

JUSTICE BREWER ON THE KANSAS SUPREME COURT

After his success in Leavenworth, Kansas, as a lawyer in private practice, a local judge, county attorney, and generally active and engaged citizen, the Republican Party nominated Brewer for the position of Associate Justice of the Kansas Supreme Court on the 1870 election ballot. Several newspapers opined that Brewer "bears the reputation, by those who know him best, of being a gentleman of fine legal attainments."² Thus, Brewer's "nomination is conceded by all parties to be one well worthy to be made."³ Brewer was elected to the Kansas Supreme Court in 1870, and again in 1876 and 1882 (he was appointed U.S. Circuit Judge in 1884).

¹ U.S. Supreme Court Justice Charles Whittaker was born in and spent some of his early life in Troy, Kansas, in the far northeastern part of the state, not far from Leavenworth. But, for better or worse, Justice Whittaker is perceived as a Kansas City, Missouri person, with a magnificent, modern federal courthouse named for him in downtown Kansas City, Missouri. Maybe Whittaker could be labeled "The Other Kansas Justice," with a qualifying asterisk and explanation.

² Ft. Scott Daily Monitor, at 2 (Sept. 11, 1870).

³ *Id.*

The Kansas Justice, David Josiah Brewer



The Brewer family residence during his tenure on the Kansas Supreme Court still stands.

A. Justice Brewer the Workhorse

During Brewer's time on the Kansas Supreme Court, that body had only three members, a chief justice and two associate justices. The Court's workload was miniscule in the first year of statehood (1861) – with only three cases – but by the time Brewer joined the Court the number of cases had risen to well over 100 per year, and quickly increased to 276 by 1874.⁴ Brewer and his colleagues thus carried a heavy caseload, especially with the Court's practice of issuing a written opinion in every case. In fact, during Brewer's time on the Court, he authored very nearly 1,000 majority opinions, plus many concurrences and dissents.⁵

⁴ The Wyandott Herald, at 2, col.2 (Kansas City, Kansas) (Nov. 25, 1875).

⁵ These numbers are based on Westlaw searches for opinions of the Court written by Brewer. The results may not be exact, but they are close. In any event, there is no question Brewer (like at least some of his colleagues) was quite prolific in terms of number of opinions authored. For instance, in 1877, the *Atchison Daily Champion* featured a story on the newest volume of the Kansas reports (volume 17) in which well over 100 decisions were reported,

Brewer became very concerned about the Court's increasing workload by 1875, and wrote a lengthy letter for publication in Kansas newspapers, attempting to generate public support for managing the Court's caseload. In particular, Brewer made three proposals: (1) increase the number of Justices on the Court to at least five, if not seven; (2) eliminate any requirement or expectation that the Court issue a written opinion in every case; and (3) impose a minimum amount-in-controversy requirement of \$200 for invoking the Court's jurisdiction.⁶ Eventually, the Kansas Supreme Court did expand, but not before Brewer left the Court, and it does not appear the legislature greeted his other proposals with enthusiasm.

B. A Few Cases of Interest During Justice Brewer's Tenure

Justice Brewer participated in several thousand cases as a Kansas Supreme Court Justice, so this article highlights only very few of potentially particular interest, and the criterion is cases that make a good story more than ones with jurisprudential significance.

Some cases that came to the Kansas Supreme Court soon after Brewer joined that Court were ones in which he had participated as a lawyer or party below. In *Kansas v. Reddick*,⁷ the Court reversed a murder conviction in a case in which Brewer had been the prosecutor. Brewer did not sit on the appeal, and the reversible error the Court found was a verdict form error not attributable to Brewer. In *Mitchell v. Penfield*,⁸ the Court (with Brewer, a named party, not sitting) affirmed a trial court decision in a dispute involving a mechanic's lien asserted against property of an estate of which Brewer was an executor. Brewer's former law partner, J.L. Pendery, argued for the petitioner, and lost.

But lest one get the impression that his new judicial colleagues were hostile to Brewer's position as a lawyer or party in cases being appealed to the Court, the most notable case involving Brewer's pre-judicial activities was *Commissioners of Leavenworth County v. Brewer*.⁹ Yes, Brewer was the

"forty-six by Judge Brewer." The Atchison Daily Champion, at 2 (Jul. 8, 1877).

⁶ The Eureka Herald, at 1, col. 3 ("A Letter from Judge Brewer") (Dec. 9, 1875) (reprinting Justice Brewer's letter in its entirety).

⁷ 7 Kan. 143 (1871).

⁸ 8 Kan. 186 (1871).

⁹ 9 Kan. 307 (1872).

plaintiff who sued for fees he claimed the county owed him. In a nutshell, Brewer was hired and paid as the county attorney for Leavenworth County (remember his prosecution of the murder charge in *Reddick*), but he was asked to defend a case in *federal* court for the county, a case that took him (in his view) outside the existing contract for his services. Brewer asked for \$1,287.50 in fees for that case and \$79.50 in expenses. The county commissioners approved the expenses but not the fees, arguing that Brewer's contract covered such services, and no more was due.

The trial court ruled in favor of Brewer, and the county appealed. Now comes the remarkable part: after the county's lawyer argued the county's position, Brewer apparently stood before his two Kansas Supreme Court colleagues and argued his own cause (though he did not participate in the decision). There are no transcripts of the proceedings, but the official reports, which much like the 19th century *U.S. Reports* typically summarize the arguments of the parties before the Court's opinion, include this reference for Brewer's side: "D.J. Brewer, defendant in error, *in person*."¹⁰ One can only imagine what it might have been like in 2006 or 2007 for Chief Justice John Roberts to step to the lectern in the U.S. Supreme Court to defend a claim for his attorney's fees in a case litigated prior to his becoming a member of that Court. Perhaps not surprisingly, Brewer won the case.

Certainly, Brewer wrote decisions in cases of importance to Kansas jurisprudence, and he was relatively progressive for his era with respect to women's rights, authoring some important opinions protecting such rights.¹¹ He also generally was a staunch supporter of property rights.¹² Brewer was, however, a mixed bag jurisprudentially.¹³

¹⁰ Id. at 314 (emphasis added).

¹¹ E.g., *Wright v. Noell*, 16 Kan. 601 (1876) (holding that even though women could not vote, nothing in Kansas law precluded them from holding the elected office of county superintendent of public instruction); *Monroe v. May*, 9 Kan. 466 (1872) (recognizing significant property rights for married women).

¹² Notably, in *Mugler v. Kansas*, 29 Kan. 252 (1883), he argued in dissent that a Kansas law prohibiting the manufacture of intoxicating liquors, a law which greatly reduced the value of a Kansas brewer's facility, was an unconstitutional taking. The case was appealed to the Supreme Court of the United States, where Justice Harlan writing for an eight-Justice majority rejected any due process or takings claim, with only Brewer's uncle, Stephen J. Field, agreeing with Brewer's position. See *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹³ *Bd. of Ed. of Ottawa v. Tinnon*, 26 Kan. 1 (1881) (court upheld claim of African-American

C. *The Baby Case*

One of Brewer's most fascinating cases was one he handled essentially as a trial judge, issuing a writ of habeas corpus to have a young child brought to Leavenworth where Brewer presided over a trial to determine which of two women was the child's mother and thus entitled to legal custody of the child. On April 7, 1877, the *Leavenworth Times* gave prominent attention to the case with the headline "Whose Is It?"¹⁴ The article proceeded to describe the case that fascinated Leavenworth and Kansas during April 1877.

One Carrie E. Hull was married to Charles A. Hull, and they resided in Independence, Kansas, which is in the southeast corner of the state. Mr. Hull's father desired an heir for the family and offered \$5,000 to whichever of his sons first produced a child. Although Mr. and Mrs. Hull apparently had been trying to claim the award, no pregnancy had occurred. But Mrs. Hull left Independence and went to northeast Kansas, where she visited the Home for Friendless Women in Leavenworth. Eventually, she sent news to Mr. Hull that she had given birth to a son and was at a hotel in Kansas City with the child. Mr. Hull excitedly rushed to Kansas City, but apparently became suspicious. The Hulls took the child home to Independence, but Mr. Hull soon decided that Mrs. Hull had faked the "birth" and that the child was not theirs. He then filed for divorce and made allegations that led to the cause celebre over which Brewer would preside.

During the course of the divorce proceedings, evidence suggested that Hester A. Wiley had given birth to twins (a boy and a girl) in the Home for Friendless Women at the time Mrs. Hull claimed she gave birth to the boy. Lawyers for Wiley applied to Brewer to issue a writ of habeas corpus to have the child brought from Independence to Leavenworth. Brewer issued the writ, and the child and Mrs. Hull came to Leavenworth, where things got more interesting.

The trial was scheduled for April 7, but the lawyers requested a continuance, which Brewer granted until April 24. Nonetheless, the local paper

student to attend otherwise white elementary school, but Brewer dissented arguing for local control of school-related decisions). This case makes one wonder what Brewer might have done in *Plessy v. Ferguson*, a U.S. Supreme Court case in which he did not participate, for reasons explained in note 25, *infra*.

¹⁴ The *Leavenworth Times*, at p. 3, col. 2 (Apr. 7, 1877).

gloried in the case, providing a lengthy summary of the courtroom events, discussing the various parties, the lawyers, and even the scene behind the bench. In particular, the paper analogized Brewer to King Solomon, observing that hanging behind the bench in the courtroom was a “picture [that] represented an almost similar [case] which is said to have occurred nearly 3,500 years ago as recorded in the first book of Kings”¹⁵ The news story went on to describe how King Solomon resolved the dispute over a baby and determined its true mother.

On the appointed day, the paper ran another story titled “The Little Trouble,” with subheadlines of “A Few More Facts Bearing Directly Down Upon ‘That Baby,’ Which Will Be Interesting” and “The All-Important Day Has Arrived When an Associate Judge of the Supreme Court is to Find its Real Mother.”¹⁶ The next day’s paper gave a full account of the first day of trial, expressing awe at the large crowd in the courtroom, including the “old gray headed sinner with a leering expression,” “the quiet young man,” “the jaunty, hatted and gloved ‘gentleman of leisure,’” “the common greasy loafer,” and many others.¹⁷

During the two days of trial, both Mrs. Hull and Mrs. Wiley asserted maternal rights. The women who ran the Home for Friendless Women testified (in support of Mrs. Wiley), and the court conducted a physical examination of the child, apparently revealing both a birthmark on his neck and a tattoo or “brand” (as the paper at one point declares) of the name “Hull” on the child’s body. After the second day, the paper strongly opined that Hester Wiley, and not Carrie Hull, was the actual mother.¹⁸

On April 27, the paper reported that “according to Judge Brewer’s decision yesterday,” the “baby’s name, for the present, is Wiley,” even “though he still bears the superscription of Hull upon his back.” Nonetheless, there were those who sympathized with Mrs. Hull because she both seemed very attached to the child and had substantial resources to care for it, while Mrs. Wiley was unaffectionate and essentially a pauper. The paper opined that there is “of course, considerable diversity of opinion in regard to the matter, . . . though it is generally conceded that Mrs. Wiley is the

¹⁵ *Id.* at 3 col. 3.

¹⁶ The Leavenworth Times, at 3 (April 24, 1877).

¹⁷ The Leavenworth Times, at 3 (“Habeas Corpus Infantum”) (Apr. 25, 1877).

¹⁸ The Leavenworth Times, at 3 (“The Wiley Hull”) (Apr. 26, 1877).

mother of the child, and there are many who think it would be better for the child to remain with Mrs. Hull”

The paper declared that Brewer’s decision “sends the youngster back to the Home for the Friendless, and to send a child there is, as Horace Greeley said of hanging, about the worst use you could put it to.” The paper defended Judge Brewer’s decision, however, acknowledging that because “the evidence shows conclusively that Mrs. Wiley is the mother of the child, the court, of course, could not do otherwise than grant her application for the writ.” Indeed, as the King Solomon of Kansas, Judge Brewer “could not have decided otherwise than as he did, with the testimony before him.”¹⁹

What became of the baby? Two months after the trial, Mrs. Hull initiated habeas corpus proceedings to have the baby brought before the court. Brewer’s order on April 26 was “that the child should be kept within the limits of Leavenworth county for sixty days,” perhaps to allow time for a possible appeal. In any event, when the writ was served on the Home for Friendless Women in Leavenworth just under sixty days after the trial, “Mrs Wiley could not be found,” and the “baby also was somewhere else, and not to be seen.”²⁰

II. JUSTICE BREWER THE PUBLIC INTELLECTUAL

Brewer might as easily have been a law professor as a judge. He had an insatiable appetite for (1) intellectual pursuits and (2) an audience with which to share his thoughts. There are several reports of him giving public lectures during his tenure on the Kansas Supreme Court. For instance, in 1875, the *Leavenworth Times* reported that:

¹⁹ The Leavenworth Times, at 2 (“The Baby Case”) (Apr. 27, 1877). Two weeks later another paper declared that during

the progress of the trial, as one after another, fraud, falsehood and deception were brought to light, there seemed to any discriminating mind, but one decision possible – the one given by Judge Brewer, after a clear and candid reviewal of the testimony: “The Court decrees the child be restored to Hester A. Wiley, its lawful mother.”

The Holton Recorder (Holton, Kansas), at 4 (May 10, 1877).

²⁰ The Leavenworth Times, at 3 (“Where Is He?”) (Jun. 26, 1877).

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The Manhattan *Industrialist* says:

Judge Brewer, of the Kansas Supreme Court, has kindly consented to deliver a special course of twelve lectures on Practical Law, embracing those principles and usages of Kansas law which every farmer, mechanic, business man or woman need to understand. This is a new feature in the Agricultural College, and the high attainments of Judge Brewer are a guarantee that this difficult and important subject will be handled with rare ability. The lectures will be given in November before the proper classes.²¹

In 1880, Brewer gave an acclaimed public lecture on “Municipal Indebtedness,” “a theme which would indicate a lecture as dry as the sands of the desert,” but instead Brewer’s talk was hailed as “full of wit and sense, and utterly destitute of legal technicalities and verbiage.” Indeed, it was “a lecture in which any sensible man or woman in Kansas could feel interested, and which we wish every man and woman in Kansas could hear or read.” Brewer focused not on the law, but on the “moral and economic aspects of the bond question.” He closed with a “beautiful eulogy on Kansas, young, free, blessed with boundless resources in earth and air, so fortunate that she could use to older and less favored States, the words of the manacled Apostle to King Agrippa, ‘I would that thou wert altogether such as I am except these bonds.’”²²

Brewer gave another well-received lecture, this time on “Minority Representation,” in 1882. Brewer’s lecture addressed how to ensure elected representation for the “minority.” He examined several ways of choosing elected bodies, and endorsed the “Swiss system,” in which representatives are selected in proportion to the groups voting for them. The example the paper reported was to suppose 40,000 Republicans, 15,000 Democrats, and 5,000 Greenbackers, voted for a legislature that consists of 60 representatives. According to Brewer, the result should be 40 Republican legislators, 15 Democrats, and 5 Greenbacks. The close of Brewer’s lecture “was received with hearty applause and with such warm congratu-

²¹ The Leavenworth Times, at 4 (Oct. 2, 1875). The “Agricultural College” in Manhattan, Kansas would become part of what is now known as Kansas State University, the land grant university in Kansas.

²² The Atchison Daily Champion, at 4 (Feb. 28, 1880). The evening also included the “young ladies” singing “Mrs. Howe’s ‘Battle Hymn of the Republic.’”

lations that Judge Brewer must have been convinced that the audience gladly heard him for himself and his cause.”²³

III.

JUSTICE BREWER, A MAN OF FAITH

Brewer was a man of faith all of his life. His father was a lifelong minister and missionary of the Congregational Church, the denomination to which Brewer belonged in Leavenworth. Indeed, his faith, charm, and love of Kansas all show through in a letter he wrote in 1870 in a successful effort to recruit a Congregational minister, William Kincaid, to come from the east to serve as reverend for the First Congregational Church in Leavenworth.

Brewer began by informing Kincaid that Leavenworth is “the largest city and the commercial metropolis of Kansas – we have claimed 30,000 inhabitants” through the latest census. He described the church itself as “the largest and most influential of our denomination in the state,” with its location “in the central part” of Leavenworth. He offered Kincaid a salary of \$2,000 per year and argued that, “with the exception of the Methodists,” all other denominations in the area were struggling with building issues while the Congregationalists had an outstanding facility (which Brewer described in detail).

Brewer described Leavenworth as a city “full of western life” with “an abundant field for usefulness and toil with promise of rich harvest to any [minister] who will till it well.” He gently critiqued the reverend he was asking Kincaid to replace as one who “lacked a little (and we say it with all kindness) in the capacity of reaching the young men.” Brewer appealed to Kincaid’s character, stating that “we need a man who can do a large work and whose heart is wholly in that work.” He closed with the query: “Can you not find it within the love of duty to ‘spy out the country’ – come over into Macedonia and help us.”²⁴

²³ The Atchison Daily Champion, at 4 (Feb. 4, 1882).

²⁴ Letter from David J. Brewer and C.B. Bruce to William Kincaid (July 25, 1870) (available at www.kansasmemory.org/item/220817). The letter is signed by both Brewer and Bruce, but Brewer’s signature is first, and matches both the handwriting in the letter as well as the ink color of the letter’s body, while Bruce’s signature appears much darker. For those reasons as well as the substance and tone of the letter, it appears that Brewer was the author.

IV.

JUSTICE BREWER'S KANSAS CASES WHILE A U.S. SUPREME COURT JUSTICE

Brief mention of a handful of Brewer's decisions while on the Supreme Court of the United States is warranted both to demonstrate that he occasionally sat on cases coming from his home state and, in one instance, to emphasize a very direct connection to the bobblehead which this article celebrates. I take these cases in chronological order.²⁵ First, in 1893, he wrote the opinion in *Board of Education of Atchison, Kansas v. DeKay*.²⁶ There is nothing particularly noteworthy about the case, except that it involves "municipal indebtedness," one of Brewer's pet topics, and the case comes from the very city in which he gave his 1880 lecture on the topic.

The second case is *Atchison, Topeka and Santa Fe Railway v. Matthews*,²⁷ in which Brewer wrote for the Court upholding a Kansas law allowing plaintiffs who successfully sue railroads (for starting fires that cause property damage to adjacent landowners) to recover attorney's fees. This case would have resonated with Brewer's empathy for property owners and his frequent antipathy to railroads. He himself was involved in at least one successful suit against a railroad while in Kansas, a suit that resulted in a sheriff's sale of railroad property to satisfy the judgment.²⁸

The third case is *Cotting v. Godard*,²⁹ in which Brewer wrote for the Court striking down a Kansas law that limited the charges made by stockyard companies. Brewer echoed Chief Justice John Marshall when, without

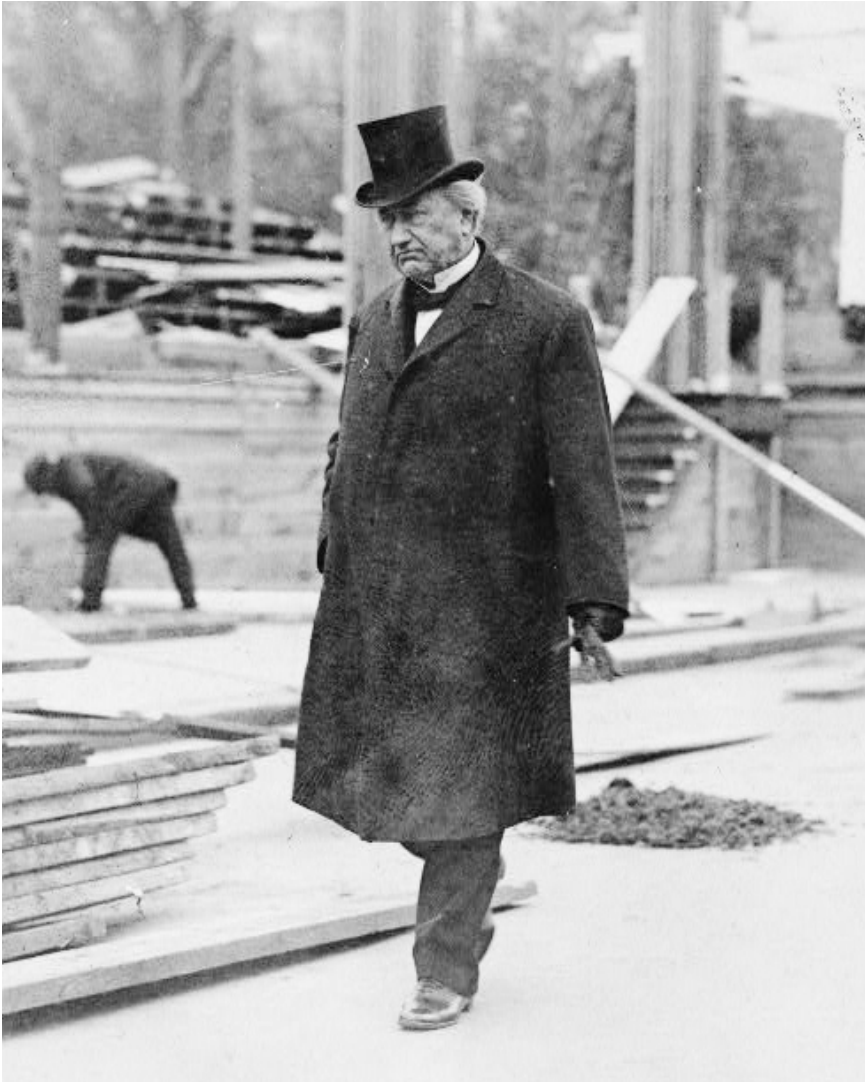
²⁵ Notably, there is one very important case, not from Kansas, in which Justice Brewer did not participate because of events in Kansas. One of his daughters, Fanny, passed away in 1896, in Leavenworth. Brewer left Washington and traveled home to Kansas the day of the oral argument in *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which he did not vote or participate. See J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 Miss. L.J. 315 (1991).

²⁶ 148 U.S. 591 (1893).

²⁷ 174 U.S. 96 (1899).

²⁸ The Leavenworth Times, at 1 (Apr. 8, 1879) (giving public notice of a sale of property of the "Central Railway Company" to satisfy a judgment owed to "Mathew Keenan and David J. Brewer," the "Plaintiffs").

²⁹ 183 U.S. 79 (1901).



Justice David J. Brewer, out for a stroll in Washington, DC (circa 1900-1910).

attribution, he wrote that it “has been wisely and aptly said that this is a government of laws, and not of men.” The Court found the Kansas law violated equal protection, on the ground that limiting the charges of stockyards while not regulating the charges of other companies was arbitrary discrimination. Brewer also considered an Eleventh Amendment argument

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(Godard was the Kansas Attorney General) but seems to have concluded that the attorney general did not make a timely objection so that the Court could decide the appeal on that ground. He did, however, direct that Godard should be dismissed from the suit on remand (a result inconsistent with *Ex parte Young*, which would be decided seven years later).

The next case is *Smiley v. Kansas*,³⁰ which involved a conspiracy to restrain the grain trade in tiny Bison, Kansas. Kansas had an antitrust statute that made such a conspiracy a crime, and the defendants were prosecuted and convicted under the statute. The Supreme Court, with Brewer writing, upheld the Kansas statute against constitutional challenge. Brewer opined that “[u]ndoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment,” but “a secret arrangement” by which “existing competition” is “substantially destroyed” “is one to which the police power extends.”

The final case is the one directly relevant to the bobblehead. In *Kansas v. Colorado*,³¹ Brewer did his home state no favors when he ruled against Kansas in one of the earliest disputes between these two states over the Arkansas River,³² the river which appears on the base of the bobble. Perhaps even a distinguished Kansas jurist from Leavenworth, which sits on the banks of the Missouri River (running between northeast Kansas and northwest Missouri), did not fully appreciate the control that Colorado had over Arkansas River water by virtue of its upstream location.³³ In any event, it would be more than 100 years before Kansas and Colorado finally resolved their dispute over the Arkansas River.³⁴

³⁰ 196 U.S. 447 (1905). Just this past term, the Supreme Court recognized the prerogative of Kansas and other states to apply their longstanding antitrust laws (many predate the Sherman Act) to conspiracies to fix prices in the natural gas industry, *OneOK v. Learjet*, 575 U.S. ___, 135 S. Ct. 1591 (2015), a case in which Kansas participated as an amicus in support of the antitrust plaintiffs.

³¹ 206 U.S. 46 (1907).

³² Perhaps only in Kansas, in fact likely only in Kansas, the river’s name is pronounced “AR-KAN-SAS”, not “ARK-AN-SAW.”

³³ That said, when Brewer first came to the Kansas territory in 1859, he traveled to Pikes Peak in southern Colorado via the Arkansas River basin, in his unsuccessful gold-prospecting effort. Michael J. Brodhead, *David J. Brewer: The Life of a Supreme Court Justice 1837-1910*, at 6 (1994). Thus, Brewer had at least seen firsthand the Arkansas River.

³⁴ The final piece of the most recent litigation, a dispute over whether expert witness fees

V.

FINAL HOMECOMING AND RESTING PLACE

Justice Brewer died suddenly and unexpectedly at home in Washington, DC in 1910. His body was returned by train to the Leavenworth railway depot (still standing and located in the heart of the original downtown area of Leavenworth, although now converted to a community center and other uses), then buried in Mount Muncie Cemetery. The cemetery is actually located just south of Leavenworth, in adjacent Lansing, Kansas, and next to the Leavenworth National Cemetery where thousands of U.S. service members and their spouses are buried. Mount Muncie was established in 1866, a very old cemetery for Kansas.

Brewer is buried with both of his wives (Louise, aka Lulu, was his first wife; he married Emma after Louise died) and one of his daughters (Fanny Adele), with simple, flat stones for each of them set in the ground near a larger but not elaborate monument. The larger stone bears the name “Brewer” on one side and minimal information about the Justice (including his service on the U.S. Supreme Court) on the other. He and his family rest under a large oak tree in the beautiful and well-maintained cemetery.

Perhaps fittingly, the entrance to Mount Muncie overlooks the Leavenworth County Detention Center and is just down the road from several state prison facilities. I don’t think Brewer would mind his proximity to the jail and prisons. He spent every Fourth of July when he was a Kansas Supreme Court Justice delivering a speech (perhaps better labeled a “sermon”?) to the local inmates. Brewer remarked that he probably lost out on campaign opportunities spending his Fourth of July that way, but he had a longstanding connection to prisons and empathy for inmates. As a boy, his father was chaplain to a state prison in Connecticut. Brewer frequently accompanied his father on prison visits and became acquainted with several inmates. Mount Muncie, given its simple grace, its views of beautiful Kansas territory, and its proximity to jails and prisons, seems a perfect final resting place for Kansas Justice David Josiah Brewer.

(incurred in litigating the States’ rights in the Arkansas water) should be included in the “costs” Colorado owed to Kansas, was concluded in 2009. *Kansas v. Colorado*, 556 U.S. 98 (2009).

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The Brewer family resting place in Mount Muncie Cemetery.



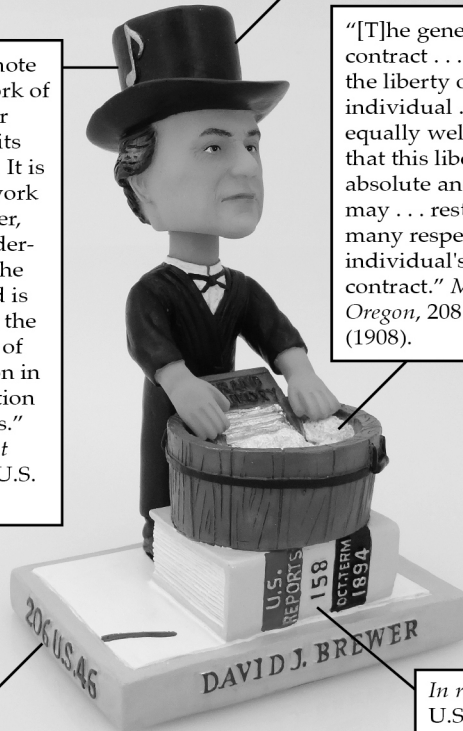
The Brewer family headstone in Mount Muncie Cemetery.

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"It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."
Church of the Holy Trinity v. U.S., 143 U.S. 457 (1892).

"[T]he headnote is not the work of the court, nor does it state its decision . . . It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports."
U.S. v. Detroit Lumber, 200 U.S. 321 (1906).

"[T]he general right to contract . . . is part of the liberty of the individual . . . ; yet it is equally well settled that this liberty is not absolute and . . . a state may . . . restrict in many respects the individual's power of contract." *Muller v. Oregon*, 208 U.S. 412 (1908).



In re Debs, 158 U.S. 564 (1895).

"As Congress cannot make compacts between the states, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of government, is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes." *Kansas v. Colorado*, 206 U.S. 46 (1907).

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