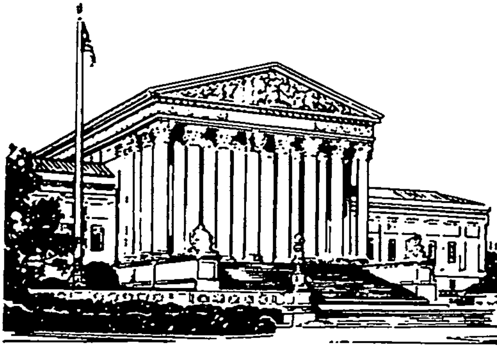

THE SUPREME COURT
HISTORICAL SOCIETY

Quarterly

VOLUME VI NUMBER 4, 1984

Membership Committee Appoints State Chairmen As Part of National Membership Drive

At the October meeting of the Executive Committee, Justin Stanley of Chicago, the chairman of the Membership Committee, as well as a member of the Board and the Executive Committee, reported on a plan that he had developed to increase the membership of the Society. At the present time, nearly two-thirds of the revenues of the Society consist of gifts, grants and the net proceeds from the sale of commemorative items. Membership receipts amount to only one-third of the Society's annual revenues. Under the plan developed by Mr. Stanley, a nationwide campaign to increase the Society's membership would be conducted, headed by a state chairman in each state.

The Executive Committee approved Mr. Stanley's plan and appointed a membership committee consisting of Justin Stanley, Judge Griffin Bell of Atlanta and J. Roderick Heller III, Esq. of Washington, D.C.

State chairmen for the membership drive are now being selected by the membership committee and plans are being made for a dinner meeting in Washington, D.C. at which each state chairman will report on the results of the campaign in that state. The state chairmen selected at the time this *Quarterly* went to press include:

Arkansas — **Herschel H. Friday, Esq.**
Friday, Eldridge & Clark
First National Bldg.
20th Floor
Little Rock, AR 72201

Colorado — **L. Richard Freese, Jr., Esq.**
Davis, Graham & Stubbs
2600 Colorado Natl. Bldg.
950 17th Street
Denver, CO 80201

Dist. of Columbia — **John W. Vardaman, Jr., Esq.**
Williams & Connolly
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Florida — **William Reece Smith, Jr., Esq.**
Carlton, Fields, Ward, Emmanuel & Cutler
P.O. Box 3239
Tampa, FL 33601

Georgia — **Frank C. Jones, Esq.**
King & Spaulding
2500 Trust Company Tower
Atlanta, GA 30303

Idaho — **Eugene C. Thomas, Esq.**
Moffatt, Thomas, Barrett & Blanton
300 First Security Bank Bldg.
Boise, ID 83702

—continued on page six

Date Set for 1985 Annual Meeting

The Society's Executive Committee has approved Monday, May 13, 1985 as the date for the Society's next Annual Meeting. Formal invitations will be sent to the membership between 30 and 45 days preceding the meeting as required by the Society's by-laws. No response is required of those members who wish to attend only the annual lecture and membership meeting. Members who wish to attend the annual reception and dinner should return their reservation forms with payment promptly to assure acceptance. The limited seating capacity of the Court's Great Hall necessitates that reservations be accepted in the order of their receipt. No reservations will be accepted prior to the date the invitation is mailed.

J. Roderick Heller III, chairman of this year's Annual Meeting Committee, has indicated that his committee hopes to announce other details pertaining to the meeting, including the name of this year's annual lecturer, in the next issue of the *Quarterly*. Questions regarding the meeting should be directed to Kathy Shurtleff at the Society's headquarters in writing, or by calling (202) 543-0400.

William Johnson: "The Father of Dissent"

The History of Dissent

Chief Justice Charles Evans Hughes once observed that a "dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed."

Not often inclined toward dissenting opinions himself, Hughes no doubt drew this conclusion from first-hand observations of his brethren. As Associate Justice, he had shared the high bench with "the Great Dissenter," Oliver Wendell Holmes, Jr. As Chief Justice, Hughes had often had to contend with the eloquent dissents of Benjamin Cardozo, and later, the vigorous dissents of Justice James C. McReynolds. (Once, in a particularly vituperative dissent, McReynolds rejected the Court's majority opinion saying: "That never was, it never ought to be law. Shame and humiliation are upon us.")

By Hughes' time, dissenting opinions had become an accepted, if not always welcomed practice among the justices. But this was not always the case. At the time of the Court's inception, in 1789, the justices reported their *seriatim* opinions in reverse seniority order. As a result, the Court's first reported opinion, *State of Georgia* v. *Brailsford* (1792), produced considerable confusion, because the first opinion was a dissent from the majority, and all of the opinions had to be considered to even determine what the majority stance was.

When John Marshall succeeded to the post of Chief Justice in 1801 he was determined to change this situation. Guided by a broad view of the Court's role under the constitution he sought to quell the sometimes confusing practice of issuing *seriatim* opinions as well as dissents which he felt undermined the Court's prestige in the public eye. Instead, he often persuaded his brethren to permit him to give a single majority opinion for the Court, and to forgo making their internal differences public. While this approach probably served Marshall's purpose in cultivating greater public esteem of the Court, it did not ultimately become the settled practice of a bench which would be occupied by so many independent thinkers.

Johnson Lays the Foundation

Before Marshall's efforts to unify the Court behind his own powerful leadership had become enshrined in tradition, it was challenged by Associate Justice William Johnson, an 1804 Jefferson appointee. Johnson gave his first, and what scholars call *the* first real dissenting opinion on the Court in *Huidekoper's Lessee* v. *Douglass* (1805). During the remainder of his thirty-year tenure on the Court he would account for nearly half of the 70 dissenting opinions recorded. In doing so, he established a tradition in Supreme Court procedure and earned for himself the unofficial title as "the Father of Dissent" on the high bench. Many of his brethren, however, were appalled at Johnson's practice of publicly airing the Court's differences of opinion about the law.

In an 1822 letter to then ex-President Thomas Jefferson, the spiritual leader of Johnson's own Democratic-Republican Party, Johnson cited his colleagues' reactions, saying:

> *Some Case soon occurred in which I differed from my Brethren, and I felt it a thing of Course to deliver my Opinion. But during the rest of the Session, I heard nothing but lectures on the Indecency of Judges cutting at each other.*

Throughout Johnson's judicial career, there was immense peer pressure exerted to persuade him to subordinate his independence to the interests of the Court as an institution.

Associate Justice William Johnson
(1804-1834)

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Preserving his independence was even more difficult for him because of his age. Johnson joined the Court at age 32, and his concurring opinions and dissents were often viewed, not merely as being divisive, but also as a challenge to the wisdom of his elder brethren.

Johnson's position became even more tenuous in 1811 when Joseph Story joined the high bench, succeeding William Cushing. Like Johnson, Story came to the Court at the comparatively youthful age of 32, was a Democratic-Republican, and active in politics prior to his appointment. But, unlike Johnson, Story embraced Chief Justice Marshall's strong nationalistic philosophy and a belief in the importance of a unified bench. His voting record helped focus attention on the stark contrast between his own judicial philosophy and that of Johnson. Ironically, after Marshall's death in 1835 and the accession of a number of Jackson appointees, Story himself became politically and philosophically isolated on the Court and with increasing frequency resorted to then accepted practice of dissent for which Johnson had laid the foundation.

Johnson's Era: A Time of Dissent

Yet, if Johnson was to gain a reputation as the Court's first great dissenter, the judicial independence which led to his fame was to some extent the consequence of his era. The son of Revolutionary patriot William Johnson, Johnson was the second of eleven children. His father had moved to Charleston, South Carolina in the early 1760s and, in 1769, married Sarah Nightingale, whose own father's death brought considerable wealth to the future justice's parents.

Johnson's father was extremely active in politics, attending many pre-Revolutionary organizational meetings and later serving in South Carolina's state legislature for nearly two decades. During the struggle for independence, William Johnson, Sr. was the leader in South Carolina's Liberty Tree party and a strong critic of Britain's efforts to administer the unrepresented colonies through her own Parliament. Following Britain's seige and capture of Charleston, he was twice imprisoned, and in the second instance was sent to detention in St. Augustine, Florida. Ultimately, he was freed through a prisoner exchange, but nearly two and one-half years passed before he was reunited with his family at his Goose Creek plantation. Thus, throughout his childhood, Johnson was imbued with a deep reverence for this right to challenge governmental authority and a willingness to endure hardship in doing so.

Despite the adversity war brought to the Johnson family, the future justice apparently was undeterred in pursuing his education, winning honors at Princeton and graduating at the head of his class in 1790. On his return to Charleston he read law under the tutelage of Charles Cotesworth Pinckney, a well known attorney and a leader of the Federalist Party. Pinckney himself had studied at the Inns of Court and was then serving as an advisor to President Washington. He left a deep impression on his young protege who later attributed to him "... every quality that can render man amiable and estimable."

Johnson's life took a dramatic change following his admission to the bar in 1793. First, in 1794, he married the sister of his political friend Thomas Bennett, later Governor of South Carolina. Like Johnson's parents, he and Sarah

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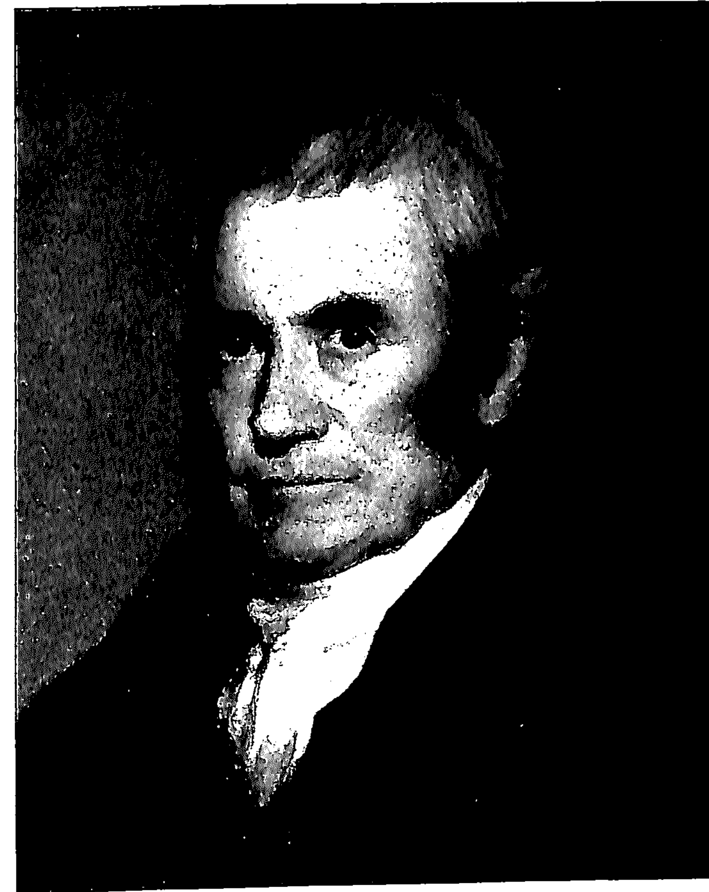

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Ironically, Justice Johnson shared much of his 30-year tenure on the Court with two of his chief philosophical adversaries: Chief Justice John Marshall, 1801-1835 (left); and, Associate Justice Joseph Story, 1811-1845 (right).

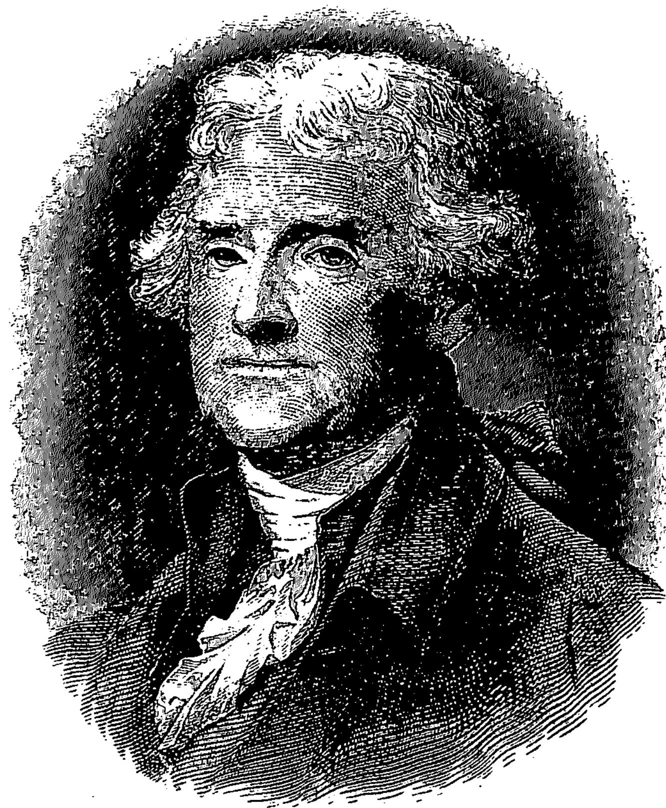
Bennett were inclined toward a large family, having eight children of their own and adopting two others. Sadly, only two of Johnson's natural children survived to maturity.

Second, in the same year he married, Johnson began his political career, departing from Pinckney's Federalist teachings to enter South Carolina's House of Representatives as a Democratic-Republican. He joined with Pinckney's young cousin, Charles Pinckney, to establish Jefferson's new party and to promote his own budding political career.

At age 23, Johnson began the first of three consecutive two-year terms in the state's House. In 1798, he became its Speaker. Johnson acquired considerable experience in this latter post with a broad range of legislative matters, including judicial reform. As a consequence of this experience and his own considerable political power, he secured appointment, in 1799, to the South Carolina's Court of Common Pleas, that state's highest court. As a member of that court he spent the next four years riding circuit and broadening his judicial experience.

Johnson Begins His Judicial Career

Owing to the Republican majority in South Carolina's state legislature, most of the seats of the State's high bench were occupied by members of Johnson's party, a contrast to his later experience on the Supreme Court. Of equal or greater contrast, was the manner in which Johnson and his peers on the Court of Common Pleas expressed their own opinions in cases on the court's docket. Nearly half of the decisions reported during Johnson's tenure at that court were issued *seriatim.* By comparison, the Marshall Court of 1801-1803, just before Johnson's appointment, handed down unanimous opinions in every case, announced in all but two instances by Marshall himself, the spokesman for the Court's staunchly Federalist majority.



Bureau of Engraving and Printing

Common ideology led Charles Pinckney (above, left) to work with Johnson in organizing South Carolina's Democratic-Republican Party in 1794. It also was a major factor in the decision of President Thomas Jefferson (above) to nominate Johnson to the high bench in 1804. But, when Johnson, in his *Gilchrist* decision in 1808, broke with President Jefferson's policy, Jefferson directed Attorney General Caesar A. Rodney (below) to publicly repudiate the decision and its author.

Library of Congress

Apointment to the Supreme Court

Thomas Jefferson's victory in the presidential election of 1800 accompanied by major gains for the Democratic-Republicans in Congress set the stage for a series of major confrontations between Jefferson's government and the Federalist-dominated Court. Among these, of course, was the well-known case of *Marbury* v. *Madison* (1803), in which the Court averted a potentially destructive collision with the Jefferson administration by holding invalid the statute which authorized the Court to take the action requested by the plaintiff. Yet, in the process it chided the Jefferson administration for denying Marbury his rightful commission.

Jefferson and other Republic leaders were outraged at this criticism, and more than ever, became determined to gain a toehold in this last bastion of Federalist power which the Court embodied. Having been denied any opportunity to nominate a justice to the high bench in his first three years in office, Jefferson decided to manufacture one in 1804, through the impeachment of Justice Samuel Chase, probably the most outspoken critic of his administration on the Court. Chase's acquittal ended that attempt as well as rumored plans to bring similar charges against the remaining Federalist justices.

Meanwhile, however, Justice Alfred Moore submitted his resignation pleading ill health, and Jefferson was afforded his first Court vacancy. Recognizing the highly developed persuasive powers of Chief Justice Marshall, and the strong peer presure that could be brought to bear by the Court's other four Federalist justices, Jefferson sought a replacement of strong intellect and independent character. Aside from Johnson's considerable judicial experience, his political credentials were impeccable and he received a strong endorsement from South Carolina's Republican delegation in Congress. Jefferson placed his name in nomination on March 22, 1804 and he was confirmed two days later by the Senate's Republican majority.

Johnson and President Jefferson

Yet, if Johnson's tendency toward judicial independence figured prominently in Jefferson's decision to nominate him, the President soon discovered this independent nature to be a two-edged sword. Seeking to avert American entry into the Napoleonic Wars, Jefferson had secured passage of a trade embargo to preclude further seizures of American ships bound for English or French ports. Denying material aid to both of the warring parties was thought to be a practical means of averting charges of favoritism as well as punishing the two antagonists for ignoring U.S. neutrality claims. Subsequently, in an attempt to tighten the law's numerous loopholes, port collectors were authorized by the Treasury to detain any vessel in port which they even suspected was preparing to violate the embargo.

When Alan Gilchrist's vessel was embargoed in Charleston after he applied for clearance to carry a load of cotton and rice to Baltimore, Gilchrist petitioned Justice Johnson, then on circuit, for its release. According to family accounts, Justice Johnson boarded Gilchrist's vessel, walking stick in hand, and personally issued sailing orders to its captain, in defiance of Jeffersons' administrative decree. He then proceeded to other similarly detained ships and instructed the captains of each to set sail. His circuit opinion in *Gilchrist* v. *Collector of Charleston* (1808) emphatically rebuked the Collector by asserting that it was not Congress' intention to set such "restraints upon commerce" and that his acts could not be justified simply under the guise of obeying an executive order.

Jefferson was incensed at this seeming betrayal by his own appointee and directed his Attorney General, Caesar A. Rodney to publish a legal opinion publicly repudiating the Gilchrist decision. A heated exchange followed in the press. Not until 1822, over a decade after Jefferson had left office, was this rift partly bridged when the two men began a cordial exchange of correspondence on politics and legal philosophy.

Dissent Becomes More Common

In the interim, Johnson moved on numerous occasions to exert himself against the Federalist philosophies of Chief Justice Marshall and Associate Justice Story, personally accounting for half of the Court's separate concurring opinions and dissenting opinions issued between 1804 and 1822. He criticized Story's excessive "liberalty of construction" in a series of banking cases giving "citizen" standing to corporations in U.S. courts.

He was equally critical of Story's expansive view of the Court's jurisdiction in admiralty cases. His judicial tenure on the high bench was fraught with conflicts, and at least twice he attempted to obtain an executive appointment so that he might abandon the Court for other pursuits. He stayed, nevertheless, buoyed by occasional victories over Story, his philosophical rival, and by the promise of important new cases, as well as a raise in judicial salaries in 1819.

In October 1822, retired President Thomas Jefferson, still the Republican Party's philosophical mentor, opened a correspondence with Johnson which offered the Justice the opportunity to assess his own performance after 16 years on the court. The initial letter congratulated Johnson on publication of his two-volume *Life of Greene,* a Republican perspective of the life of General Nathanael Greene, Washington's second-in-command. But the former President went on to complain of how many in his party—even Supreme Court justices — had fallen under the political influence of Federalists like John Marshall, and had forsaken Republican ideals. Johnson's studied replies to this and subsequent letters illustrates a major shift in the Court's procedure which occurred during his tenure. Until 1822, with infrequent exception, Chief Justice Marshall acted as the Court's spokesman, announcing nearly all of its opinions. Jefferson strongly criticized this practice, but as Johnson observed.

> *At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all.*

Ultimately, by maintaining cordial relations with his brethren, Johnson secured greater toleration for dissent, and even renewed the practice of seriatim opinions. In his last eleven terms, for example, he delivered nine of eleven

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Johnson *(continued)*

concurring opinions and 18 of 42 dissents. As a result, he established a precedent for openly airing the Court's philosophical divergencies, which reflected not "appeals to the brooding spirit of the law" which Hughes later criticized, but rather an acknowledgement of the wide diversity of American thought which came before the Court both then and now.

Johnson remained on the Court through 1834, participating in most of the landmark decisions which established the Court's role as a third and co-equal branch of government. But, at age 62, with 30 years of service behind, he was stricken with a jaw infection, and died following surgery on August 4, 1834.

Library of Congress

Justice Johnson in his later years — despite his death at the relatively youthful age of 62, his 30-year tenure ranks him eighth amongst the 102 justices in longevity of service.

State Chairmen *(continued from page one)*

Illinois	**Albert E. Jenner, Jr., Esq.** Jenner & Block One IBM Plaza Chicago, IL 60611
Indiana	**Theodore R. Boehm, Esq.** Baker & Daniels 810 Fletcher Trust Building Indianapolis, IN 46204
Iowa	**Allen E. Brennecke, Esq.** Welp, Harrison, Brennecke, & More 302 Masonic Temple Building Marshalltown, IA 50158
Kansas	**Philip H. Lewis, Esq.** Edison, Lewis, Porter & Haynes 1300 Merchants Natl. Bank Bldg. 8th and Jackson Streets Topeka, KS 66612
Louisiana	**M. Truman Woodward, Jr., Esq.** Milling, Benson, Woodward, Hillyer, Pierson & Miller 1100 Whitney Building 228 St. Charles St. New Orleans, LA 70130
Maryland	**The Honorable Benjamin R. Civiletti** Venable, Baetjer & Howard 1800 Mercantile Bank & Trust Bldg. Two Hopkins Plaza Baltimore, MD 21201
Michigan	**Wallace D. Riley, Esq.** Riley & Roumell 7th Floor Ford Building Detroit, MI 48226
Minnesota	**Keith Libbey, Esq.** Fredrikson, Byron, Colborn, Bisbee & Hansen 4744 IDS Center Minneapolis, MN 55402
Montana	**William H. Coldiron, Esq.** Gough, Shanahan, Johnson & Waterman 301 First Natl. Bank Bldg. P.O. Box 1715 Helena, MT 59624
New Jersey	**Adrian Foley, Esq.** Connell, Foley & Geiser Gateway I Suite 1600 Newark, NJ 07102
Tennessee	**Robert F. Worthington, Jr., Esq.** Baker, Worthington, Crossley, Stansberry & Woolf 530 Gay Street, S.W. Knoxville, TN 37901
Texas	**Morris Harrell, Esq.** Rain, Harrell, Emery, Young & Doke 4200 Republic National Bank Tower Dallas, TX 75201
Vermont	**Austin B. Noble, Esq.** Gibson, Noble & Goodrich 26 State Street P.O. Box 159 Montpelier, VT 05602
West Virginia	**Robert W. Lawson, Jr., Esq.** Steptoe and Johnson P.O. Box 1588 Charleston, WV 25326

In the months ahead, Mr. Stanley and his committee will select chairmen for the remaining states. The Membership Committee hopes to have this campaign well underway by the time of the Society's annual meeting this coming May.

Publications of Note

As a service to its members, in the Quarterly *the Historical Society will review publications dealing with the history and significance of the American Constitution and the Supreme Court.*

Toward the Bicentennial of the Constitution, a special Fall issue of *National Forum* cosponsored by the Honor Society of Phi Kappa Phi and the American Bar Association, is written for a broad audience of teachers, students, community leaders, and other civic-minded citizens interested in a better understanding of the history, significance and contemporary issues surrounding the Constitution. Guest edited by Mark W. Cannon, the Administrative Assistant to the Chief Justice of the United States, it contains 17 articles by public leaders and scholars on the following constitutional themes in the order they appear in the publication:

Mark W. Cannon, "Why Celebrate the Constitution?": Dr. Cannon discusses the uniqueness of the American experiment in constitutional self-government and why celebration of the Bicentennial of the Constitution is both necessary and appropriate.

Gordon S. Wood, "The Intellectual Origins of the American Constitution": Professor Wood argues that the political thought of the Founding Fathers was borrowed from classical antiquity, Renaissance civic humanism, and the peculiarities of the English legal tradition, as well as from the long colonial experience in self-government.

Richard B. Morris, "Creating and Ratifying the Constitution: Professor Morris offers a detailed account of the proceedings of the Constitutional Convention of 1787, the ratification of the Constitution, and the addition of the Bill of Rights.

Albert P. Blaustein, "The United States Constitution: A Model in Nation Building": Professor Blaustein discusses the influence of the American Constitution on the constitution making activities of other nations.

Thomas P. O'Neill, Jr., "Congress: The First 200 Years": Speaker O'Neill explores the dynamic relationship of Congress and the President in our constitutional system and reviews the vast changes that have occurred in Congress since 1789 in the structure and operation of the party system, congressional staffs, tenure, and the scope of legislative duties.

Ronald W. Reagan, "The Presidency: Roles and Responsibilities": After discussing the nature of the executive function in the context of the framers' intention that the President provide the critical element of "energy" in the national government, President Reagan reflects on the challenges confronting the modern presidency because of the enormous growth of the federal establishment.

Warren E. Burger, "The Judiciary: The Origins of Judicial Review": Chief Justice Burger examines the foundations of the judiciary's power to review the acts of the other branches of government for their constitutionality, including the historical basis of that power, its justification in *Marbury* v. *Madison,* and its constitutional underpinnings.

NATIONAL Forum

THE PHI KAPPA PHI JOURNAL

FALL 1984

TOWARD THE BICENTENNIAL OF THE CONSTITUTION

GUEST EDITED BY MARK W. CANNON ★ WITH WILLIAM J. BENNETT ★ WALTER BERNS ★ ALBERT P. BLAUSTEIN ★ WARREN E. BURGER ★ ORRIN G. HATCH ★ RITA E. HAUSER ★ A. E. DICK HOWARD ★ TOM JOHNSON ★ DAVID MATHEWS ★ WADE H. McCREE, Jr. ★ RICHARD B. MORRIS ★ BETTY SOUTHARD MURPHY ★ THOMAS P. O'NEILL, Jr. ★ DON K. PRICE ★ RONALD W. REAGAN ★ GORDON S. WOOD ★ ★ ★ ★ ★ ★ ★ ★

COSPONSORED BY THE AMERICAN BAR ASSOCIATION

National Forum

The Fall, 1984 edition of *National Forum*.

Walter Berns, "Do We Have a Living Constitution?": Professor Berns outlines the principles underlying the American Constitution and argues that they are incompatible with the "living Constitution" view that constitutional limitations and powers may be altered by means other than formal constitutional amendment.

Orrin G. Hatch, "Civic Virtue: Wellspring of Liberty": Senator Hatch discusses the close relationship between civic virtue and American principles of equality and liberty as that relationship was understood by the founding generation. He argues that they believed the securing of those ideals through democratic government requires a public-spirited, virtuous citizenry, which it is partly the responsibility of the government to encourage.

Wade H. McCree, Jr., "Civil Liberties and Limited Government:" Former Solicitor General McCree explains how in order to secure the rights of individuals against tyrannical majorities, the framers established a system of federalism and separation of powers, and attached to the Constitution a Bill of Rights which the courts have vigorously enforced.

continued on next page

Publications of Note *(continued)*

A. E. Dick Howard, "The Constitution and Free Expression": In his overview of the right of free expression under the Constitution, Professor Howard argues that libertarian notions of freedom of expression were incorporated into the First Amendment and are generally reflected in the evolving judicial rules regulating the time, place, and manner, but not the content, of individual expression.

Tom Johnson, "A Publisher Reflects on Freedom of the Press": Mr. Johnson, publisher of the Los Angeles Times, discusses the nature and causes of public dissatisfaction with the media and the professional and ethical obligations of the media, given their vast influence and constitutional protection from external control.

David Mathews, "We the People ...": Mr. Mathews describes and assesses changes in the constitutional system that threaten the continued vitality of popular sovereignty, especially as these changes relate to ever-increasing bureaucratization, the information explosion, and the expanding influence of special interest groups.

Betty Southard Murphy, "The Commercial Republic and the Dignity of Work": Mrs. Murphy focuses on the intent of the framers that the Constitution should expand individual opportunity and guard against violent factional conflict by creating a prosperous environment made possible through free commercial enterprise.

Don K. Price, "Science, Technology, and the Constitution": Professor Price examines the interrelationship between science and government from both an historical and a policy perspective, including the contributions that the sciences may make to the process of government, and the protection of the independence and objectivity of science from political interference.

Rita E. Hauser, "The Constitution and National Security": Mrs. Hauser discusses the national government's constitutional powers over foreign affairs both in terms of their relation to national security and their division between the executive and the Congress. In particular, she examines the problems of balancing the state's legitimate needs for secrecy with individual rights and democratic accountability.

William J. Bennett, "How Should Americans Celebrate the Bicentennial of the Constitution?": Mr. Bennett argues that at least for a few years, the American people should take the Bicentennial as an occasion to "steal" the Constitution away from lawyers, and approach it as a *civic* document because it is a statement of practical philosophy written by and for self-governing citizens.

The Society has a limited number of copies of this issue of the *National Forum* which it will distribute to its members without charge upon written request.

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