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.

Continued on page 8
A Letter from the President

My last letter discussed in considerable detail the apparent support for the campaign to secure sponsorship of a new building for the Society in the Spring of 1974. Copies of the letter have been sent to members of the Society in the first months of this calendar year. Let me mention here one of the most important developments that have taken place in this time period.

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 past several years. He reported at the April 22 meeting that our headquarters building is presently very good condition, and that we are greatly indebted to him for his continued support.

Announcement of the new headquarters project for the Society. I hope that by the time you read this, the bill will have been finally adopted by both houses of Congress and signed by the President.

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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. The book contains a foreword by Chief Justice Rehnquist and a manuscript of the book. It contains a foreword by Chief Justice Rehnquist and a manuscript of the book.

(b) Membership.

I am pleased to report to the Society that the Supreme Court is nearing an all-time high in membership under the leadership of Franklin N. Gruenfeld. The court has now reached about 10,000 members this year. Ten state clubs have reached their individual goals by the end of March 2004. They are: Thomas H. Boyd (Minnesota); Robert A. Gwinn (Washington, D.C.); Douglas J. Blades (New York); John Alvarson (New Hampshire); Thomas S. Kilburn (Oregon); John S. Siffert (New York); Victor F. Battaglia (Delaware); William E. Hayes (Iowa); James Syrgrass (Missouri-West); and John R. Shaub (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.

(c) Conclusion.

In November, we will celebrate the 30th anniversary of the Society. It is my pleasure to announce that Robert 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.

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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 the free state of Illinois 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."

Justice Curtis' dissent specifically rebutted Taney's race and ancestry argument, presented a combined response to his rejection of the Circuit Court's jurisdiction, and accepted Scott's Negro ancestry as disqualifying him from being a Missouri citizen. He examined the plea minutely, and concluded that "[w]as a special traverse of the plaintiff's allegation of citizenship on the facts stated in the plea as grounds for the traverse absolutely disapproved by the Circuit Court." He believed that Scott's Negro race and slave ancestry precluded his claiming Missouri citizenship for purposes of asserting Article III diversity jurisdiction. Curtis argued that "the rights of citizenship which a State may confer within its limits" were not to be conflated with "the rights of citizenship as a member of the Union" (p. 405); that "neither the class of persons who had been impressed as slaves nor their descendants, whether they had become free or not," were "citizens of the several States when the Constitution was adopted" (p. 405). Moreover, under Strader the Court need not even notice: 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. Curtis therefore failed in his effort to write into law the extraordinary proposition that neither slaves nor their offspring could ever become citizens. What to do next? The class of persons upon whom the Court had been retained 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 in the proposition that "[i]t is not to be assumed that the Court had before it any case in which a [slave] had appealed from the adverse Missouri Supreme Court decision] the writ of habeas corpus would have been dismissed for want of jurisdiction in this court." 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."

Alternatively, Taney argued (p. 405) that, even if some states accepted certain 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 agreed with 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 Constitution." 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."}

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 inconsistencies; . . . 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 endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts.

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Conscientious Conservative continued from page 5

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 Circuit 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 not a citizen."

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 in the Circuit Court. 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).

Taney thus required consideration of the prohibition against slavery in both territories. He held that Scott lacked standing to sue because he had failed to show his residence in Upper Louisiana, therefore a majority of the Court ruled that he had no standing to sue Sanford. Justice Curtis protested vigorously that the majority, " having first decided...that this is a case to which the judicial power of the United States does not extend...[and we] have gone on to examine the merits of the case...[and] on the question of the power of Congress to pass the Missouri Compromise Act...[such an exercise of the judicial power transcends the limits of the authority of the court]."

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

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Taney's critical error, however, lay in his examining only the question whether Scott had been manumitted by reason 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 least 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 Territory Act. That Act incorporated by reference the prohibition against slavery that by express reference to the Ordinance, and indirectly, by reference to the laws of Michigan, which in turn incorporated the laws of the Mississippi Territory, which in turn incorporated the Northwest Ordinance. Both prohibitions derived directly from the Ordinance, and therefore were unaffected by the rationale Taney fashioned to defeat the Missouri Compromise Act.

Taney's unexplained—perhaps inexcusable—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 United States, for the purpose of making war and of adopting any measures for the general safety of the community, the exclusive legislative authority over the acquired territories." Either interpretation would be unconstitutional. The Constitution did not empower Congress to regulate slavery in the territories.

Curtis' argument that the constitutional provision authorizing Congress to legislate for the territories applied only to the

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Continued from page 1

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 insightful and thought-provoking presentation. Two of Justice Brennan’s former clerks, Clyde Szuch and Dan O’Hara, (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.

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, searching us out.

He was born here, on New Street. He grew up here, in Vaileburg. 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, “Why 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, 19th Century Justice from, of all places, Newark, New Jersey. His name was Joseph P. Bradley.

Fairman went on to say that these traits are 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 analyzes that these are like “diagnosis to the doctor” and he equates it with the philosophy of Oliver Wendell Holmes called a certain “instinct” for the legal jugular.

Third, experience—Fairman notes that any great judge must have a “broad working knowledge” of the ways practical people must work, and he 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 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 being 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” guarantee 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 type 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 his 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, privacy, 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” guarantee 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.

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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 independence. Justice Brennan was never-dominated by his teacher Frankfurter, a 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 criterion for judicial greatness, I think, is a point of view, 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” could 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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territory then possessed by the United States therefore was
Conscientious Conservative continued from page 7
tional law, settled beyond controversy in England and
marriage by a duly authorized Justice of the Peace in the free
under Missouri law.
conflicted with that court's well-established body of prece
suggesting that under Missouri law Scott was a free man.
Missouri Compromise Act therefore was constitutional.
mandated that slave owners be accorded the same right as other
citizens "to go with their property upon the public domain,"^3
execution of the treaty and the organization of the lands thus
restricted the right of slave owners to enjoy the specific ben
benefit of moving with their slave property to other states or ter
ritories likewise were not unconstitutional.
Finally, he pointed out that the language of the Treaty of
1803 between the United States and France for the acquisi
tion of the Louisiana Territory did not restrict the power of
Congress to legislate for that territory. The provisions pro
tecting the property and religious rights of the then inhabi
nants 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. Moreover treaties are
not perpetual: for example, Congress repealed the Revolu
tionary War treaties with France July 7, 1798.135
Curtis concluded that the Constitution empowered Con
gress to prohibit slavery in any of the territories, and that the
Missouri Compromise itself 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 prece
dent. Under Peck v. Peck136 ["such a decision] is not neces
sarily to be taken as the rule." (p. 604).
Second, under Dred Scott, in matters involving "pri
inciples of universal jurisprudence, this court is not bound
by the decisions of State courts" (p. 603). The Supreme Court
did not have 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 (without reference to Wisconsin Ter
ritory), and his "full capacity to enter into the civil contract
of marriage", and "It is a principle of interna
tional 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 techni
cal domicile at the place of the contract is necessary to make it
valid."
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, . .
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 mar
riage in a free State, attended by all the civil rights and obli
gations which belong to that condition. . . . [T]his Court,
in the Constitution and the laws of the United States, has the
rightful authority finally to decide [these questions].138
Throughout his dissent Justice Curtis reiterated three
themes, all previously articulated in his opinion for the Court
in Cooley v. Philadelphia Port Wardens139 First, to decide
only those questions which the case presents; second, to ac
cord great weight to constructions of the Constitution made
by those who participated in framing and adoption; and
third, to accept the enactments of Congress unless "in viola
tion 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."
If 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 Con
stitution . . . it manifests the understanding of Congress, at
the outset of the government.140
Mr. Dumas recently retired from the law firm of Hol
land 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.

^59 U.S. (18 How.) 595 (1856).
^Ibid. at 425-30.
^Ibid. at 442-43.
^Ibid. at 451.
^Ibid. at 452-54.
^589.
^199.
^Ibid. at 613, citing American and Ocean Insur. Co. v. 356 Bales of Cotton
^59 U.S. (18 How.) 595 (1856).
^Ibid. at 452-54.
^Ibid. at 451.
^Ibid. at 425-30.
^59 U.S. (18 How.) 595 (1856).
^Ibid. at 589.
^Ibid. at 571.
^Ibid. at 572-73.
^Ibid. at 576-78.
^Ibid. at 576-78.
^Ibid. at 575-76.
^Ibid. at 575-76.
^Ibid. at 576-78.
^Ibid. at 575-76.
As time goes on we are presented with multiple opportunities to examine an ancient achievement of the Court with safety to our posterity. 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.

Sometimes, 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, where Reed took his seat in January 1938, and thus having the pleasure of assisting in the preparation of Reed's notorious 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. Burger, probably at Harold's suggestion, thought he 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 Burgess 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.
Opinion-Assigning continued from page 15
deal with the subject. However, Magrath's biography of Waite does give the matter respectable attention. King's life of Chief Justice Fuller touches the subject only in the barest way. In Pringle's two-volume life of Taft the subject scarcely rises above a whisper. 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. 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." 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.

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 hardly touches the matter of Chief's assignment opinions. I should add that, to the best of my recollection, Mason, in dealing with (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. 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.*

This at last brings us back to Chief Justice Burger's letter, which appears on this page. The letter is cordial and candid, while making the point that the speech he made at Columbia had not a prepared text. I recently undertook to have the Columbia archives checked to see whether they might possess a tape recording 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. 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 signifies the graciousness which was often characteristic of Justice Stone's approach to the Supreme Court.

*Mr. Boskey is a member of the District of Columbia Court of Appeals. He is an active photographer and artist, and is currently working on a series of night-time photographs of a fictional Ohio county.

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

In August 2003, the Supreme Court, with the financial assistance of the Supreme Court Historical Society, acquired the 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 daguerreotype of Justice Daniel had been located. Now the Supreme Court, with the financial assistance of the Supreme Court Historical Society, has acquired a daguerreotype of Justice Daniel, which was taken by an unidentified photographer in the early 1850s. The daguerreotype was discovered in the collection of the Supreme Court of the United States, where it was stored until 2003.

Justice Daniel was born in 1784 in 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.

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 government immediately declared it unlawful to sell books or pamphlets within the municipal limits without having obtained a license and paid a license tax. There was a vigorous debate on the issue, and ultimately, the matter was declared unconstitutional in the 1854 case of United States v. Stevens.

The Supreme Court's acquisition of Justice Daniel's daguerreotype is the latest in a series of night-time photographs of a fictional Ohio county. 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 Acquisition fund would be welcomed. You may also reach the Society through its website at www.supremecourthistory.org.

**Franz Jantzen has managed the Supreme Court's Acquisitions Committee 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.
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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 (1896) 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.

Regular Price: $19.95
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