THE SUPREME COURT
HISTORICAL SOCIETY

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SOCIETY SPONSORS SPECIAL EVENTS

Michael Mastacchi & Associates

Justice Kennedy delivered a special lecture in San Francisco. He discussed the 1937 Court-packing scheme and included portraits, such as this of Justice Van Devanter, in his presentation.

During the Fall of 2003, the Society had two significant events outside the Washington, DC area. The first, on September 25, 2003, was held in San Francisco when Justice Anthony M. Kennedy was the keynote speaker for a dinner held at the Presidio Golf Club. The program was sponsored by Society Trustees William Edlund and Foster Wollen, and was open to all members of the Supreme Court Historical Society in California. Justice and Mrs. Kennedy joined a group of approximately 115 for the reception and dinner event. The Justice presented a fascinating discussion of the Court-packing plan of 1937—a plan devised by President Roosevelt to increase the number of Justices on the Supreme Court, allowing him an opportunity to appoint Justices sympathetic to his New Deal agenda. An accomplished speaker and teacher, Justice Kennedy gave an animated account of this unique incident in the history of the Court. His presentation was enhanced by photographs of the members of the Hughes Court who were serving at the time of the controversy.

The second event, held on Thursday, October 16, 2003, was the Second Annual Gala of The Historical Society of the United States District Court for the District of New Jersey, held at the U.S. Courthouse in Newark, New Jersey. This event was cosponsored by the Supreme Court Historical Society and included the presentation of awards and the delivery of two speeches.

Chief Judge Bissell made introductory remarks, welcoming guests and acknowledging the presence of visitors. Speakers on the program were introduced by magistrate Ronald J. Hedges. Dr. Mark Lender, the author of a recently-published formal history of the District Court, was the first speaker. Noting that there are few written histories of district courts, Mr. Lender commented that the District Court for New Jersey was one of the original courts created pursuant to the Judiciary Act of 1789, and the first two judges of the court were appointed by President Washington. Many of the cases that have come before the court have been of national significance and scope, and thus made an important mark on the jurisprudence of the federal courts.

Dr. James B. O'Hara, a member of the Board of Trustees and Chairman of the Library Committee of the Supreme Court Historical Society, presented the concluding speech titled "What Makes a Great Justice: William J. Brennan." The text of his remarks can be found in this issue of the *Quarterly*, starting on page 8.

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Michael Mastacchi & Associates

Justice Anthony M. Kennedy (second from left) was photographed at the event with (left to right) William Edlund, the principal organizer of the dinner, Society President Frank C. Jones, and Foster Wollen, who assisted with program development and implementation.

A Letter from the President

My last letter discussed in considerable detail the apparently successful conclusion to our campaign to secure sponsorship of a Coin Bill honoring the 250th anniversary of the birth of Chief Justice John Marshall. In a gesture of great importance, Chief Justice William H. Rehnquist made a rare appearance before Congress on March 10 in support of the bill. We are greatly indebted to him for his continued support of this important undertaking. I hope that by the time you receive this issue of *The Quarterly*, the bill will have been finally adopted by both houses of Congress and signed by the President.

Once again, let me express appreciation to Ralph I. Lancaster, Jr., who has chaired the *ad hoc* Coin Committee, and to the other prominent lawyers throughout the nation who have assisted him.

There have been other significant developments at the Society in the first months of this calendar year. Let me mention three of them here, and I will discuss others in the next letter.

(a) ***Black, White, and Brown: The Landmark School Desegregation Case in Retrospect.***

In May of this year, the Society marked the 50th anniversary of the Supreme Court's landmark decision in the case of *Brown v. Board of Education* by publishing this book. This resulted from recommendations of both the Program Committee, chaired by Philip A. Lacovara, and the Publications Committee, chaired by E. Barrett Prettyman, Jr. Copies have been distributed on a complimentary basis to all members of the Society and additional copies will be available for purchase in the Gift Shop.

Clare Cushman and Melvin I. Urofsky served as editors of the book. It contains a foreword by Chief Justice Rehnquist. The book is 340 pages in length with an eight-page folio of illustrations, and contains the entire text of the two decisions collectively referred to as *Brown v. Board of Education*. The book is a skillful blending of articles published in previous issues of the *Journal of Supreme Court History* or elsewhere, with new articles prepared exclusively for this publication. The Society can indeed be proud of this book.

One of the chapters is an article written by Jack D. Fassett, who clerked for Justice Stanley F. Reed during the 1953 Term of the Court. We are deeply indebted to Mr. Fassett both for this article and for his generosity in making a donation to the Society to underwrite much of the cost associated with the production of this book.

(b) **Membership.**

I am pleased to report that the Society is nearing an all time record high in membership under the leadership of Frank N. Gundlach. The state chair network has accounted for about three-fourths of the new members this year. Ten state chairs had achieved their individual goals by the end of March 2004, these being Thomas H. Boyd (Minnesota); Robert A. Gwinn (Texas/Dallas-Ft. Worth); Scott A. Powell (Alabama); J. Bruce Alverson (Nevada); Thomas S. Kilbane (Ohio-North); John S. Siffert (Downstate New York); Victor F. Battaglia (Delaware); James P. Hayes (Iowa); James Wyrsch (Missouri-West); and John R. Schaibley (Indiana). They were recognized at a dinner meeting in the Supreme Court Building on the evening of April 22, 2004, along with a number of major donors to the Society.

It is my pleasure to announce that Michael E. Mone of Boston, a Past President of the American College of Trial Lawyers, has agreed to serve as Chair of the Membership Committee for the new fiscal year beginning on July 1, 2004. He is now in process of updating the state chair network. I know that he would welcome the help of any Society members who may wish to volunteer to take part in this important effort.

(c) **Dwight D. Opperman Gift.**

Dwight D. Opperman, Chairman Emeritus of the Society, has been extraordinarily generous to the Society for a good many years. He donated the principal gift that made it possible for us to acquire our present headquarters at 224 E. Capitol Street, which quite appropriately is known as "Opperman House." The Executive Committee was thrilled to learn at its meeting on April 22 that Mr. Opperman has made yet another major gift to the Society in the amount of $738,000.00. This gift will become a part of the permanent endowment of the Society, with the income only to be used for the upkeep, maintenance and improvement of Opperman House, as may be needed from time to time hereafter. Justice Stephen Breyer joined the Executive Committee for lunch and participated in the expression of appreciation to Dwight Opperman for his wonderful support and generosity.

The Supreme Court Historical Society

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Managing Editor Kathleen Shurtleff
Assistant Editor James B. O'Hara

This gift is of tremendous importance to the future of the Society in two respects: first, the provision of endowment income will insure that Opperman House will be kept in a truly first-class condition in the future, notwithstanding any financial exigencies that may arise; and second, revenues of the Society that otherwise would be devoted to the maintenance and improvement of our headquarters will be available hereafter to enhance the programs, publications, and other activities of the Society. We are truly indebted to Dwight Opperman.

Frank B. Gilbert has chaired the Facilities Committee for the past several years. He reported at the April 22 meeting that our headquarters building is presently in very good condition.

(d) **Conclusion.**

In November, we will celebrate the 30th anniversary of the incorporation of the Society. I am confident that the original incorporators would be both impressed and highly gratified with the tremendous strides the Society has made to date. This is due in large measure to the faithful support of the individual members, and to the law firms and foundations that have made generous gifts to help realize the hopes and aspirations set forth in the charter. From a modest beginning in November 1974, an organization has emerged that commands increasing national recognition and respect. With the passage of the Coin Bill, and the culmination of certain other initiatives that are now underway, the Society should be well poised to register continued growth and success for the next 30 years, and beyond.

Frank Jones

ELIZABETH BREWER'S SCRAPBOOK

*By Mary A. van Balgooy, Collections Manager**

In November 2003, the Office of the Curator acquired a scrapbook created by Justice David Brewer's youngest daughter, Elizabeth. The book begins in 1889, the same year President Benjamin Harrison appointed David Brewer to the Supreme Court, and ends in 1905, a year after Elizabeth's marriage to Wellington Wells. Because Elizabeth actively participated in social events with her father, the scrapbook offers a behind-the-scenes look into the social life of a sitting Justice of the period.

Although worn and faded on the outside, the scrapbook contains numerous calling cards, invitations, programs, telegrams, letters, and newspaper clippings in good condition. A quick glance through the pages illustrates the Brewers' busy social life as they visited and dined with other Justices and their families, attended events at the White House, and entertained foreign ambassadors and ministers.

One of the highlights of the scrapbook are the pages that cover the time the Brewers spent in Paris in 1899 while Justice Brewer served on a commission to resolve a border dispute between Venezuela and British Guiana (now Guyana). During this period the Brewers hosted a dinner party one week after the commission's oral arguments concluded but one week before the decision was rendered. Elizabeth saved not only the invitation and letters of acceptance from advocates and judges such as the Minister of Venezuela, British Chief Justice Lord Charles Russell, Lord Justice Richard Collins, and Russian writer Frederic de Martens, but also the menu card depicting the border dispute that was signed by most of the arbitration commission members. The inscription at the foot of the menu card reads, *"Eat drink and be merry, for tomorrow, We Decide."*

The purchase of this valuable artifact was made possible with funds provided by the Supreme Court Historical Society and dealer William R. Darcy, who made a partial gift to the Society of a significant portion of the scrapbook's value. The scrapbook joins a large collection of memorabilia related to Justice Brewer that has been donated by his descendants over the years.

Courtesy of the Supreme Court of the United States

**Mary A. van Balgooy joined the Curator's Office staff as a part-time Collections Manager in 2002. Previously, she worked at several museums and historic sites in southern California.*

PART 2

CONSCIENTIOUS CONSERVATIVE: BENJAMIN ROBBINS CURTIS AND THE STRUGGLE AGAINST SLAVERY

*By Harry Downs**

Editor's Note:

The first half of this article appeared in the previous issue of the Quarterly, Volume XXIV No. 4, 2003, page 8. If you did not receive that issue and are interested in obtaining a copy of the magazine, please contact the Society s office.

THE SUPREME COURT DECISION

All nine Justices wrote separate opinions. Chief Justice Taney's opinion for the Court addressed "two leading questions": whether the Circuit Court had jurisdiction in the matter; and if so, whether its judgment had been erroneous. He presented three arguments against that Court's having jurisdiction: first, that Sanford's plea in abatement should have been granted, because Scott's Negro race and slave ancestry precluded his being or becoming a Missouri citizen for purposes of establishing Federal diversity jurisdiction; second, that Scott's residence in Upper Louisiana did not emancipate him, much less make him a citizen, because the Missouri Compromise Act was unconstitutional insofar as it purported to prohibit slavery anywhere within the Louisiana Territory; and third, that Scott's residence in the free state of Illinois did not preclude the Missouri courts from ruling that he remained a slave in Missouri, which of course precluded his being a Missouri citizen. The Circuit Court therefore "had no jurisdiction in the case" and Scott's suit "must be dismissed for want of jurisdiction."[24]

Justice Curtis' dissent specifically rebutted Taney's race and ancestry argument; presented a combined response to his rejection of Scott's claim that his residence in free territory and in the free state of Illinois had emancipated him; and concluded with additional arguments supporting Scott's claims which Taney simply had ignored.

SANFORD'S PLEA IN ABATEMENT

Taney argued that "the rights of citizenship which a State may confer within its own limits" were not to be confounded with "the rights of citizenship as a member of the union" (p. 405); that "neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not," were "citizens of the several States when the Constitution was adopted" (p. 407); and that "upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled to sue in its courts, and consequently that the Circuit Court had no jurisdiction in the case" (p. 427).

Curtis devoted a third of his 69 page dissent to rebutting these assertions. He agreed that Scott's citizenship was critical to his standing to sue and that if Sanford's plea had been wrongly rejected Scott's suit must be dismissed. The Federal government possessed only those powers granted to it

Library of Congress

Dred Scott initiated his bid for freedom in the state courts of Missouri, claiming he should be emancipated from slavery based on his residence in free territoryi from 1836-1838.

under the Constitution: therefore, ". . . the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted."[25]

He examined the plea minutely, and concluded that "[was] a special traverse of the plaintiff's allegation of citizenship" (pp. 568-69), and could succeed only if the facts recited in the plea as grounds for the traverse absolutely disproved Scott's citizenship. Moreover, in ruling on Sanford's plea, ". . . this court cannot look at the record to see whether (Scott's averments of Missouri citizenship) are true except so far as they are put in issue by [Sanford's] plea to the jurisdiction"[26] The question, therefore, was as the Chief Justice had stated it: whether Scott's Negro race and slave ancestry (which his demurrer admitted), precluded his being "a citizen of the State of Missouri within the meaning of the Constitution and laws of the United States."[27]

Taney recognized that Sanford's subordinate facts had to compel the requisite inference and offered two parallel arguments for the proposition that Scott's race and ancestry precluded his being or becoming a citizen. He first argued the general proposition that when the Constitution was adopted, Negroes universally were "considered as a subordinate . . . class of beings . . . so far inferior that they had no rights which the white man was bound to respect . . . it is too clear for dispute that the enslaved African race . . . formed no part of the people who framed and adopted [the Declaration of Independence; otherwise] the conduct of [those] distinguished men . . . would have been utterly and flagrantly inconsistent with the principles they asserted."[28]

Curtis would have none of this:

". . . a calm comparison of these assertions of universal abstract truths and of their own individual opinions and acts would not leave these men under any reproach of inconsistency; . . . and . . . it would not be just to them nor true in itself to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts."[29]

Curtis then summarized his contrary belief:

"[I]t is not true . . . that the Constitution was made exclusively **by** the white race. And that it was made exclusively **for** the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration that it was ordained and established by the People of the United States . . . And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established."[30]

Alternatively, Taney argued (p. 405) that, even if some states accepted some Negroes as citizens, state citizenship did not necessarily confer full rights of Federal citizenship, and in particular the right to bring suit in the federal courts. Curtis asked the opposite question: whether any state had the power to deny to any United States citizen resident in that state access to the federal courts of that state. He argued that the Article II phrase, "a citizen of the United States at the time of the adoption of the Constitution", meant "[a citizen] of the United States under the Confederation"; and since the Confederation "was simply a confederacy of the several States, . . . citizens of each state [were] citizens of that Confederacy into which that State had entered."[31] Therefore, at the adoption of the Constitution, all those persons who then were citizens of one or another of the original thirteen states automatically became citizens of the United States.

HARRIET, WIFE OF DRED SCOTT.

Library of Congress

Harriet Scott met her husband when his master, Army surgeon John Emerson, brought him to live at the fort. She too claimed the right of emancipation predicated on her residence in a free state.

Taney had attempted anticipatorily to rebut this line of argument with the remarkable claim that freed former slaves were not "citizens of the several States when the Constitution was adopted" (p. 407). Curtis pointed out that this claim could not be sustained:

"At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens."[32]

Free Negroes therefore were citizens – indeed, voting citizens – in at least five of the states when the Constitution was adopted.

The legislative history of the Privileges and Immunities Clause (Article IV) of the Articles of Confederation confirmed this analysis. While the Articles were under consideration before Congress, the South Carolina delegates sought to amend Article IV to restrict the privileges and immunities of general citizenship to white persons. The refusal of Congress to accept the amendment affirmed that free Negroes were, "at the time of the adoption of the Constitution, . . . entitled to the privileges and immunities of general citizenship of the United States."[33] Therefore, since Scott's race and ancestry did not preclude his being a citizen of the United States, and since it was undisputed that he resided in Missouri, "no provisions contained in the Constitution or laws of Missouri can deprive [him] of his right to sue citizens of States other than Missouri in the courts of the United States."[34]

The power of Justice Curtis' reasoning did not pass unnoticed: Only Justices Wayne (p. 456) and Daniel (p. 472) agreed with the Chief Justice that Scott's Negro race and slave ancestry precluded his claiming Missouri citizenship for purposes of asserting Article III diversity jurisdiction.[35] Taney therefore failed in his effort to write into law the extraordinary proposition that neither slaves nor their offspring could ever be or become citizens. What to do next?

Taney could have ensured that Scott remained a slave simply by ruling that *Strader* encompassed residence in free territory as well as a free state. He clearly believed this to be the teaching of *Strader*: he cited the case for the proposition that, "It is too plain for any argument that [had Scott appealed from the adverse Missouri Supreme Court decision] the writ must have been dismissed for want of jurisdiction in this court" (p. 453). Moreover, under *Strader* the Court need not even have addressed the question whether a Louisiana or Wisconsin territorial court would have ruled that Scott was free in Upper Louisiana or Wisconsin: the courts in his home state were not required to recognize any change in his status that may have occurred elsewhere. Finally, as Justice Nelson's

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Conscientious Conservative continued from page 5

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Benjamin Robbins Curtis served on the Court from 1851-1857, resigning shortly after the *Dred Scott* decision was handed down.

concurring opinion (which originally was intended to be the opinion of the Court) reveals, a majority of the Court would have agreed with this reading of *Strader*. This approach, however, would have left unresolved the question whether the prohibition of slavery provisions of the Missouri Compromise Act were constitutional.

Scott's Residence in Free Territory

Taney stated the question to be whether Congress had the power to exclude slavery from Upper Louisiana. He claimed to act in response to "doubts . . . entertained by some of the members of the Court on this writ of error;" in fact, he was forced to act by his failure to secure a majority for his position on Sanford's plea to the Circuit Court's jurisdiction. He also argued that the Supreme Court's supervisory authority over inferior federal courts made it "the judicial duty" of the High Court "to examine the whole case as presented by the record; . . . and if the facts upon which (Scott) relies have not made him free . . . [and he therefore is] still a slave (and therefore not a citizen) . . . the suit ought to have been dismissed by the Circuit Court for want of jurisdiction in that court."[36] Neither justification explains why he chose to address the difficult constitutional argument instead of the straightforward *Strader* precedent, which Scott's Illinois residence would require him to consider in any event.

Taney ruled the Missouri Compromise Act unconstitutional insofar as it prohibited slavery in Upper Louisiana. This was not easy, as his tortured rationale reveals. As noted previously, the Northwest Ordinance had prohibited slavery in the Northwest Territory, and the prohibitory language in the Act closely tracked the Ordinance. Taney therefore undertook to distinguish the Act from the Ordinance. He first eviscerated the Territories Clause of the Constitution[37] by limiting that clause "to the territory which . . . was within the boundaries [of the United States] as settled by the treaty with Great Britain."[38] Thus, he argued, Congress had no express constitutional authority to legislate in respect of subsequently acquired territories.

He then purported to discover an "unquestionable" congressional power to govern territories "as the inevitable consequence of the right to acquire territory."[39] That implied power, however, did not include the power to deprive slaveowning citizens resident in such territory of their "property in a slave," because such property was as fully protected under the Fifth Amendment "against the encroachments of the Government" as any other property.[40] Congress therefore lacked the power to prohibit slavery in Upper Louisiana.

Scott's Illinois Residence

Taney dealt swiftly with Scott's claim of citizenship based on his residence at Rock Island in the free state of Illinois. Citing *Strader*, he ruled that "the Circuit Court of the United States had no jurisdiction when, by the laws of the State [of Missouri], the plaintiff was a slave and not a citizen." Since Scott was "not a citizen of Missouri in the sense in which that word is used in the Constitution, . . . the Circuit Court of the United States . . . had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction."[41]

A bare majority of the Court agreed that the prohibition of slavery in portions of the Louisiana Territory was unconstitutional. Justice Daniel argued (pp. 490-92) that the territories were the common property of all citizens, including slaveholders, and that Congress therefore lacked the power to prohibit slavery in any of the territories. Justice Grier agreed that the prohibition of slavery in Upper Louisiana was void and that Scott was still a slave and therefore lacked standing to sue (p. 469). Justice Wayne concurred completely with the Chief Justice (p. 454). Justice Catron agreed that Congress could not prohibit slavery in the Louisiana Territory (pp. 526-28), but insisted that Sanford had waived his plea to the Circuit Court's jurisdiction and that consequently there was "nothing in controversy here but the merits" (p. 519).

Justices Campbell and Nelson avoided both the constitutional question and the jurisdictional issue. Campbell held that Scott had never become domiciled in either Upper Louisiana or Illinois and therefore could not claim manumission under the laws of either jurisdiction. Nelson limited his opinion to the *Strader* precedent. Only Justices Curtis (p. 633) and McLean (pp. 538-47) voted to uphold the Act.

What, then, of Taney's argument that Scott lacked standing to sue because he had not been freed by his residence in Upper Louisiana, therefore remained a slave, and therefore was not a citizen and could not sue in a federal court? Taney, Daniel, Grier, Wayne and Campbell so held – the first four on constitutional grounds and the fifth for lack of domicile. Thus one of Taney's five votes on the constitutional issue denied

that it deprived Scott of standing, and one of his five votes on standing declined to commit on the constitutional issue.

Justice Curtis protested vigorously that the majority, ". . . (h)aving first decided . . . that this is a case to which the judicial power of the United States does not extend . . [but we] have gone on to examine the merits of the case . . . [and in particular] the question of the power of Congress to pass the [Missouri Compromise Act] . . . such an exertion of the judicial power transcends the limits of the authority of the court."[42]

But, as we have seen, only two of Taney's colleagues agreed that the Circuit Court had erred in sustaining Scott's demurrer to Sanford's plea to the jurisdiction. Taney confused the situation by casting his whole opinion as an inquiry into Scott's standing to sue, but Justice Catron was closer to the truth when he commented that there was "nothing in controversy here but the merits."

Curtis' position also presented the paradox that, whereas the majority could not properly consider the merits, he could: "But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits should stand or be reversed" (pp. 589-90).

Taney's critical error, however, lay in his examining only the question whether Scott had been manumitted by reason

Chief Justice Taney penned one of seven separate majority opinions in the *Dred Scott* case—a case termed by one eminent historian a "a gross abuse of trust."

of his residence in Upper Louisiana and ignoring his claim that he also had been manumitted by his residence in Wisconsin territory. At the very time Dr. Emerson brought Scott to Fort Snelling, the fort and all the surrounding territory on both sides of the Mississippi river were organized into the Territory of Wisconsin. Although Scott alleged residence in both territories, the facts clearly showed that he had spent at most only a few days in Upper Louisiana, and that his principal place of residence in free territory had been Wisconsin. According to the truncated recital in the agreed statement of facts, he lived in Wisconsin Territory for over two years, from or shortly after its incorporation April 20, 1836 until late 1838, including the months Dr. Emerson was posted elsewhere. He actually spent an additional two years, from his return with Dr. Emerson in late 1838 until the Doctor's reposting for Seminole War service in 1840. His claim therefore turned on the prohibition against slavery provisions of the Wisconsin Territory Act, not the exclusion of slavery provisions of the Missouri Compromise Act.

A proper analysis of the territories question *as stated by Taney* thus required consideration of the prohibition against slavery clauses of the Wisconsin Territories Act. That Act incorporated by reference the prohibition against slavery and involuntary servitude set forth in the Northwest Ordinance, both directly, by express reference to the Ordinance, and indirectly, by reference to the laws of Michigan, which in turn incorporated the laws of the Michigan Territory, which in turn incorporated the Northwest Ordinance.[43] Both prohibitions derived directly from the Ordinance, and therefore were unaffected by the rationale Taney fashioned to defeat the Missouri Compromise.

Taney's unexplained – perhaps inexplicable – failure to address Scott's residence in Wisconsin territory fatally undermines his constitutional ruling. If Scott was a free man under Wisconsin territorial law he had standing to sue Sanford unless, under *Strader*, Missouri could ignore his Wisconsin manumission. Either way the Missouri Compromise Act was irrelevant. If the Court required Missouri to honor his Wisconsin manumission, his claim that he also had been manumitted under the Act would be superfluous; if the Court agreed that *Strader* permitted Missouri to ignore his Wisconsin manumission, his claimed manumission under the Act likewise could be ignored. Thus at bottom Justice Curtis' criticism was correct: by causing the Court to rule on the constitutionality of the Missouri Compromise Act, Taney carried the Court beyond the requirements of the case, and thus exceeded its mandate.

Curtis disagreed sharply with Taney's holding that the Constitution did not empower Congress to regulate slavery in the territories. He cited Chief Justice Marshall for the proposition that, "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty."[44] Taney's argument that the constitutional provision authorizing Congress to legislate for the territories applied only to the

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Photo Courtesy of Orazio Micelli

The U. S. Courthouse in Newark, New Jersey was the location of a special event cosponsored by the Supreme Court Historical Society and the Historical Society of the U.S. District Court for the District of New Jersey.

Dr. O'Hara's subject, Justice William J. Brennan, Jr., was born and raised in New Jersey and many of those present in the audience had known him personally, prior to his appointment to the Supreme Court Bench in 1956. The lecture considered Justice Brennan from an historical perspective, rather than through the traditional biographical approach. It was an insightful and thought-provoking presentation. Two of Justice Brennan's former clerks, Clyde Szuch and Dan O'Hern, (now a Justice on the Supreme Court of the State of New Jersey), were present.

This symposium was also extremely successful. It is the goal of Society program activities to expand the outreach of our educational endeavors. To that end, efforts will be increased to develop events with local or regional historical societies and similar groups to bring increased educational programming to areas outside the Washington, DC area. Please contact the Society's staff members if you are interested in hosting and assisting in your area of the country.

WHAT MAKES A GREAT JUSTICE: WILLIAM J. BRENNAN, JR.

*By James B. O'Hara**

For an outsider like me, it is a little intimidating to stand before a group of New Jersey judges and lawyers to discuss the work of Justice Brennan. He was, after all, one of you. I did not know in advance, but I am not surprised, that two of his former clerks are here. I did not know in advance, but am not surprised, that his portrait looks down from the wall of this Courtroom, checking on my words.

He was born here, on New Street. He grew up here, in Vailsburg. He went to Barringer High School. Your grandparents and great grandparents cast their ballots for his father when his father ran for public office. Some of your families knew his family. The Brennans typified Newark. They were a family of immigrant background which became, in two generations, an integral part of the political, social, cultural life of New Jersey.

Almost everyone in this room is from the legal community. You already know the work of Justice Brennan as a Superior Court Judge, or of his later cases in the Appellate Division, or later yet, in the Supreme Court of New Jersey, even before his appointment as Associate Justice of the Supreme Court of the United States. So today I will not even attempt to add to your knowledge of the facts about Justice Brennan, nor will I discuss representative cases in which he took part. Another approach, perhaps, is more appropriate.

In 1950, the eminent legal historian Charles Fairman of Stanford University delivered the prestigious Bacon Lecture at Boston University Law School, and his topic was a question: "What makes a great Justice?"

Fairman answered his own question by postulating a series of temperamental traits, of technical skills, of psychological insights which, combined, would give the raw material for greatness in a judge. To this would have to be added that being on the right court at the right time with the right cases helps a lot. (Although as an aside, someone once asked: "How did it happen that Judge Cardozo got the most interesting cases?" The reply, of course, was that the cases were not all that interesting until Judge Cardozo got finished with them.)

In Fairman's lecture, the characteristics of greatness were demonstrated not by a review of the life and work of John Marshall, or Joseph Story, or Oliver Wendell Holmes,Jr. or Cardozo, or Brandeis, but rather by application to a relatively obscure and now mostly forgotten, surely neglected, 19th Century Justice from, of all places, Newark, New Jersey. His name was Joseph P. Bradley.

Fairman went on to say that these traits to be expected in a great jurist were exemplified in the life of Justice Bradley. And he included among the traits the following:

First, integrity—A "fundamental honesty in dealing with the facts and the evidence of a case;"

Second, clarity of conception—An ability to "find the main point, the controlling questions." Fairman analogizes that these are like "diagnosis to the doctor" and he equates it with what Oliver Wendell Holmes called a certain "instinct for the legal jugular;"

The career of Justice Joseph P. Bradley was the subject of a talk given by Charles Fariman in 1950, and formed the basis of Professor O'Hara's lecture on Justice Brennan.

Third, experience—Fairman notes that any great judge must have a "broad working knowledge" of the ways practical lawyers do things, and he or she must have an acquaintance with the practices of business. And all this must be coupled with a "scholarly interest in fields of law even remote from the common lawyers' practice." This experience will lead, he said, to a "capacity for original thought" which arises not from stabs in the dark, but from an insider's ability to put pieces of a puzzle together;

Fourth, a great judge must have a sense of proportion. Some might call this common sense. Fairman says it involves reaching a sane conclusion in situations where there are undoubted values on both sides;

Fifth, a sense of national authority. The 19th century saw far too many judges who thought like northerners or southerners. An ability to step out of one's geographical, political and cultural environment provides an important context for constitutional debate and constitutional decision. "Remember," John Marshall said, "it is a constitution we are expounding;"

Sixth, Fairman insists that a great judge is "watchful" always for the constitutional rights of citizens and alert to "any stealthy encroachment thereon;"

Seventh, the great Justice has a "courteous attitude toward *stare decisis*." There is a willingness to overturn but only with great respect, and even reverence, for the legal past.

A final trait of a great Justice is a sense of serenity. There is an ability to step back from the passions of litigants, of politics, or even the passions of an era, and to look at what is to be judged with a calm perspective that rises above all the smoke and all the noise. This does not mean that a good judge does not have passion, but he or she looks well at the causes to which passion will be committed.

As we look at the professor's list, we probably think that our own list might be a little different. In talking about Justice Brennan, I will not judge him by Fairman's standards alone. Professor Fairman delivered his lecture in three segments over three days and was able therefore to flesh out his observances at considerable length and with a deft amount of nuance and shading. In order to consider Justice Brennan's career in a comparable way, we would have to continue tomorrow and the day after that, and the day after that, and the day after that.

Still it is useful to re-ask the question: "What makes a great Justice?" And to re-answer it, but this time with our own criteria, looking at William J. Brennan, Jr. for some tentative parallels. My own list has only five criteria.

Before any questions arise about ability or character traits, a great Justice must have— and I hate to say it, but it is true—longevity. However intelligent, however able, no judge can significantly influence the course of the law after only a few years on the bench. John Quincy Adams once appointed a Justice to the Supreme Court named Robert Trimble, a man of extraordinary ability, but he died after only two years, and his contributions to the Supreme Court and to the constitutional life of our nation are insignificant.

Justice Brennan sat on our highest court for 34 years, nearly a sixth of the Court's total life. He shared the bench with 22 Justices, almost a quarter of the 106 Justices. He wrote 1,360 opinions: 461 decisions of the Court, 425 dissents, 474 other opinions, mostly concurrences and dissents from certiorari decisions.

He was a Justice through the presidencies of Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan and the first Bush.

His decisions touched every phase of modern legal life: free speech, flag-burning, freedom of the press, obscenity, freedom of association, freedom of religion, abortion and reproduction rights, criminal justice, the death penalty, police misconduct, gender equality, zoning, one person/one vote, welfare reform, administrative law, the role of the judiciary, standing, jurisdiction and federalism.

On each of these issues there is a recognizable, distinct, well-reasoned, well-written Brennan point of view. As Justice Souter, who took Brennan's seat on the Court, puts it: "the sheer number, the mass of opinions" guarantees Justice Brennan a place in legal history and a role in future decisions that ranks him with Marshall, with Story, with Holmes, with Brandeis, with Black, with Frankfurter.

A second trait on my list is intelligence. Brennan was from his youth a good student. At the University of Pennsylvania he was near the top of his class. At Harvard Law School he got good grades, although he was not a star and was barely noticed by one of his professors who had an eye for a certain

Collection of the Supreme Court of the United States

Justice Brennan waves upon his arrival in the garage of the Supreme Court on his first day as a member of the Court.

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Library of Congress

Felix Frankfurter was an instructor at Harvard when Bill Brennan was a student. Later they would serve together on the Supreme Court of the United States.

kind of flashy brightness which Brennan never had and never, frankly, wanted. He later joked about that professor, Felix Frankfurter. Frankfurter always wanted his students to think independently, but he liked it best if they thought independently and arrived at Frankfurter's conclusions. The professor apparently thought that Brennan had learned the lesson of independence too well.

Brennan and Frankfurter served on the Court together but they surely did not think alike. Frankfurter always had an eye for the particular, for detail, for procedural niceties. Brennan's look was more global. He saw things in relation to one another. He saw one area of law as it dealt with another. He looked at the sweep of things, he looked at trend, he looked at developments. It is not surprising that on important and controversial issues, the teacher often went one way and the student often went another.

Brennan's whole career is evidence of this intellectual mastery. He enlisted in the Army at the beginning of World War II and left it as a full colonel. He began as an associate at one of New Jersey's most prestigious and venerable law firms, and rapidly became a name partner. He served only briefly as a trial and appellate judge before being raised to the State Supreme Court, and then joined the United States Supreme Court at what is for a Justice a very young age of 50.

His time on that Court gives ample evidence of the broad, vast knowledge that he had. Brennan was not a bookish intellectual; indeed, intellectuals play bridge, he played poker. And his intelligence tended to be pragmatic, more practical than theoretical.

A third of my characteristics is <u>independence</u>. Justice Brennan was never dominated by his teacher Frankfurter, in Washington, neither was he dominated by the legendary Chief Justice Vanderbilt in Trenton. Indeed, it was this freedom from domination by others that first attracted Vanderbilt to Brennan, and that first attracted Eisenhower's Attorney General Herbert Brownell to him.

On the Warren Court, he quickly joined the liberal block. But Brennan was never a follower. His jurisprudence was more scholarly than Warren's and he frequently found himself on a different side of the issue from the genial Chief Justice. His liberalism was sharply different from that of Black, and infinitely better informed than that of Douglas.

He sympathized with the views of Thurgood Marshall, and he recognized the special legal talents and insights of Arthur Goldberg and Abe Fortas; but he led, he did not follow.

A fourth criteria for judicial greatness, I think, is a <u>point of view</u>, a judicial philosophy that is coherent, that is logical, that is sane. At the time of his retirement, and again at his death, there was considerable discussion of Brennan's philosophy. Much of that discussion centered on what the uninitiated would call his liberalism. Liberals praised him for his liberal conclusions, and conservatives condemned him for his liberal conclusions.

Passing over the question of whether the terms "liberal" or "conservative" can accurately be applied to the career of a judge—and I think they cannot easily be—they do have a certain usefulness. But William Brennan was not a great Justice only because he was a liberal, or even chiefly because he was a liberal. There have been great conservative Justices, too. John Marshall Harlan comes to mind, Robert Jackson,

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Justice Brennan's 34-year tenure on the Bench included service with some 22 Justices. Shown here are: (left to right front row; Tom C. Clark, Hugo L. Black, Earl Warren and William O. Douglas; (left to right back row; Byron F. White, Brennan, Potter Stewart, and Arthur Goldberg.

and even Felix Frankfurter. And there have been liberal Justices who surely would not be called great by any really accurate historian.

Brennan's greatness comes from his insight, from his instinct, from his probing ability to see precisely what is at stake in a case, from the capacity to think things out in a way that has vision and which does not overstate the point of view that future generations are stuck with it instead of being led by it.

William Brennan was a craftsman of the law. Writing clearly and well did not always come easily to him. He did not dash his opinions off. He labored. He sometimes wrote and rewrote and rewrote again, and he did all of this while he was personally reading virtually every request for certiorari that came to the Court in the 34 years he was there.

His philosophy was straightforward: He believed that every legal wrong had a legal remedy. He believed that access to the courts was the best safeguard that a free people could have. His standards for justiciability, for standing, for jurisdiction were the broadest ever held by a Supreme Court Justice, except perhaps for Justice Story, who it was said would find federal jurisdiction under admiralty law if a child was playing with a toy boat in a tub within 50 feet of the alleged violation. But Brennan was also sane. What so exasperated his critics was that he always seemed to find a precedent appropriate to the point. His memory was retentive and global and his reasoning was comprehensive.

Finally, a great Justice must have an ability to <u>persuade and convince</u>. Every account of Brennan's association with his colleagues notes his pixie-like charm, the gleam in his eye, the easy smile, the elfin wit. Everybody was called "pal."

When another Justice was having difficulty with an opinion, Brennan would suggest some way out of the problem. And no one knows how many times an opinion was issued in the name of another Justice when Brennan actually wrote it.

He looked for consensus, unlike some of his colleagues.

Historical Society of the US District Court for the District of New Jersey

Judge James B. O'Hara delivered this talk on Justice Brennan in the Courthouse in Newark, New Jersey.

Collection of the Supreme Court of the United States

Photographer Ken Heinen took Justice Brennan's last official portrait a few years before the end of his 35-year career on the Court.

He sought coalitions, or as Justice Souter put it in his remarks at Brennan's funeral: "When I was with him he might tell me some things that were true like how a justice is supposed to know how to count to five."

It is a mark of Brennan's unusual talent to get along that the three appointments of this Democrat to state judgeships were from a Republican Governor, Alfred E. Driscoll, and his appointment to the Supreme Court was at the hands of a Republican President, Dwight D. Eisenhower, who, by the way, never said that he made two mistakes, and both were sitting on the Supreme Court.

Brennan's ability to persuade his colleagues is coupled with his exceptional ability to use the right language in his opinions to convince his readers. Even a reader whose own philosophy takes him on a road quite different from the Justice's will find his argument lucid, vigorous, robust. He writes clearly, carefully, sometimes elegantly, always forcefully. And the words chosen always seem precisely right, leading to a conclusion that seems, after you've read him, inescapable.

So there you have it. A Supreme Court Justice who was intelligent, independent, with a distinct judicial philosophy uniquely his own, with a powerful ability to persuade and convince; a Justice who served so long that he has powerfully shaped the course of American law.

Was he a great Justice?

The answer is not difficult. Of course he was.

Conscientious Conservative continued from page 7

territory then possessed by the United States therefore was wrong. The Constitution gives Congress the power to make "all needful rules and regulations" respecting any territory belonging to the United States. Taney's trimming away of inconvenient portions of the Territories Clause therefore could not stand.

As regards Taney's argument that equal treatment demanded that slave owners be accorded the same right as other citizens "to go with their property upon the public domain,"[45] and that Congress therefore had no power to deprive slave owners of any benefits which might accrue from owning slave property, he argued that the Embargo Act of December 22, 1807, which "[laid] an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States," equally had deprived ship owners of important benefits of owning maritime property. Despite this fact, the embargo law never was held unconstitutional. Therefore laws restricting the right of slave owners to enjoy the specific benefit of moving with their slave property to other states or territories likewise were not unconstitutional.

Finally, he pointed out that the language of the Treaty of 1803 between the United States and France for the acquisition of the Louisiana Territory did not restrict the power of Congress to legislate for that territory. The provisions protecting the property and religious rights of the then inhabitants of Louisiana applied only during the period between the execution of the treaty and the organization of the lands thus acquired into states and territories.[46] Moreover treaties are not perpetual: for example, Congress repealed the Revolutionary War treaties with France July 7, 1798.[47]

Curtis concluded that the Constitution empowered Congress to prohibit slavery in any of the territories, and that the Missouri Compromise Act therefore was constitutional.

Curtis offered three additional arguments for rejecting the Missouri Supreme Court's ruling in *Scott v. Emerson*, and suggesting that under Missouri law Scott was a free man. First, as Chief Justice Gamble's dissenting opinion made manifest, the Missouri Supreme Court's decision directly conflicted with that court's well-established body of precedent. Under *Pease v. Peck*[48] "[such a decision] is not necessarily to be taken as the rule" (p. 604).

Second, under *Swift v. Tyson*,[49] in matters involving "principles of universal jurisprudence, this court [is not] bound by the decisions of State courts" (p. 603). The Supreme Court therefore was free to examine independently the question whether Scott's residence on free soil made him a free man under Missouri law.

Third, Dr. Emerson's consent to Dred's and Harriet's marriage by a duly authorized Justice of the Peace in the free territory of Wisconsin emancipated them. In Wisconsin Territory Dred and Harriet had "full capacity to enter into the civil contract of marriage", and "It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted . . . is valid everywhere, and that no technical domicile at the place of the contract is necessary to make it so.

"If, in Missouri, the plaintiff were held to be a slave, the validity and operation of his contract of marriage must be denied. . . . [For] Missouri [to] thus annul a marriage, lawfully contracted by these parties while resident in Wisconsin . . . would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. . . . [T]here can be no more effectual abandonment of the legal rights of a master over his slave than by the consent of the master that the slave should enter into a contract of marriage in a free State, attended by all the civil rights and obligations which belong to that condition. . . . [T])his Court, under the Constitution and laws of the United States, has the rightful authority finally to decide [t]hese questions."[50]

Throughout his dissent Justice Curtis reiterated three themes, all previously articulated in his opinion for the Court in *Cooley v. Philadelphia Port Wardens*:[51] First, to decide only those questions which the case presents; second, to accord great weight to constructions of the Constitution made by those who participated in its framing and adoption; and third, to accept the enactments of Congress unless "in violation of the Constitution."

"We decide the precise question before us, upon what we deem sound principles, applicable to this particular subject. . . . We go no further.

"[In 1789] Congress declared that all pilots in . . . the United States, shall continue to be regulated in conformity with the existing laws of the states . . . this contemporaneous construction of the Constitution . . . is entitled to great weight in determining whether such a law is repugnant to the Constitution . . . [it] manifests the understanding of Congress, at the outset of the government."[52]

Taney's opinion violated all three of these principles. He need never have considered the constitutionality of the Missouri Compromise Act to "decide the precise question" whether Scott was a slave in Missouri and therefore lacked standing to sue Sanford in Federal Court, as Justice Nelson's concurring opinion convincingly demonstrates. His ruling that the Territories Clause did not encompass the Louisiana Territory accorded no weight to Chief Justice Marshall's construction of the clause nearly thirty years previously in the *American Insurance* case.[53] His holding that the Act was unconstitutional ignored its close tracking of the Northwest Ordinance, a contemporaneous construction by Congress of its power under the Territories Clause, and rested on a strained and constricted reading of the Constitution. To all of those excesses Curtis gave a calm, measured and detailed response —a response perhaps made more devastating because it was phrased so dispassionately.

But although his language was measured, Curtis keenly felt the enormous gulf that had opened between him and the majority over the issue of slavery. Under Taney's reasoning, slaveholders could carry their slaves into any of the new territories west of the Mississippi river, and thereby influence and perhaps even control the framing of state constitutions at

In this biting political cartoon circa 1860, Dred Scott plays the tune to which all of the politicans dance. The cartoonist implies that each politican was courting the specific interests of an element of the populace.

such time as the inhabitants sought admission to statehood. His actions suggest that this loss of collegiality on the Court and prospect of additional divisive litigation convinced him that he should leave the Court, and six months after delivering his dissent he submitted his resignation.

**Mr. Downs recently retired from the law firm of Holland and Knight in Atlanta. He is currently associated with the firm of Crowley & Clarida LLP in Atlanta, Georgia.*

The author would like to acknowledge the assistance in the preparation of this article of professors Paul Finkelman and Randall Kennedy who provided assistance by reviewing and critiquing the work article prior to publication.

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[24] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
[25] *Ibid.* at 562, citing *Cutter v. Rae*, 7 How. 729.
[26] *Ibid.* at 589, citing *Livingston v. Story*, 11 Pet. 351.
[27] *Ibid.* at 569. Why Sanford elected the awkward and indirect route of pleading subordinate facts which merely implied that Scott was a slave and therefore not a citizen has never been satisfactorily explained. See, e.g., Fehrenbacher, *Dred Scott*, p. 278; Finkelman, Paul, *An Imperfect Union – Slavery, Federalism and Comity*, University of North Carolina Press, Chapel Hill, North Carolina (1981), p. 275.
[28] *Ibid.* at 404, 407 and 410.
[29] *Ibid.* at 574-75.
[30] *Ibid.* at 582 (emphasis added).
[31] *Ibid.* at 572.
[32] *Ibid.* at 572-73.
[33] *Ibid.* at 575-76.
[34] *Ibid.* at 571.
[35] Moreover, only four Justices – Taney, Wayne, Daniel and Curtis – agreed that Sanford's plea to the Circuit Court's jurisdiction was properly before the Court. Two Justices – Catron and McLean – expressly disagreed, and the remaining three – Nelson, Campbell and Grier – declined to discuss the question.
[36] *Ibid.* at 427-430.
[37] U.S. Constitution, Art. IV, Sec. 3, cl. 2.
[38] *Dred Scott v. Sandford*, 60 U.S. (19 How.) at 432-42.
[39] *Ibid.* at 442-43.
[40] *Ibid.* at 451.
[41] *Ibid.* at 452-54.
[42] *Ibid.* at 589.
[43] *Ibid.* at 592-99.
[44] *Ibid.* at 613, citing *American and Ocean Insur. Co. v. 356 Bales of Cotton* (cited as *American Insur. Co. v. Canter*), 26 U.S. (1 Pet.) 542 (1828).
[45] Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969), holding that a one-year state residency requirement for receipt of state welfare assistance improperly burdened the constitutional right of persons to travel freely from state to state.
[46] Louisiana Treaty, Article 3.
[47] *Dred Scott v. Sandford*, 60 U.S. (19 How.) at 629-30.
[48] 59 U.S. (18 How.) 595 (1856).
[49] 41 U.S. (16 Pet.) 1 (1846).
[50] *Ibid.* at 599-600, 603.
[51] *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).
[52] *Ibid.* at 315 and 320.
[53] *American and Ocean Insur. Co. v. 356 Bales of Cotton* (cited as *American Insurance Company v. Canter*) 542.

OPINION-ASSIGNING BY CHIEF JUSTICES

*By Bennett Boskey**

As time goes on we are presented with multiple opportunities to scrutinize ancient files and to decide what can safely be thrown away. One serious impediment is that unexpected items surface to stir old memories and stimulate autobiographical reflections that can long delay the goal of weeding things out.

A recent episode will illustrate the point. I came upon a letter to me from Chief Justice Burger dated December 5, 1972. I knew Chief Justice Burger slightly, but not well, and this is the only letter he ever sent me. But the background, as I now recall it, may be far more interesting than the letter itself.

Sometime, I think around the spring of 1972, I received a telephone call from my friend Harold Leventhal, who was then a judge on the United States Court of Appeals for the District of Columbia Circuit, where Burger had been his colleague before being elevated to the constitutional position of Chief Justice of the United States. Harold was a predecessor of mine as law clerk to Justice Reed (Harold had been Reed's first clerk, moving with Reed from the Office of Solicitor General, when Reed took his seat in January 1938, and thus having the pleasure of assisting in the preparation of Reed's notable concurring opinion in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 90 (1938). He had also earlier been law clerk to Justice Stone, for whom I had later served as the senior law clerk during Stone's first two terms as Chief Justice). Harold said that Burger had agreed to speak at a ceremony to be held at Columbia University for the Harlan Fiske Stone Centennial, commemorating what would have been Stone's 100th birthday.[1] Burger, probably at Harold's suggestion, thought I might have some comment about Stone that would be useful to him in formulating his remarks, and it would be appreciated if I could write out some short thoughts to be submitted to Burger through Harold.

Rightly or wrongly, I decided it might be helpful to Burger to prompt him into discussing the role of a Chief Justice in assigning opinions in those situations where, as is usually the case, the Chief Justice is in the majority. The practice dates back at least to the time of Chief Justice Taney. I knew how important the wise exercise of this responsibility was to the success of the Court, to the effectiveness of the Chief Justice, and to the ultimate contributions and reputations of the individual Associate Justices.

The leadership role of a Chief Justice has many facets; and a continuing adeptness in the assignment of opinions, though not necessarily visible to outsiders, is a quality of high significance. Accordingly, I prepared a short memorandum. I think about three or four pages, dealing with this subject and illustrating the variety of considerations that could enter into how the Chief Justice went about making the assignments. The memorandum itself has, unaccountably, disappeared from my files (perhaps some future archaeologist will unearth it from the voluminous papers of Chief Justice Burger) but I do remember the three cases I used to develop the topic.

Many factors enter into the assignment of opinions by any Chief Justice. Some are obvious. For example, if an Associate Justice possesses or has developed a special expertise in a particular field, it is to the benefit of the Court, as well as the Justice, that opinions in that field should often tend to gravitate to him or to her. Or the need to get the Court's business done in a timely fashion requires that recognition be given to the fact that some Justices are slow opinion-producers (such as Van Devanter) and some are speedy (such as Holmes or Douglas). Or preliminary differences of views as to how to reach a result may call for the special skills of a particular Justice in mediating toward a consensus. Or again, it may be important to avoid assigning an opinion to a Justice who, either from the Conference or otherwise, is known to have extreme or unduly far-reaching views on the matter in controversy. Moreover, fairness and the need to promote a relatively happy or congenial Court suggest that the opinions in cases which are "dogs" (such as narrow technical federal tax cases which made their way to the Court only because there was a conflict of circuits on a question affecting large numbers of taxpayers nationally) should be distributed in a manner not too uneven.

But there are many other factors, often far less obvious, and unique to a particular case. My memorandum discussed three cases as illustrative.

One of these I knew nothing about first-hand, and I was necessarily operating by reasonable surmise. It was Chief

Harlan Fiske Stone was elevated to the center chair of the Cou in 1941.

In this cartoon Attorney General Cummings is shown speaking to Uncle Sam, who holds a KKK robe. After his confirmation to the Court, it was disclosed that early in his life, Hugo L. Black had belonged to the Ku Klux Klan.

Justice Hughes' assignment to Justice Black of the opinion in *Chambers v. Florida*, 309 U.S. 227 (1940), where the Court unanimously reversed a death-sentence conviction of four ignorant young Negro tenant farmers on the ground that, because of the methods followed by police in extensive interrogation, confessions had been unconstitutionally coerced. It will be recalled that, after Black's confirmation, but before the Court's Term began, it was disclosed that in his past in Alabama he had briefly been a member of the Ku Klux Klan, and this had raised some serious misgivings as to his attitude toward the civil rights of Negroes. It seemed that in assigning the *Chambers* opinion to Black, Hughes had found and wisely used an opportunity to neutralize the still-lingering misgivings about Black and to strengthen the Court in the eyes of the public.[2]

As to the other two cases discussed in my memorandum, I did have first-hand knowledge. This was because it was Chief Justice Stone's practice to meet with me after each Conference of the Court to inform me of the decisions reached at the Conference and to discuss with me what opinion assignments he would make so that the assignment sheet could be promptly delivered to the Associate Justices. He always welcomed my comments, if any, and needless to say, I tended to keep my suggestions on the modest side.

One such case was *Taylor v. Georgia*, (315 U.S. 25 (1942), in which the issue was whether the conviction of a lowly manual laborer under certain provisions of the Georgia statutes violates the prohibition against peonage in the Thirteenth Amendment and in the implementing federal statute. The vote to reverse the conviction, so that the manual laborer would be freed, had been unanimous. The opinion was assigned by Stone to Justice Byrnes, a relatively new member of the Court. He served only a single term, resigning to take up the post, at President Roosevelt's request, of essentially an Assistant President to handle economic affairs during the War). As is well known, Byrnes was a southerner, having most recently served in the U.S. Senate from South Carolina, and was generally looked upon as a conservative (though not the reactionary he ultimately seemed to become after his distinguished service as Secretary of State). It was thought that an opinion from such a source on such a subject would be good for Justice Byrnes' image and good for the Court.

The other opinion assignment discussed in my memorandum involved considerations of an entirely different nature. The case was *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), involving the question of whether Jehovah's Witness children could be compelled at school to salute the flag. Stone had been a dissenting minority of one in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), where the Court upheld the constitutionality of the compulsory flag salute. Meanwhile, in another case, Justices Black, Douglas, and Murphy had, somewhat gratuitously, issued a statement saying they had changed their minds since *Gobitis*,[3] and when in *Barnette* new Justices Jackson and Rutledge also voted with the Stone position it made a majority of six to overrule *Gobitis*. Stone, who found satisfaction whenever one of his previous dissents was about to become law,[4] would have been glad to undertake writing the opinion himself. But in the interests of assuring that the new majority would hold together, and hopefully be able to agree on a single opinion, he felt it more prudent to let the opinion go to Jackson, who did produce an opinion that substantially suited the other five.

So much for a sample of factors that can enter into opinion-assigning. This subject does not seem to get sufficient attention from biographers of the Chief Justices—perhaps in part because the biographer may often feel he has little to go on except speculation, and perhaps in part because the biographer has failed to recognize or does not fully appreciate the importance of the matter in measuring his biographee's performance as Chief Justice.

Thus Swisher's standard life of Taney simply does not

James Byrnes served only one term on the Court, during which time he wrote the opinion in *Taylor v. Georgia*.

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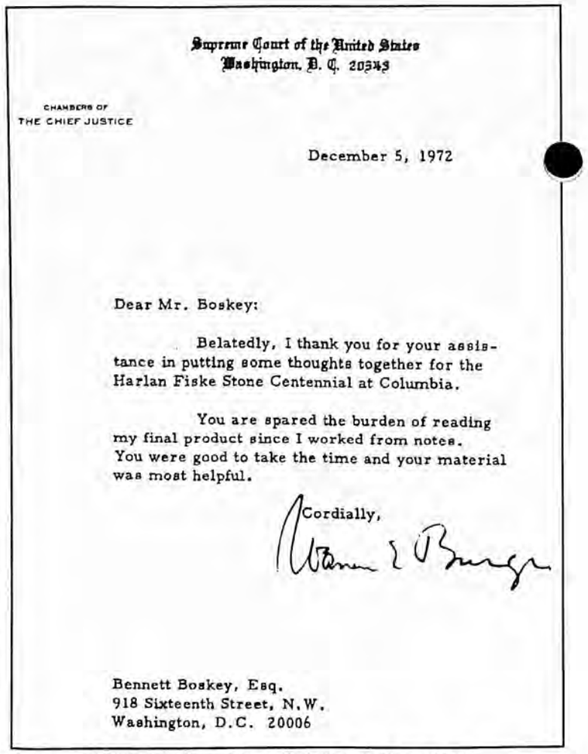
deal with the subject.[5] However, Magrath's biography of Waite does give the matter respectable attention.[6] King's life of Chief Justice Fuller touches the subject only in the barest way.[7] In Pringle's two-volume life of Taft the subject scarcely rises above a whisper.[8] Pusey's excellent though slightly over-adulatory two-volume biography of Hughes has a useful summary on the subject but hardly deals with it in depth.[9] It is evident that Hughes was highly deliberate and thoughtful in carrying out this responsibility; indeed, Justice Frankfurter, in discussing the matter, said "No Chief Justice, I believe, equaled Chief Justice Hughes in the skill and the wisdom and disinterestedness with which he made his assignments."[10] Moreover, Hughes himself, in the 1928 printed version of the lectures on the Court which he delivered during the interim between his service as an Associate Justice and his appointment as Chief Justice, carefully assessed a Chief's assignment role, and added, "It is recognized that he has sole control over the assignment of opinions and his assignments are never questioned."[11]

During the tenure of Hughes' successor as Chief, Harlan F. Stone, the Court developed a certain visible turbulence of its own. Preoccupied with this, Mason's massive biography of Stone[12] hardly treats the matter of Stone's assignment of opinions. I should add that, to the best of my recollection, Mason, in dealing with me (and presumably with others), did not even make any inquiry about the subject. However, Schwartz's full account of the Warren Chief Justiceship deals deliberately and affirmatively with Warren's assignment of opinions.[13] Moving closer to the present, Chief Justice Rehnquist, in his 1987 book on the Court, included a few passages on his own approach to assigning opinions.[14]

This at last brings us back to Chief Justice Burger's letter, which appears on this page. The letter is cordial and kindly, while making the point that the speech he made at Columbia did not have a prepared text. I recently undertook to have the Columbia archives checked to see whether they might possess a tape or a transcript of the Burger remarks; they do not. But there is an extensive report in a Columbia Law School publication of what was said on the occasion.[15] It is clear that Burger referred to a number of interesting topics about Stone. There is not a word relating to a Chief Justice's job in assigning opinions, and in all probability the subject was never mentioned. Accordingly, the overwhelming likelihood is that his letter to me typifies the graciousness which was often characteristic of Warren Burger.

**Mr. Boskey is a member of the District of Columbia and Supreme Court Bars, Treasurer of the American Law Institute, and author of various books and articles relating to the Supreme Court.*



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 5, 1972

Dear Mr. Boskey:

Belatedly, I thank you for your assistance in putting some thoughts together for the Harlan Fiske Stone Centennial at Columbia.

You are spared the burden of reading my final product since I worked from notes. You were good to take the time and your material was most helpful.

Cordially,

Warren E. Burger

Bennett Boskey, Esq.
918 Sixteenth Street, N.W.
Washington, D.C. 20006

A copy of Chief Justice Burger's letter to the author.

[1] Stone's 100th birthday would have been October 11, 1972; the Columbia University commemorative celebration was held on November 28, 1972.

[2] After the issuance of Black's strongly-worded *Chambers* opinion, which was well received in the public print, President Roosevelt suggested at a press conference that the newspapers owed an apology to Justice Black. Gerald T. Dunne, *Hugo Black and the Judicial Revolution*, p. 203 (1977).

[3] *Jones v. Opelika*, 316 U.S. 584, 623 (1942). The case sustained, by a vote of 5-to-4, the conviction of Jehovah's Witnesses for violating the city ordinances declaring it unlawful to sell books or pamphlets within the municipal limits without having obtained a license and paid a license tax. Stone wrote a vigorous dissent joined in by Black, Douglas and Murphy. The decision was overruled on rehearing at the next term, after Justice Rutledge had come to the Court. *Jones v. Opelika*, 319 U.S. 103 (1943), and accompanying cases.

[4] Warner W. Gardner, "Mr. Chief Justice Stone" in 59 *Harvard L. Rev.* 1203, 1208-1209 (1946). Warner W. Gardner, "Harlan Fiske Stone: The View from Below," 22 The Supreme Court Historical Society *Quarterly*, No. 2, 2001, pp. 1, 8.

[5] Carl Bent Swisher, *Roger B. Taney* (1935).

[6] C. Peter Magrath, *Morrison R. Waite: The Triumph of Character*, pp. 258-64 (1963).

[7] Willard L. King, *Melville Weston Fuller, Chief Justice of the United States, 1888-1910*, pp. 142-43, 290-291 (1950).

[8] Henry F. Pringle, *The Life and Times of William Howard Taft*, vol. 2, pp. 961, 968, 1060 (1939).

[9] Merlo J. Pusey, *Charles Evans Hughes*, vol. 2, pp. 678-79 (1951).

[10] Felix Frankfurter, *Of Law and Men* (ed. Philip Elman 1956), reproducing his 1953 informal talk titled "Chief Justices I have Known," p. 137. I have no intention of seeking to track down every reference, in the literature or otherwise, to opinion-assigning by the Chief Justices, but anyone inclined to such a pursuit can find help in John B. Taylor's "Hail to the Chief: A Bibliographical Essay on Six Chief Justices of the United States," in the Society's 1998 *Journal of Supreme Court History*, Vol. 1, pp. 133-65.

[11] Charles Evans Hughes, *The Supreme Court of the United States*, pp. 58-60 (1928).

[12] Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956).

[13] Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court: A Judicial Biography*, pp. 29-30 (1983).

[14] William H. Rehnquist, *The Supreme Court: How It Was, How It Is*, pp. 296-97 (1987). The revised edition, published fourteen years later, leaves these passages substantially unchanged. *The Supreme Court* pp. 259-60 (2001).

[15] Through the good offices of my ALJ colleague and friend Professor Lance Liebman of Columbia Law School, a search was made which turned up this extensive account in *The Columbia Law Alumni Observer*.

DAGUERREOTYPE OF ASSOCIATE JUSTICE PETER V. DANIEL

*By Franz Jantzen, Collections Manager**

In August 2003, the Supreme Court, with the financial assistance of the Supreme Court Historical Society, acquired its first daguerreotype, a 150-year old photograph of Justice Peter V. Daniel. The daguerreotype was taken by an unidentified photographer in the early 1850s, when the Justice was around 70 years old. Prior to its discovery, no photograph of Justice Daniel was known to exist. It is now one of the oldest photographs in the Court's collection of 40,000 historic photographs and prints.

Collection of the Supreme Court of the United States

Justice Daniel was born in 1784 at the Daniel family homestead known as Crow's Nest, near what is now Fritters Corner, Virginia. His early career included service in the Virginia House of Delegates, as Virginia's lieutenant governor, and on the U.S. District Court for Eastern Virginia. In 1841 he was appointed by President Martin van Buren to the Supreme Court of the United States, where he served until his death in 1860. His strong support of agrarianism and a weaker federal government left him at odds with the Court's majority, resulting in Daniel's many dissenting opinions. A devoted Southerner and slaveholder, however, he wrote a vigorous concurring opinion in the landmark case of *Dred Scott* v. *Sandford* (1857).

Daguerreotypes are photographic images on highly polished silver plates and must be viewed at precisely the right angle for their rather magical image to appear clearly. Each daguerreotype is a one-of-a-kind original because no negative is made. The daguerreotype process, named after its French inventor Louis Jacques Mandé Daguerre, was purchased by the French government in 1839. The invention was thought to be so significant that the French allowed it to be published worldwide. This decision spurred the spread of photography around the world and by the mid-1840s every major town in the United States had at least one daguerrian gallery. By 1860, however, other photographic processes had improved and the era of daguerreotypes ended.

The discovery of the Daniel daguerreotype places him in a very small group of Justices who are known to have been photographed by this method. The others are Justices Joseph Story, John McLean, James Moore Wayne, Stanley Matthews and Levi Woodbury, and Chief Justices Roger B. Taney and Salmon P. Chase. The Curator's Office staff continues to seek daguerreotypes of Justices to learn more about these early photographic images.

**Franz Jantzen has managed the Supreme Court's Photograph & Print Collection since 1992. He is also an active photographer and artist, and is currently working on a series of night-time photographs of a fictional Ohio county.*

WANTED

In the interest of preserving the valuable history of the highest court, The Supreme Court Historical Society would like to locate persons who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature and any other materials related to the history of the Court and its members. These items are often used in exhibits by the Court Curator's Office. If any of our members, or others, have anything they would care to share with us, please contact the Acquisitions Committee at the Society's headquarters, 224 East Capitol Street, N.E., Washington, D.C. 20003 or call (202) 543-0400. Donations to the Acquisitions fund would be welcomed. You may also reach the Society through its website at www.supremecourthistory.org.

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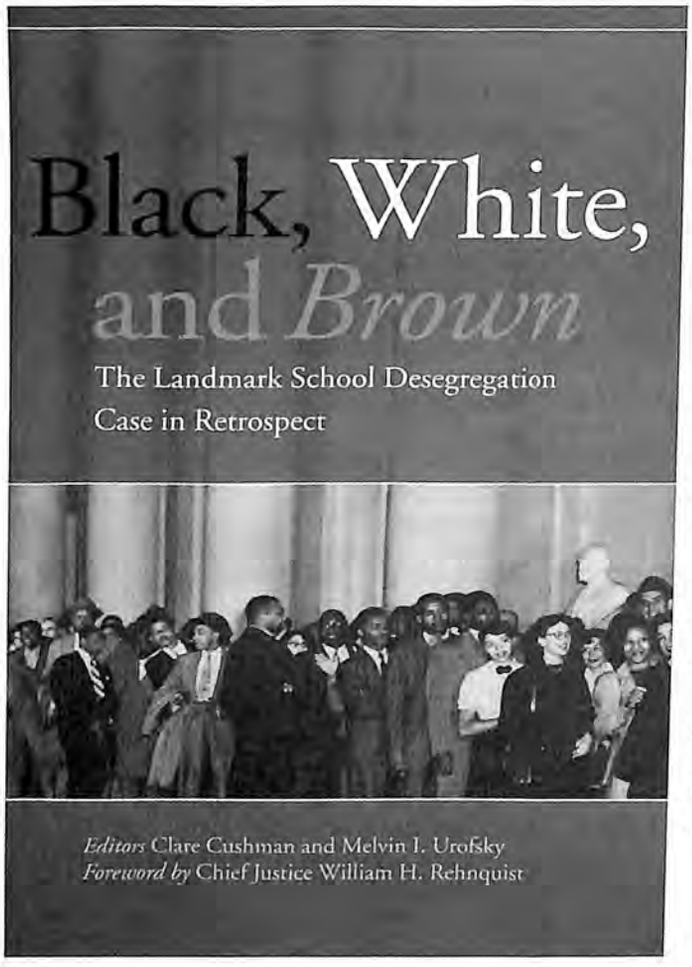

Black, White, and Brown: The Landmark School Desegregation Case in Retrospect, edited by Clare Cushman and Melvin I. Urofsky, has just been published to commemorate the 50th anniversary of *Brown v. Board of Education*, which was handed down on May 17, 1954. On that historic day, Chief Justice Earl Warren announced that the separate-but-equal doctrine, which had permitted racial segregation in all realms of our nation's public life since *Plessy V. Ferguson (189* was no longer valid. "Separate educational facilities are inherently unequal," ruled the Court unanimously, marking the beginning of a long, hard road to desegregating our nation's schools.

The essays collected in this volume trace the history of African-American rights and race relations before *Brown* and explore the decision's immediate and long-term impact. The role that the lawsuit played in the lives of the plaintiffs, advocates, Justices and law clerks, is also highlighted in individual essays. Other essays describe the challenges of enforcing *Brown* and examine how public and scholarly opinions about the case have changed over the last half-century. For educators, the book offers an essay outlining the best approaches to teaching the case in the classroom. This volume includes a bibliographic essay and nine pages of illustrations.

Current members of the Society should have already received a personal copy of the Society's latest publication, *Black, White, and Brown* (see President's letter on page 2 of this magazine). You may want to consider purchasing a copy to donate to your favorite student, local high school or college library.

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