“THE MOVEMENT OF COERCION”

BY

Justice David J. Brewer

FOREWORD

BY

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Editor, MLHP

David Josiah Brewer served on the Supreme Court from December 18, 1889 to March 27, 1910. Off the court, he continued to express his views on a wide range of subjects, legal and otherwise, through articles in journals, books and numerous public addresses, including the following to the New York State Bar Association in January 1893.[1] His topic was “The Movement of Coercion” which, he explained, referred to the demands of the “multitudes” to share the wealth earned and accumulated by a few:

> I wish rather to notice that movement which may be denominated the movement of "coercion," and which by the mere force of numbers seeks to diminish protection to private property. It is a movement which in spirit, if not in letter, violates both the Eighth and Tenth Commandments; a moment, which, seeing that which a man has, attempts to wrest it from him and transfer it to those who have not. It is the unvarying law, that the wealth of a community will not be in the hands of a few, and the greater the general wealth, the greater the individual accumulations.

[1] In his biography of the justice, Michael J. Brodhead devotes an entire chapter to his “off-the-bench activities.” *David J. Brewer: The Life of a Supreme Court Justice, 1837-1919* 116-138 (Southern Illinois Univ. Press, 1994)(“In fact, he was the most visible and widely known member of the Fuller Court.”).

He argued that the "coercion movement" against private property expressed itself through, first, unions and, second, excessive regulation, though neither was evil *per se*:

> First, in the improper use of labor organizations to destroy the freedom of the laborer, and control the uses of capital. . . . It is the attempt to give to the many; a control over the few — a step toward despotism. . . . The other form of this movement assumes the guise of a regulation of the charges for the use of property subjected, or supposed to be, to a public use. This acts in two directions: One by extending the list of those things, charges for whose use the government may prescribe; . . . And second, in so reducing charges for the use of property, which in fact is subjected to a public use, that no compensation or income is received by those who have so invested their property. By the one it subjects all property and its uses to the will of the majority; by the other it robs property of its value.

He saw the courts as guardians of private property, as a bulwark against this movement:

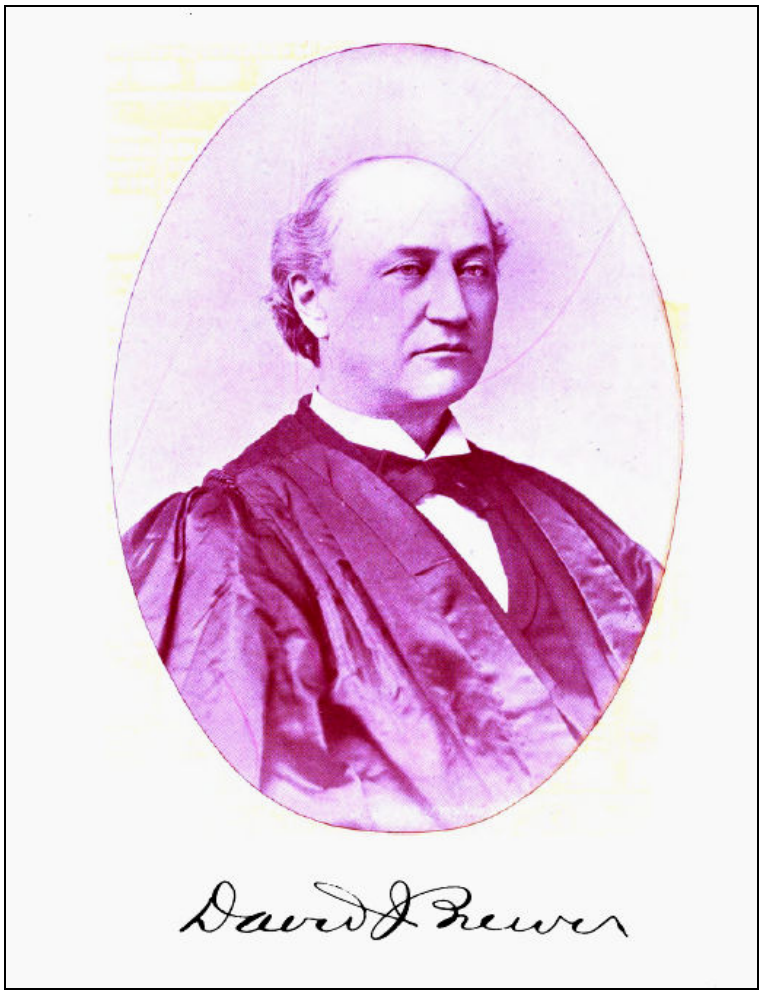
> What, then, ought to be done? My reply is, strengthen the judiciary. How? Permanent tenure of office accomplishes this.

If they were to protect private property, judges themselves had to be protected from undue influence by the "multitudes" by life tenure. In other words, an elected judiciary could never be independent enough to resist "antagonizing popular feeling, or the wishes or interests of some prominent leader or leaders..."

Justice Brewer's reputation for a "strong tendency . . . to maintain individual rights against anything like the tyranny of the majority," was noted in the following sketch in the June 1896 issue of *Case & Comment*, a popular publication for the bar for decades:

DAVID JOSIAH BREWER

The selection of a judge already eminent among the judges of the country when making an appointment to the Supreme Court of the United States is sure to meet the approval of the nation. The judicial career of David J. Brewer, both in state courts and in the circuit court of the United States, had given him great prominence before he was appointed by President Harrison December 18, 1889, to fill the vacancy on the bench of the Supreme Court created by the death of Mr. Justice Matthews.



Judge Brewer's judicial career began soon after he engaged in the practice of law. He was elected judge of the probate and criminal courts of Leavenworth county, Kan., in

1862, having been appointed a United States commissioner in the year previous. He was elected judge of the district court for the first judicial district of Kansas in 1864. During the short period in which he was subsequently off the bench, he served as county attorney in 1868, but in 1870 was elected a justice of the supreme court of Kansas, was re-elected in 1876, and again in 1882. In March, 1884, he was appointed judge of the circuit court of the United States for the eighth circuit and continued in that office nearly six years, until his appointment to the Supreme Court. Some of his opinions written while judge of the supreme court of Kansas, and others while he was judge of the United States circuit court, attracted wide attention. Among these were the cases in which the Kansas prohibitory amendment to the Constitution and the legislation under it were sustained. In a very elaborate opinion in the case of *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866, 1 L.R.A. 744 [1888], he upheld the power of the court to grant an injunction against the enforcement of a schedule of unremunerative rates fixed by railroad commissioners.

Since he came upon the bench of the Supreme Court this doctrine has been reaffirmed in an opinion written by him in the case of *Reagan v. Farmers' Loan & T. Co*. 154 U. S. 362, 38 L.ed. 1014 [1894]. Among the many other important cases in which he has written the opinion of the Supreme Court is that of *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226 [1892], denying the application of the contract labor law to a rector of a church. Also *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 38 L. ed. 1041 [1894], sustaining a state tax upon that part of a railroad in the state according to a mileage basis in proportion to the value of the entire road, and *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031 [1894], sustaining the same mode of taxation in respect to the rolling stock of a railroad in the different counties through which the road runs. Another case is *Brennan v. Titusville*, 153 U.S. 289, 38 L.ed. 719

[1894], denying the power of state authorities to impose a license tax on a canvasser or solicitor of orders at retail for goods to be sent from another state. Among his strong dissenting opinions are those in *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247 [1892], and *Brass v. North Dakota*, 153 U. S. 391, 38 L.ed. 757 [1894], in which the majority of the court sustained statutes regulating the charge for elevating and storing grain. The power of the Federal courts to restrain the obstruction of trains engaged in interstate commerce or carrying the mails was established by his convincing opinion in [*In*] *re Debs*, 158 U. S. 564, 39 L. ed. 1092 [1895].

The opinions in several of the above cases show the strong tendency of Mr. Justice Brewer to maintain individual rights against anything like the tyranny of the majority. This is still more clearly and emphatically shown in his address before the New York State Bar Association in 1893, where he said: “Here there is no monarch threatening trespass upon an individual. The danger is from the multitudes — the majority, with whom is the power.” In this address he expressed the opinion that the movement of coercion which by the mere force of numbers seeks to diminish protection to private property must be checked, and that the way to do this was to strengthen the judiciary by giving judges a permanent tenure of office and an unchangeable salary, and at the same time making them ineligible to political office. In the "Yale Law Journal” of May, 1894, he strongly urges a reform in the patent system. Among his suggestions is that on an application for a patent there should be, not a mere *ex parte* hearing, but a real contest by the government making defense in the same way that it would resist a suit against it for money. He suggests also the prohibition of all expert testimony in patent cases and a much greater reliance on model and copy in determining the question of infringement, while he urges also that one half of the interest in a patent should be made inalienable in order to secure that portion of the fruits of the invention to the inventor and his heirs. These matters briefly illustrate

the progressive and vigorous character as well as the breadth and range of his thinking.

Smyrna, Asia Minor, is the place where Mr. Justice Brewer was born, June 20, 1837. But his parents soon returned to this country and he was educated in Connecticut. He entered Wesleyan University at Middletown in 1851, but took the latter part of his college course at Yale College. His father was the Rev. Josiah Brewer. His mother was the daughter of Rev. David Dudley Field, D. D., and the sister of David Dudley, Cyrus W., and Henry M. Field of New York, and Stephen J. Field, the present Senior Justice of the Supreme Court. After studying law with his uncle, David Dudley Field, in New York City and at Albany Law School, David J. Brewer, in 1858, went to Kansas and after a trip to Pike's Peak and Denver settled in Leavenworth, where he resided until he removed to Washington as Justice of the Supreme Court. While living in Kansas his interest in educational matters induced him to become a member of the board of education of Leavenworth in 1863, and he was afterwards president of the board, superintendent of the public schools of the city, and president of the State Teachers' Association. He was also secretary of the Mercantile Library Association of Leavenworth in 1862 and 1863, and its president in 1864.

The letter written by Judge Brewer declining to be a candidate against Judge [Henry Billings] Brown when their names were under consideration for appointment to the Supreme Court by President Harrison was referred to in the March number of "Case and Comment" in the sketch of Mr. Justice Brown; but it is too significant of the finer and higher qualities which fit a man for a high judicial position to be forgotten.[2]

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[2] 3 *Case and Comment* 1-2 (June 1896) (this article is complete, original punctuation unchanged; one lengthy paragraph has been split to make reading easier; case names have been italicized; the photograph is taken from this issue of the magazine).

Brewer's reputation, like that of all justices, has fluctuated over time. See J. Gordon Hylton, "The Perils of Popularity: David Josiah Brewer and the Politics of Judicial reputation," 62 *Vanderbilt University Law Review* 567 (2009). This fine study is available online at

The Justice's address was subsequently published by the Chicago Building Contractors' Council in a fifteen page pamphlet. Interestingly, the Council inserted the following passage from the Wisconsin Supreme Court's opinion in *Gatzow v. Buening*, 81 N. W. 1003, 1007 (1900), on the page before his address:

> "This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinion and selfish ends of particular classes. There is clamor for laws to prevent combination, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischief complained of that are actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems in many quarters to be little understood.....The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body."

The address that follows is taken from this pamphlet. It is complete. Spelling and punctuation have not been changed.

It complements "Protection to Private Property from Public Attack," Justice Brewer's commencement address to the graduating class of Yale Law School in 1891, which is posted separately. ◊

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http://scholarship.law.marquette.edu/facpub/-123 (Marquette Law Scholarly Commons, Paper 123 (January 2009)).
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THE MOVEMENT OF COERCION.

AN ADDRESS BY MR. JUSTICE BREWER,
Of the Supreme Court of the United States.

BEFORE THE NEW YORK STATE BAR ASSOCIATION,
JANUARY 17, 1893.

Three things differentiate the civilized man from the savage—that which he knows, that which he is, and that which he has.

That which he knows: The knowledge of the savage is limited to the day, and bounded by the visible horizon. The civilized man looks backward through all history, and beholds the present limits of the universe.

The accumulations of the centuries are his. The logic of Aristotle and Bacon determines the processes of his mind. The philosophy of Plato and Herbert Spencer is his wisdom. Phidias chisels his sculptured beauties, and Raphael paints his pictured splendors before his enraptured soul; while Mozart and Beethoven bring to him an echo from the song on high. All ages pour their thoughts and wisdom into his brain, and he stands possessor of all the beautiful, the true and the good that the ages have wrought or accumulated, and in this he stands secure from human assault.

> The beings of the mind are not of clay;
> Essentially immortal, they create
> And multiply in us a brighter ray
> And more beloved existence.

That which he knows he can never be despoiled of, and he carries its glory and its joy as safe in his soul as the secrets of eternity in the consciousness of omnipotence.

That which he is: All passions riot in the savage. He grovels through things of earth to satisfy the lusts of the body; and the height of his morality is an eye for an eye and a tooth for a tooth. Civilization lifts the soul above the body, and makes character the supreme possession. It reads into human history the glory and value of self-denial. It catches from the Divine One of Nazareth the nobility of helpfulness, and teaches that the externals are not the man; that accumulations and accomplishments only suggest that which makes be valuable; and that the poet's divination,—"a man's a man for a' that" is the ultimate fact.

That also which a man is, is not the subject of larceny; nor can it be wrested from him by king or mob. The unavailing tortures of the inquisition, the gloom of the dungeon, the awful silence of the scaffold and the blazing splendors of the martyr's fires, attest the words of Him who said, "Fear not them which kill the body, but are not able to kill the soul;" and affirm the inalienable immortality of that which a man is.

That which he has: A hut for a home—a blanket and a breech-cloth for his apparel—a bow and arrow for his means of support—a canoe and a horse for his travel—and sea-shells for his jewels; these are the possessions of the savage. But for the child of civilization all continents bring food to his table, and decorations to his home. In a recent number of that pictorial and comic paper, "Judge," comic even in name, was a cartoon, the central figure of which was an American girl seated on a throne, and around her were gathered the representatives of every zone and nation, each bearing some typical offering for her adornment;—silks and furs—laces and jewels, and beneath was the motto: "Every part of the earth is ransacked to please her fancy. That cartoon is the picture of civilization;—The World brings tribute And the potency of civilization is that it accumulates all that the earth produces, and pours it round and into the homes of its children, the magnificence and luxuriousness which surround our lives, Solomon's glory is an unnoticed and forgotten splendor; and the fairy revelations of Haroun Al Raschid's palace are but the half pictures, the dim foreshadowings of the American home and life.

But that which he has lies within the reach of others. Given power and willingness on the part of those about him, and a man may be stripped of all his material possessions. Hence the Eighth and Tenth Commandments: — "Thou shalt not steal," "Thou shalt not covet." Only under their sanctions is society possible.

I am not here this evening to defend the Eighth Commandment or to denounce its grosser violators. I do not propose to discuss the foot-pad or the burglar; they are vulgar and brutal criminals, in whose behalf there has as yet been organized no political party. I wish rather to notice that movement which may be denominated the movement of "coercion," and which by the mere force of numbers seeks to diminish protection to private property. It is a movement which in spirit, if not in letter, violates both the Eighth and Tenth Commandments; a moment, which, seeing that which a man has, attempts to wrest it from him and transfer it to those who have not. It is the unvarying law, that the wealth of a community will be in the hands of a few, and the greater the general wealth, the greater the individual accumulations. The large majority of men are unwilling to endure that long self-denial and saving which makes accumulation possible; they have not the business tact and sagacity which bring about large combinations and great financial results; and hence it always has been, and until human nature is remodeled always will be true, that the wealth of a nation is in the hands of a few, while the many subsist upon the proceeds of their daily toil. But security is the chief end of government; and other things being equal, that government is best which protects to the fullest extent each individual, rich or poor, high or low, in the possession of his property and the pursuit of his business. It was the boast of our ancestors in the old country, that they were able to wrest from the power of the king so much security for life, liberty and property. Indeed, English history is the long story of a struggle therefor. The greatest of English orators, opposing a bill which seemed to give power to the government to enter the homes of the individual, broke forth in this most eloquent eulogy of that protection and security which surrounded an English home, even against the king: "The poorest man in his cottage may bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm

may enter it; but the king of England cannot enter it. All his power dares not cross the threshold of that ruined tenement!”

Here there is no monarch threatening trespass upon the individual. The danger is from the multitudes — the majority, with whom is the power; and if the passage quoted is the grandest tribute to the liberty which existed in England, I would thus paraphrase it to describe that which should prevail under this government by the people. The property of a great railroad corporation stretches far away from the domicile of its owner, through state after state, from ocean to ocean; the rain and the snow may cover it, the winds and the storms may wreck it, but no man or multitude dare touch a car or move a rail. It stands, as secure in the eye and in the custody of the law, as the purposes of justice in the thought of God.

This movement expresses itself in two ways: First, in the improper use of labor organizations to destroy the freedom of the laborer, and control the uses of capital. I do not care to stop to discuss such wrongs as these — preventing one from becoming a skilled laborer, by forbidding employers to take more than a named number of apprentices; compelling equal wages for unequal skill and labor; forbidding extra hours of labor to one who would accumulate more than the regular stipend. That which I particularly notice is the assumption of control over the employer's property, and blocking the access of laborers to it. The common rule as to strikes is this: Not merely do the employees quit the employment, and thus handicap the employer in the use of his property, and perhaps in the discharge of duties which he owes to the public; but they also forcibly prevent others from taking their places. It is useless to say that they only advise — no man is misled. When a thousand laborers gather around a railroad track, and say to those who seek employment that they had better not, and when that advice is supplemented every little while by a terrible assault on one who disregards it, every one knows that something more than advice is intended. It is the effort of the many, by the mere weight of numbers, to compel the one to do their bidding It is a proceeding outside of the law, in defiance of the law, and in spirit and effect an attempt to strip from one that has that which of right belongs to him — the full and undisturbed use and enjoyment of his own. It is not to be

wondered at, that deeds of violence and cruelty attend such demonstrations as these; nor will it do to pretend that the wrong-doers are not the striking laborers, but lawless strangers who gather to look on. Were they strangers who made the history of the "Homestead" strike one of awful horror? Were they women from afar who so maltreated the surrendered guards, or were they the very ones who sought to compel the owners of that property to do their bidding? Even if it be true that at such places the lawless will gather — who is responsible for their gathering? [William] Weihe, the head of a reputable labor organization [Amalgamated Association of Iron, Steel and Tin Workers], may only open the door to lawlessness; but [Alexander] Beekman the anarchist and assassin, will be the first to pass through, and thus it will be always and everywhere.

In the State of Pennsylvania only last year, to such an extent was this attempt of an organization to control both employee and employe carried, that there is now pending in the courts of the state, upon the concurrent advice of all the justices of its Supreme Court, an inquiry as to whether this disturbance of social order did not amount to treason. And this is but one type of multitudes of cases all over the land. This is the struggle of irresponsible persons and organizations to control labor. It is not in the interest of liberty — it is not in the interest of individual or personal rights. It is the attempt to give to the many; a control over the few — a step toward despotism. Let the movement succeed; let it once be known that the individual is not free to contract for his personal services, that labor is to be farmed out by organizations, as to-day by the Chinese companies, and the next step will be a direct effort on the part of the many to seize the property of the few.

The other form of this movement assumes the guise of a regulation of the charges for the use of property subjected, or supposed to be, to a public use. This acts in two directions: One by extending the list of those things, charges for whose use the government may prescribe; until now we hear it affirmed that whenever property is devoted to a use in which the public has an interest charges for that use may be fixed by law. And if there be any property in the use of which the public or some portion of it has no interest, I hardly know what it is or where to find it. And second, in so reducing charges for

the use of property, which in fact is subjected to a public use, that no compensation or income is received by those who have so invested their property. By the one it subjects all property and its uses to the will of the majority; by the other it robs property of its value. Statutes and decisions both disclose that this movement, with just these results, has a present and alarming existence. A switching company in Minneapolis had for eight years been operating under charges of $1.50 a car. With such charges it had not during that time paid off a floating debt incurred in construction, nor a dollar of interest or dividend to those who had invested in its stocks or bonds. Without a hearing before any tribunal the State of Minnesota, through its railroad commission, reduced these charges to $1 a car. Of what value would the ownership of that property be to its owners? and how soon would all semblance of title be swept away under foreclosure by the unpaid bondholders? Sometimes there is an appeal from a majority, and that effort at confiscation failed. And yet that the effort was made and that it did receive some judicial sanction is but a revelation of the spirit which lies behind and prompts the movement, and of the extent to which it has taken hold of the public mind.

There are to-day ten thousand million of dollars invested in railroad property, whose owners in this country number less than two million persons. Can it be that whether that immense sum shall earn a dollar, or bring the slightest recompense to those who have invested perhaps their all in that business, and are thus aiding in the development of the country, depends wholly upon the whim and greed of that great majority of sixty millions who do not own a dollar? It may be said that that majority will not be so foolish, selfish and cruel as to strip that property of its earning capacity. I say that so long as constitutional guaranties lift on American soil their buttresses and bulwarks against wrong, and so long as the American judiciary breathes the free air of courage, it cannot.

It must not be supposed that the forms in which this movement expresses itself are in themselves bad. Indeed, the great danger is in the fact that there is so much of good in them. If the livery of heaven were never stolen, and all human struggles were between obvious right and conceded wrong, the triumph of the former would be sure

and speedy. Labor organizations are the needed and proper complement of capital organizations. They often work wholesome restraints on the greed, the unscrupulous rapacity which dominates much of capital; and the fact that they bring together a multitude of tiny forces, each helpless in a solitary struggle with capital, enables labor to secure its just rights. So also, in regulating the charges of property which is appropriated to a public use, the public is but exercising a legitimate function, and one which is often necessary to prevent extortion in respect to public uses. Within limits of law and justice, labor organizations and state regulation of charges for the use of property which is in fact devoted to public uses are commendable. But with respect to the proposition that their public may rightfully regulate the charges for the use of any property in whose use it has an interest, I am like the lawyer who, when declared guilty of contempt, responded promptly that he had shown no contempt, but on the contrary had carefully concealed his feelings.

Now, conceding that there is this basis of wisdom and justice, and that within limits the movement in both directions will work good to society, the question is how can its excesses, those excesses which mean peril to the nation, be stayed? Will the many who find in its progress temporary and apparent advantages, so clearly discern the ultimate ruin which flows from injustice as voluntarily to desist? or must there be some force, some tribunal, outside so far as possible, to lift the restraining hand? The answer is obvious. Power always chafes at but needs restraint. This is true whether that power be in a single monarch or in a majority. All history attests the former. We are making that which proves the latter. The triple subdivision of governmental powers into legislative, executive and judicial recognizes the truth, and has provided in this last co-ordinate department of government the restraining force. And the question which now arises is whether, in view of this exigency, the functions of the judiciary should be strengthened and enlarged, or weakened and restricted. As might be expected, they who wish to push this movement to the extreme, who would brook no restraint on aught that seems to make for their gain, are unanimous in crying out against judicial interference, and are constantly seeking to minimize the power of the courts. Hence the demand for arbitrators to settle all disputes between employer and employees, for commissions to

fix all tariffs for common carriers. The argument is that judges are not adapted by their education and training to settle such matters as these; that they lack acquaintance with affairs and are tied to precedents; that the procedure in the courts is too slow and that no action could be had therein until long after the need of action has passed. It would be folly to assert that this argument is barren of force. There are judges who never move a step beyond what has been; who would never adjudge the validity of the plan of salvation without a prior decision of the Master of the Rolls or the Queen's Bench in favor of the doctrine of vicarious sacrifice; and it is true that proceedings in the law courts do not anticipate the flight of time. But the great body of judges are as well versed in the affairs of life as any, and they who unravel all the mysteries of accounting between partners, settle the business of the largest corporations and extract all the truth from the mass of sciolistic verbiage that falls from the lips of expert witnesses in patent cases, will have no difficulty in determining what is right and wrong between employer and employees, and whether proposed rates of freight and fare are reasonable as between the public and the owners; while as for speed, is there anything quicker than a writ of injunction?

But the real objection lies deeper. Somehow or other men always link the idea of justice with that of judge. It matters not that an arbitrator or commission may perform the same function, there is not the same respect for the office, nor the same feeling that justice only can be invoked to control the decision. The arbitrator and commission will be approached with freedom by many, with suggestions that the public, or the party, or certain interests demand or will be profited by a decision in one way; but who thus comes near to the court or offers those suggestions to the judge? There is the tacit but universal feeling that justice, as he sees it, alone controls the decision. It is a good thing that this is so; that in the common thought the idea of justice goes hand in hand with that of judge; and that when anything is to be wrought out which it is feared may not harmonize with eternal principles of right and wrong, the cry is for arbitration or commission, or something else whose name is not symbolical or suggestive. I would have it always kept so, and kept so by the very force of the work and life of him who is a judge. It is an Anglo-Saxon habit to pay respect to the judicial office; and it is

also an Anglo-Saxon demand that he who holds that office shall so bear himself as to be worthy of respect.

So it is that the mischief-makers in this movement ever strive to getaway from courts and judges, and to place the power of decision in the hands of those who will the more readily and freely yield to the pressure of numbers, that so-called demand of the majority. But the common idea of justice is that the judge should be indifferent between the litigants — as free as possible from the influence of either; and no temporary arbitrator or political commission can ever equal in these respects the established courts and regular judges.

And so it is, that because of the growth of this movement, of its development in many directions, and the activity of those who are in it, and especially because of the further fact that, carrying votes in its hand, it ever appeals to the trimming politician and time-serving demagogue, and thus enters into so much of legislation, arises the urgent need of giving to the judiciary the utmost vigor and efficiency. Now, if ever in the history of this country, must there be somewhere and somehow a controlling force which speaks for justice, and for justice only. Let this movement sweep on with no restraining force, and it is the rule of all such movements, that unchecked, they grow in violence, and Carlyle's Shooting Niagara will epitomize the story of the downfall and departure from this western continent of government of the people, by the people and for the people.

What, then, ought to be done? My reply is, strengthen the judiciary. How? Permanent tenure of office accomplishes this. If a judge is to go out of office in a few months, the litigant will be more willing to disobey and take the chances of finally escaping punishment by delaying the proceedings until a new judge shall take the place — one whom his vote may select, and from whom, therefore, he will expect slight if any punishment; while if the incumbent holds office for life, the duration of that life being uncertain, whether one or thirty years, no litigant wants to take the risk of disobedience, with a strong probability that a punishment, though it may be delayed, will come, and come with a severity equal to the wrong of the disobedience.

A striking illustration of the truth of this is found in the troubles that followed the election of 1876. The three States in which arose contests for the possession of the State government were Florida, Louisiana and South Carolina. In each of them an application was made to the highest court of the State and a decision announced by such court. In Florida the decision was accepted without question, and the control of the State government passed safely in accordance therewith. In each of the other States it was an insignificant and disregarded factor in the strife. In Florida the judges held office for life; in the other States, for only short term. The party having, or believing it had a majority, was willing in these States to risk a contest with judges whose term of office would soon expire, for it hoped to place its own friends on the bench and thus be secured from all consequence of disobedience; but in the former State there was little safety in entering upon a contest with those who might remain in office for a generation, and who could be disturbed in their position by nothing short of a revolution. So if you would give the most force and effect to the decisions of your courts, you must give to the judges a permanent tenure of office.

Again, it will give greater independence of action. Judges are but human. If one must soon go before the people for re-election, how loath to rule squarely against public sentiment. There is no need of imputing conscious dishonesty, but the inevitable shrinking from antagonizing popular feeling, or the wishes or interests of some prominent leader or leaders tend to delay or mollify the due decision, while the judge who knows nothing can disturb his position, does not hesitate promptly and clearly to "lay judgment to the line and righteousness to the plummet." Let the jury determine, is the motto of one tribunal; the court must decide, is the rule of the other. Cases at law and a jury are favored in the one, equity and its singleness of responsibility is the delight of the other. Far be it from me to intimate aught against the character or ability of that larger number of elective judges in this country who secure continuance in office only through the well-earned confidence of the people. The bulk of my judicial life has been spent in such tribunals and under such experiences, and I know the worth and prize the friendship of these men. I am simply comparing system with system. It is a significant fact that some of the older States which have the elective

system are lengthening the terms of judicial office. The judges of your highest court hold office for fourteen years, and in the sister State of Pennsylvania for twenty-one years. And this is almost equivalent to a life tenure, for it will be found that the term of office of a Justice of the Supreme Court of the United States (taking all who have held that office, including the present incumbents), averages less than fifteen years.

It is said that the will of the people would often be delayed or thwarted, and that this is against the essential idea of government of and by the people. But for what are written constitutions? They exist, not simply to prescribe modes of action, but because of the restraints and prohibitions they contain. Popular government may imply, generally speaking, that the present will of the majority should be carried into effect, but this is true in no absolute or arbitrary sense, and the limitations and checks which are found in all our written constitutions are placed there to secure the rights of the minority. Constitutions are generally, and ought always to be, formed in times free from excitement. They represent the deliberate judgment of the people as to the provisions and restraints which, firmly and fully enforced, will secure to each citizen the greatest liberty and utmost protection. They are rules prescribed by Philip Sober to control Philip Drunk. When difficulties arise, when the measures and laws framed by a majority are challenged as a violation of these rules and a trespass upon the rights of the minority, common justice demands that the tribunal to determine the question shall be as little under the influence of either as is possible. Burke says: "Society requires not only that the passions of individuals should be subjected, but that even in the mass and body, as well as in the individuals, the inclinations of men should be thwarted, their wills controlled and their passions brought into subjection. This can only be done by a power out of themselves, and not in exercise of its functions subject to that will and those passions which if is its office to bridle and subdue. In this sense the restraints on men, as well as their liberties, are to be reckoned among their rights." And surely, if the judges hold office by a life tenure and with a salary which cannot be disturbed, it would seem as though we had a tribunal as far removed from disturbing influences as possible. Though if I were to perfect the judiciary

system, I would add a provision that they should also be ineligible to political office, and to that extent free from political ambition.

It may be said that this is practically substituting government by the judges for government by the people, and thus turning back the currents of history. The world has seen government by chiefs, by kings and emperors, by priests and by nobles. All have failed, and now government by the people is on trial. Shall we abandon that and try government by judges? But this involves a total misunderstanding of the relations of judges to government. There is nothing in this power of the judiciary detracting in the least from the idea of government of and by the people. The courts hold neither purse nor sword; they cannot corrupt nor arbitrarily control. They make no laws, they establish no policy, they never enter into the domain of popular action. They do not govern. Their functions in relation to the State are limited to seeing that popular action does not trespass upon right and justice as it exists in written constitutions and natural law. So it is that the utmost power of the courts and judges works no interference with true liberty, no trespass on the fullest and highest development of government of and by the people; it only means security to personal rights—the inalienable rights, life, liberty and the pursuit of happiness; it simply nails the Declaration of Independence, like Luther's theses against indulgences upon the doors of the Wittenburg church of human rights, and dares the anarchist the socialist and every other assassin of liberty to blot out a single word.

While preparing this address I had a dream. I dreamt that I was reading before an association an article which had been prepared by another. When I had nearly finished I came to a page which was written in shorthand. Unable to decipher that, I was forced to extemporize a little. When I awoke from my sleep, and thought of this address, I saw that that dream was not wholly a dream. I realize full well that this subject is old and stale, and that I have added nothing new to what has been so often and so well said; but things may be stale and yet not flat and unprofitable. The tale of love is as old as Adam, and as new and as sweet as to-day's blushing girl of sixteen. All of Christianity is found in "the old, old story of Jesus and his love." And so it has seemed to me that this threadbare story is,

as always, in a free country, and to-day in this country more than ever, of living and pressing importance. Who does not see the wide unrest that fills the land? Who does not feet that vast social changes are impending, and realize that those changes must be guided in justice to safety and peace, or they will culminate in revolution? Who does not perceive that the mere fact of numbers is beginning to assert itself? Who does not hear the old demagogic cry—-*vox populi vox dei* (paraphrased to-day, the majority are always right)—constantly invoked to justify disregard of those guaranties which have hitherto been deemed sufficient to give protection to private property?

"To him that hath shall be given," is the voice of Scripture. From him that hath shall be taken, is the watchword of a not inconsiderable, and through the influx of foreign population, a growing portion of our voters. In such a time as this the inquiry may well be, what factor in our national life speaks most emphatically for stability and justice, and how may that factor be given the greatest efficiency? Magnifying, like the apostle of old, my office, I am firmly persuaded that the salvation of the Nation, the permanence of government of and by the people, rests upon the independence and vigor of the judiciary. To stay the waves of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he hath, demands a tribunal as strong as is consistent with the freedom of human action, and as free from all influences and suggestions other than is compassed in the thought of justice, as can be created out of the infirmities of human nature. To that end the courts exist, and for that let all the judges be put beyond the reach of political office, and all fear of losing position or compensation during good behavior. It may be that this is not popular doctrine to-day, and that the drift is found in such declarations as these—that the employee has a right to remain on his employer's property and be paid wages, whether the employer wishes him or no; that the rights of the one who uses are more sacred than of him who owns property; and that the Dartmouth College Case, though once believed to be good in morals and sound in law, is to-day an anachronism and a political outrage. The black flag of anarchism, flaunting destruction to property, and

therefore relapse of society to barbarism; the red flag of socialism, inviting a redistribution of property, which, in order to secure the vaunted equality, must be repeated again and again at constantly decreasing intervals, and that colorless piece of baby-cloth, which suggests that the State take all property and direct all the work and life of individuals, as if they were little children, may seem to fill the air with their flutter. But as against these schemes, or any other plot or vagary of fiend, fool or fanatic, the eager and earnest protest and cry of the Anglo-Saxon is for individual freedom and absolute protection of all his rights of person and property; and it is the cry which, reverberating over this country from ocean to ocean, thank God, will not go unheeded. That personal independence which is the lofty characteristic of our race will assert itself, and no matter what may stand in the way, or who may oppose, or how much of temporary miscarriage or disappointment there may be, it will finally so assert itself in this land that no man or masses shall dare to say to a laborer he must or must not work, or for whom or for how much he shall toil; and that no honest possessor of property shall live in fear of the slightest trespass upon his possessions. And to help and strengthen that good time, we shall yet see in every State an independent judiciary, made as independent of all outside influences as is possible, and to that end given a permanent tenure of office and an unchangeable salary; and above them that court created by the fathers, supreme in fact as in name, holding all, individuals and masses, corporations and States—even the great Nation itself—unswervingly true to the mandates of justice, that justice which is the silver sheen and the golden band in the jeweled diadem of Him to whom all Nations bow and all worlds owe allegiance. ■

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Afterword

This post and the MLHP are cited in G. Edward White, 2 *Law in American History: From Reconstruction Through the 1920s* 605 n.34 (Oxford Univ. Press, 2016).

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