VISIONS OF A
Comparisons of
David J. Brewer

by Michael J. Brodhead

The period between the Civil War and World War I was an age of enormous and often traumatic change in America. The nation's rapid industrialization ushered in a host of problems, which in turn produced a multiplicity of proposed solutions to the economic and social ills brought on by this sudden and thorough transformation. The careers of two prominent members of the Kansas judiciary, David Josiah Brewer and Frank Doster, well illustrate the great variety of responses to the disturbing changes of the era.

Brewer and Doster served on the Kansas bench with distinction in the later nineteenth century. In most respects, no two men could have been more dissimilar in judicial philosophy and in their views on government and society. To their contemporaries, and to many historians since, Brewer was an archreactionary and Doster an unalloyed radical. In

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several fundamental ways, their thinking was indeed at odds, but in some matters their views were quite compatible.

While both were products of Civil War-era republicanism, each interpreted the party's heritage in markedly different ways. In its early years, the Republican party supported the growth of federal power: protective tariffs, a national banking system, monetary reform, subsidies for railroads and other internal improvements, reconstruction of the South, protection of the freedmen, a homestead act, a system of land grant colleges, civil service reform and, later, regulation of railroads and other large economic interests. Although the Democratic opposition advocated some of these measures, the Republican party, for most of the last half of the nineteenth century, was conspicuously the party of centralization and expanded federal activity.

Brewer and Doster launched their careers as Republicans in Kansas. The party there enjoyed the loyal support of the great majority of the electorate and a near monopoly in state office-holding. Because of this overwhelming dominance, however, the party in Kansas was never ideologically monolithic. It housed a wide diversity of politi-
cal opinion, ranging from the conservative to the radical. Brewer and Doster reflected this range of viewpoints. Ultimately Doster left the Grand Old Party and embraced a succession of third parties, but he took with him the original Republican commitment to an activist government. Brewer remained a Republican and, in his way, a reformer, but even early in his career he began to worry over the increasing tendency towards governmental centralization. As a jurist he sought to arrest this tendency; as a citizen he repeatedly warned against it.

We do not know how well Brewer and Doster knew each other, but surely they were acquainted. Both were charter members of the Kansas Bar Association, founded in 1883. In Doster's only appearance before the state supreme court during Brewer's tenure, the young attorney and budding radical from Marion served as counsel, ironically, for the holder of a note who was trying to attach the property of his debtor. Compounding the irony, the decision delivered by the supposedly conservative Brewer went against Doster's client and for the debtor. The ruling seems not to have made Doster think ill of Brewer. On the contrary, in 1893, a few years before his election as chief justice of the state, Doster praised Brewer, then a member of the U.S. Supreme Court: "It is a pleasure to read some of his opinions. He was no legal parrot, but he had a voice and a vocabulary of his own."

The circumstances of the birth and upbringing of the two men were markedly different. Brewer was born in Smyrna, Asia Minor, in 1837, the son of a Congregational missionary. His parents belonged securely to old New England families. His mother's brothers included Stephen J. Field, a commanding figure on the U.S. Supreme Court from the Civil War until near the end of the century, and David Dudley Field, a noted attorney and the nation's foremost advocate of codification of the laws. After schooling at two prestigious institutions, Wesleyan College and Yale, Brewer graduated from Albany Law School.

Rather than build a career in the shadow of his famous uncles, Brewer struck out for Kansas Territory, settling in Leavenworth in 1859. Two years later he married Louise "Lulu" Landon and eventually became the father of four daughters. After Lulu's death in 1898, he married Emma Minor Mott, who survived him.


Upon establishing himself in Kansas, Brewer, a Republican since the inception of the party, began a remarkable climb through the American judicial system, serving as commissioner of the federal circuit court, judge of the probate and criminal court of Leavenworth County, district judge, county attorney, associate justice of the Kansas Supreme Court, and federal circuit judge.

In 1889 President Benjamin Harrison appointed him associate justice of the U.S. Supreme Court, on which he served until his death in 1910. Brewer's many off-the-bench appearances and writings made him the member of the Court best known to the public in this era.

Presiding over the nation's highest tribunal throughout Brewer's tenure on it was Chief Justice Melville W. Fuller. The Fuller Court has long had the reputation for ultraconservatism. Recent scholarship, however, has pointed out that the Court generally and the individual justices—Brewer included—were not nearly as friendly to big business or as hostile to reform as has been supposed.4

Doster's beginnings were far more humble and his professional attainments less lofty. He was born the son of a farmer in 1847 in what is now West Virginia. His


parents soon thereafter migrated to Indiana. During the Civil War, he falsified his age in order to enlist in the Eleventh Indiana Cavalry. He saw considerable action in Tennessee and Mississippi before his regiment was sent to patrol the Santa Fe Trail in Kansas. After the war, Doster returned to Indiana where he attended, but did not graduate from, Benton Law Institute and the state university. He married Carolyn "Carrie" Riddle in 1870. The young couple decided to settle in Marion County, Kansas, with which he had become familiar during his army service.

In Marion (then called Marion Centre), the county seat, Doster launched his career as a lawyer. As with Brewer, the first years were not easy, and in comparison with the more settled and developed Leavenworth, south central Kansas in the early 1870s was still a frontier area. Soon his talents and energy built up a moderately prosperous practice. In 1871 he was elected, as a Republican, to a term in the state legislature. Doster was soon attracted to third party doctrines and unsuccessfully sought state office and a congressional seat as a candidate of the Greenback party. With the collapse of the Greenback movement, he shifted his allegiance to the Union Labor party.

Despite Doster's drift towards radicalism, Republican Gov. John A. Martin appointed him judge of the new twenty-fifth judicial district in 1887. Most of the district's bar had strongly endorsed the appointment, and Doster was elected to a full term later that year. When he stood for reelection in 1891, he was by then thoroughly identified with the People's party and branded as a dangerous radical. A coalition of Republicans and Democrats in the district succeeded in defeating him.

Emerging soon thereafter as one of the most articulate spokesmen of Kansas Populism, Doster was the Populist-Democratic fusion ticket's candidate for chief justice of the state supreme court in 1896. During the campaign, he achieved a measure of (anonymou-
Kansas?”) in which the Emporia editor castigated him as a “shabby, wild-eyed rattle-brained fanatic.” He was elected chief justice and served a six-year term, at the expiration of which his chances for reelection were doomed by the demise of the People’s party. Afterwards he enjoyed a successful law practice in Topeka until his death in 1934.

In these later years he often spoke out in support of women’s rights and other reform measures and in opposition to bigotry and prohibition. He and Carrie had seven children, five of whom survived into adulthood.

It is impossible to state with certainty what forces contributed to the different personal characteristics of Brewer and Doster. But they most assuredly had different personalities. Brewer was genial, witty, and outgoing. Doster was shy and withdrawn, causing him to appear more cold and aloof than he actually was. His short temper, however, was all too real; he once threatened to “shoot the damn heart out” of another attorney in Marion.

Between them, Brewer and Doster championed just about all of the major reform causes—and occasionally the same ones—of the late nineteenth and early twentieth centuries. Doster’s political affiliations and public pronouncements more obviously show him as a reform spokesman. He embraced the full range of proposals of the People’s party and its third party predecessors. In later life (although he was a fairly regular Democrat in party affiliation), Doster called himself a socialist; in his last years he announced that he was a “communist in economic belief.”

Brewer’s commitment to reform is less apparent; nevertheless, it was genuine and consistent. Like Doster, he expressed his views in numerous articles and public addresses, as well as in judicial opinions. He was an early and steadfast supporter of the women’s movement—as was Frank Doster. In 1876 the Kansas Supreme Court, speaking through Brewer, held that women were entitled to hold elective office, even though they did not then have the right to vote. For the remainder of his life he spoke out boldly for woman suffrage and other equal rights.

8. Marion Record, October 30, 1891; Chase County Leader, Cottonwood Falls, October 29, 1891; Kansas Democrat, Topeka, October 30, 1891; Marion Times, October 29, November 19, 1891.
Brewer promoted the cause of education at all levels; as superintendent of schools in Leavenworth from 1865 to 1867, he labored diligently for better schooling for all of the community’s children. Throughout his career he urged greater rewards and higher standards for the teaching profession. He also insisted on a vastly improved system for educating those entering the legal profession.12

At the height of anti-Chinese sentiment in America, Brewer, on and off the bench, stoutly defended the right of the Chinese to live and work in the United States and to receive citizenship. Indeed, he was the high Court’s only unwavering champion of the Chinese, and most of his opinions in cases involving them were dissents.33 Brewer’s attitudes towards blacks were more ambiguous. His judicial opinions, reflecting the views of most white Americans in that time, sanctioned the states’ right to impose segregation.44 Yet it would be unfair to label him as more racist than the vast majority of his white contemporaries. For example, he denounced lynching in strong terms.13

Doster seldom addressed racial questions from the bench or the rostrum; as a radical he thought more in terms of social classes than of races. He was, however, generally sympathetic to blacks. In 1902 a black Republican newspaper supported his bid for a second term as chief justice, hailing him as “the choice of the people irrespective of creed, color or politics.” The following year he chastised the Republicans for paying attention to the black citizen only at election time; for the “balance of the year they Lynch him, ostracize him, treat him as a menial, exclude him from white churches and white schools and white recognition just as the South does.” The Democratic party, he pointed out, was at least honest and consistent because it never pretended to be friendly to blacks.15 Here again Doster appears to have been more faithful to the original principles of


14. Board of Education v. Tymon, 26 Kan. 1, 23-26 (1881); Louisville, New Orleans & Texas

Brewer’s attitude towards blacks was ambiguous, while Doster was more sensitive to racial issues including church and school segregation.
the Republican party than was Brewer.

Brewer’s most conspicuous support for a humanitarian cause was for international peace. His Civil War service was limited to militia duty in the Leavenworth vicinity, but he became sufficiently aware of war’s appalling destruction of two things he held sacrosanct: property and human life. To the end of his days Brewer condemned armed conflict and worked for solutions to prevent it. He warned against the rising tide of militarism and the demands for a big navy. Through several public addresses and writings, he urged arbitration as a means of preventing wars.17

Brewer also spoke out against the imperialism that came in the wake of the Spanish-American War.18 As a member of the Supreme Court he participated in the Insular Cases, a series of decisions that determined the constitutional status of the new overseas possessions wrested from Spain.19 In them he took the anti-imperialist position by voting with those—ultimately a minority—who opposed a colonial status for the Philippines and Puerto Rico. To him, the missionary, not the soldier or the colonial administrator, was the best instrument for extending the benefits of civilization.

Frank Doster likewise condemned overseas expansion as “Caesarism and buccaneering and hell generally.” In an article for The Arena, he argued that the demand for colonies was motivated by capitalistic dreams of profits—profits that he believed would never materialize.20

On the issue of war, however, Doster and Brewer parted company. Doster was one of the many veterans of the Civil War (Brewer’s Supreme Court colleague Oliver Wendell Holmes, Jr., being a prominent example) who believed that war purified and redeemed society, and that the military virtues were among the highest to which mankind could aspire. Doster was also convinced that the Civil War had been necessary to preserve democracy. He gave his enthusiastic support to the Spanish-American War and the first World War. This support of war and martial values even extended to Doster’s social, political, and family life. He was not a “joiner.” But, in keeping with his fascination with things military, the one organization, other than the bar, of which he was a devoted member was the Grand Army of the Republic, the nation’s leading organization of Union veterans. During the administration of Populist Gov. Lorenzo D. Lewelling, he served as judge advocate general of the Kansas National Guard, with the rank of major. Two of Doster’s sons, no doubt with his encouragement, pursued careers in the regular army.

Brewer’s abhorrence of war and militarism was to a great extent the product of his strong and abiding religious beliefs. From his boyhood in the home of a Congregational minister until his death, he never wavered in his Christian faith. Off the bench he lent his support to the missionary cause and to many other efforts to spread and strengthen Christianity at home and abroad. He was among the best known Protestant lay leaders in America.

In 1892 he wrote the Court’s opinion in the Church of the Holy Trinity case, in which he asserted that the “United States is a Christian nation.”21 The statement was merely obiter dicta based upon his interpretation of early American history and has been much misrepresented then and since.22 Nevertheless, it does reflect Brewer’s religious convictions.

Although Doster was not the village atheist portrayed by his enemies, he was very much a free thinker and a voice against religious intolerance and the union of church and state. As with Brewer, Doster’s views on religion have been misunderstood. In Doster’s case, the chief source of the misunderstanding was an article he published in 1874. In it he emphatically denied what Brewer was to assert sixteen years later in the Holy Trinity opinion (i.e., that the United States was a Christian nation). His object was to challenge those who were calling for an amendment to the Constitution that would recognize God as the Supreme Being and Christianity as the national religion.

Doster based his argument on a 1796 treaty between the United States and Tripoli, in which the Americans affirmed that “the government of the United States of America is not in any sense

22. Certainly Brewer does not merit the label “a religious bigot in robes” applied to him by Alan M. Dershowitz in Chutzpah (Boston: Little, Brown and Co., 1991), 322.
founded on the Christian religion." He stated that the treaty was "an expression of governmental principle [which] is in direct contradiction to the oft-repeated assertions that all law derives its origin from religion, and that Christianity is part of the common law of the land." It was not so much what Doster said here as the vehicle he used to say it. The article, entitled "God and the Constitution," appeared in a periodical published by the sisters Victoria Woodhull and Tennie C. Claflin, two of the era's most notorious advocates of free love.23 Doster's detractors later seized upon the article as proof that he was an atheist and a proponent of free love as well.

Doster was not guilty of either charge. He neither practiced nor advocated sexual license. Nor was he an atheist. In his later years he became a student of many varieties of religious thought and was active in Topeka's Unitarian circles. Doster once defined communism as "God's plan for living with one another, and not off one another."24 Such a definition is of course unacceptable to an orthodox Christian as well as to a true Marxist (which Doster was not). Nevertheless, he probably experienced more intellectual growth in matters of religion than did Brewer, who seems never to have questioned the faith inherited from his father.

In the realm of the law, the most pronounced difference between Brewer and Doster was their opposing views on property rights. This in turn illustrates their differing convictions on the role of government. Ultimately, it reveals their quite disparate visions of the kind of society each desired for America.

Doster's most famous address was delivered in 1891 at Marion, during the early days of the Populist crusade. In it he declared that "the rights of the user are paramount to the rights of the owner."25 He later explained that his seemingly inflammatory remark was simply a restatement of the doctrine laid down in the Munn v. Illinois decision of 1877.26 In that landmark case, the U.S. Supreme Court ruled that it was within the police power of a state to regulate railroads and other business-

24. Doster, "Communism—What is it and Why."
25. Central Kansas Advocate, Marion, May 29, 1891.
Although Brewer believed that railroads and similar public interest businesses were subject to regulation, he stopped far short of the extensive regulation advocated by Doster. The roles that were “clothed with a public interest.” As chief justice of the Kansas Supreme Court, Doster gave his views on such regulation in a strong dissenting opinion in *State v. Johnson*. In this case, the court’s Republican majority struck down the Court of Visitation, an agency created by the Populist legislature and given broad powers to regulate railroads. Doster argued that special tribunals were necessary for effective regulation and that “The business of railroad transportation is of vital public concern. It is clothed with a public interest. It is not juris privati. That was decided in the case of *Munn v. Illinois* . . . and has been repeated in a multitude of decisions since that one was made.”

Still later, in 1931, while the nation was in the throes of the Great Depression, he maintained that the *Munn* decision’s public interest doctrine could be the cornerstone upon which to build a noncompetitive, cooperative society. As he pointed out, there was little in twentieth-century economic life that was not “clothed with a public interest.” In other words, governmental regulation was the proper foundation for developing the collectivist society (which would eventually embrace all of mankind) that Doster envisaged.

It has often been said that Brewer rejected totally the public interest doctrine of the *Munn* decision. Not true. He repeatedly said that railroads and similar businesses were subject to regulation by the public. But he stopped far short of accepting the kind of regulation advocated by Doster; so far short, in fact, that the gap between the two men on this issue was unbridgeable. Brewer insisted that only those businesses clearly affected with the public interest were subject to regulation. He felt strongly that enterprises such as village grain warehouses—even if they enjoyed local monopolies—were not proper objects of the regulatory power.

In the later nineteenth century the principal judicial instrument for limiting government regulation was the doctrine of “substantive due process.” The Fourteenth Amendment, adopted in 1868,


29. See, for example, *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339 (1892).

prohibited states from taking property without due process of law. In 1886 the U.S. Supreme Court ruled that a corporation was a “person” within the meaning of the Fourteenth Amendment and therefore protected by its due process clause. Brewer and other jurists used this interpretation of the amendment to curb the regulatory power. For example, they acknowledged that a state could regulate railroad rates, but held that the rates must allow the railroad a reasonable return; if not, the state was “substantively” depriving the corporation of property without due process. In other words, a state could set rates, but such rates must not be “unreasonable.”

Similarly, Brewer and his colleagues on the U.S. Supreme Court, after ruling that the national government had the power to regulate railroad rates through the Interstate Commerce Commission (ICC), held that the ICC had no authority to set rates, only to disallow unreasonable ones.

As judge of the U.S. Eighth Circuit in the 1880s, Brewer had pioneered in the development of substantive due process. In Kansas v. Walruff, he held that the prohibitory laws of Kansas denied due process because, in effect, they took away the property of brewery owners without compensation. The U.S. Supreme Court soon nullified this ruling.

Doster, on the other hand, roundly criticized those decisions that thwarted the public’s demand for business regulation. In an 1897 opinion for the Kansas Supreme Court, he was referring to the federal courts’ use of substantive due process when he objected to the “many refinements of construction [that have been placed upon the Fourteenth Amendment to adapt it to purposes not within its original intent.”

Brewer’s fervent defense of property has been misinterpreted to portray him as a friend of big business. Actually, he was a defender of all property interests, small as well as large. In cases of conflict between small and large property interests (e.g., suits between farmers and railroads), he more often than not found in favor of the former. Moreover, in his abiding concern for the individual, he was fearful of concentrated power of any kind—


36. See, for example, Kansas Pacific Ry. Co. v. Mower, 16 Kan. 573 (1876) and St. Paul, Minneapolis & Manitoba R. Co. v. Greenough, 26 F. 563 (C.C.D. Minn. 1886).
Throughout his career, Brewer attained the reputation as an antilabor jurist. Doster, however, was prolabor, supporting the cause of the workingman.

Long after leaving the Kansas bench, Doster expressed a personal view of the monopoly question far different from the legal opinion that he and Brewer had shared in the Smiley case: Doster welcomed the concentration of private economic power because he saw it as a step towards the inevitable triumph of socialism. "It matters not that [business corporations] are predatory in character and practice. The point is—the individuals composing them have ceased economic strife among themselves, have pooled their property, have united their efforts, have socialized their interests, have communized themselves as it were, and have become, thereby, prophetic of the universal communism to come."20

37. See, for example, Brewer, "Some Thoughts about Kansas," in Twelfth Annual Meeting of the Bar Association of the State of Kansas (Topeka: Crane and Co., 1885), 64, 69.


40. Doster, "Communism—What is it and Why."
Brewer has the historical reputation—largely deserved—of an antilabor jurist. In 1895 he delivered the U.S. Supreme Court’s opinion in the notorious In re Debs, a case arising out of the Pullman Boycott. A federal district court had issued an injunction prohibiting the boycotting workers from obstructing interstate commerce and the transportation of the mails. Labor leader Eugene V. Debs defied the injunction, was convicted of contempt, and appealed to the Supreme Court. Brewer’s opinion, in which he spoke for all of his colleagues, upheld the conviction and more ominously for organized labor sanctioned the use of federal court injunctions against unions.41

In nearly all other cases involving unions or legislation designed to improve the lot of working people, Brewer could be counted upon to be opposed. Among the notable exceptions was his opinion for a unanimous Court in Muller v. Oregon, which held that Oregon’s law limiting women to eight hours of work a day was a valid exercise of a state’s power to regulate the health, safety, welfare, and morals of its citizens.42

Doster’s six-year term on the Kansas Supreme Court gave him few opportunities to register opinions in labor cases. In those in which he did participate, his sympathies are clearly pro-labor. In 1899 there came to the court a case challenging the constitutionality of a Populist enactment limiting the right of coal mine operators to issue scrip in lieu of wages and to force employees to trade at company stores. The Republican majority of the court found the law to be a denial of equal protection of the laws because it applied only to corporations employing ten or more workers. Doster, in a dissent pleading for judicial self-restraint, argued that the legislature could make such classifications.43

Although their thinking was occasionally in accord, Brewer and Doster differed widely and fundamentally in most social, economic, and political matters. Doster adhered to the original Republican commitment to governmental activism as the proper path to social and economic progress. In this sense he remained truer to the original foundations of republicanism than did Brewer and a great many other Republicans of the late nineteenth and early twentieth centuries. Brewer believed such progress depended largely upon individual effort, and it was essential that the individual and his property be protected from what he believed was excessive government action—i.e., the very policies Doster advocated. The reforms closest to Brewer’s heart—peace, education, equality for women, and Chinese rights—required little or no expansion of centralized power. Brewer’s and Doster’s visions of the better world were incompatible. Nevertheless, these intelligent and eloquent Kansas jurists shared a belief that the twentieth century would bring material, moral, and spiritual betterment for all of humanity.44

In one other important respect were they in agreement. David J. Brewer and Frank Doster were equally dedicated servants of the law and worked for the advancement of the legal profession, of which they were proud to be members. Although their notions of the ideal society were much at variance, each was convinced that the American legal system was a necessary instrument for achieving the brighter future both foresaw.45

44. For Doster’s optimistic forecast, see Topeka Daily Capital, June 13, 1901; for Brewer’s, see his The Twentieth Century from Another Viewpoint (New York: F. H. Revell, 1899), 9-10.