MAKING IT WORK

by A. E. Dick Howard

"We the People," read the first words of the new Constitution. As the former Colonies debated the Constitution after the Philadelphia Convention's adjournment, even these seemingly unexceptionable words came under attack. Who, demanded Virginia's Patrick Henry, had authorized the Convention to "speak the language of *We the People,* instead of *We the States?*" In the Continental Congress, Richard Henry Lee of Virginia thundered against the document's backers, a coalition, he said, "of monarchy men, military men, aristocrats and drones, whose noise, impudence and zeal exceed all belief."

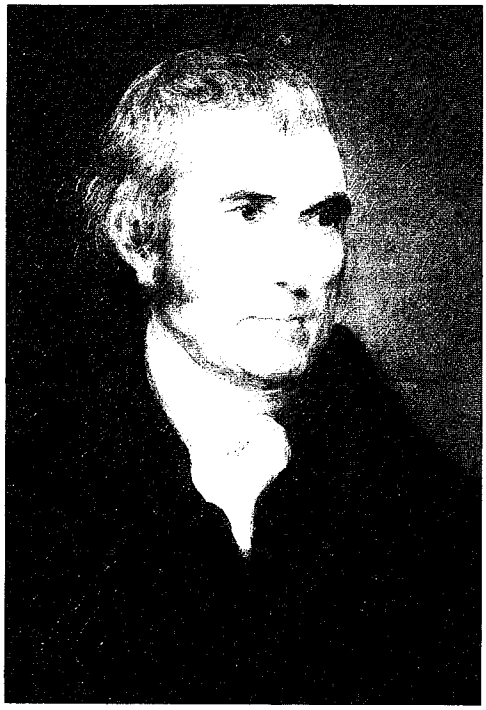
The real battle began after September 27, 1787, when the Continental Congress in New York City sent the new Constitution to special ratifying conventions to be held by the 13 states.

At first, the Federalists—the Constitution's supporters—held the initiative. During the Convention, they had managed to avoid the crippling precedent of the old wartime Articles of Confederation, which could not be altered without the unanimous consent of the states. The Constitution, by contrast, would become effective after only nine states had ratified it.

During the autumn of 1787, James Madison, the Convention's political maestro, brought his tactical skills to bear on ratification. He kept up a steady correspondence with allies around the country, gathering intelligence, coordinating campaigns, and offering advice on such crucial matters as the precise timing of the state conventions. To explain the Constitution to his countrymen, Madison contributed to a series of 85 essays that ran under the pseudonym "Publius," which he shared with Alexander Hamilton and John Jay, in several New York City newspapers. Published in book form as *The Federalist* (1788), they were hailed by Thomas Jefferson as "the best commentary on the principles of government which ever was written."

The Antifederalists, on the other hand, were in disarray. They advanced no positive alternatives. They disagreed even among themselves about the vices and virtues of the new Constitution. At first, they fell back on obstructionism. In September, Antifederalist legislators boycotted the Pennsylvania Assembly, denying it the quorum needed to authorize a convention. The tactic worked until a Federalist mob descended on the homes of two Antifederalist legislators and hustled them off to the State House. A quorum thus secured, the Assembly voted to call a convention.

Nationwide, early returns were favorable to the Federalists.



By dint of his strong personality and powerful intellect, John Marshall, fourth chief justice of the U.S. Supreme Court (1801–35), laid the foundation of American constitutional law.

Delaware moved swiftly, becoming the first state to ratify, on December 7, 1787. Pennsylvania quickly followed, joined soon thereafter by New Jersey, Georgia, and Connecticut. By January 1788, five of the nine needed states had ratified.

The contest was closer in Massachusetts. However, on February 5, after the Federalists agreed to support a measure calling upon Congress to consider nine amendments (later partially incorporated into the Bill of Rights) limiting the new government's powers, the Constitution was approved by a vote of 187 to 168.

Meanwhile, the Antifederalists, led by Virginia's Patrick Henry and Governor George Clinton of New York, among others, had begun their counterattack. In newspapers around the country, they warned that a "consolidated" national government would impose onerous taxes and wipe out the liberties won by the Revolution.

Nevertheless, in April 1788, Maryland joined the fold, followed late in May by South Carolina. Only one more state was needed to ratify. The Rhode Islanders, who chose to hold a statewide referendum on the Constitution, rejected it by a vote of 2,708 to 237.

Attention turned to Virginia, the largest and wealthiest state. "That overwhelming torrent, Patrick Henry," as General Henry

Knox called him, was the leading orator of his day, and in Richmond he summoned all of his powers. For three weeks, day after day, he flung invective at the Constitution and its "chains of consolidation." The authority conferred upon the president, Henry declared, "squints towards monarchy." Madison's checks and balances he dismissed as "your specious, imaginary balances, your rope-dancing, chain-rattling, ridiculous ideal checks and contrivances."

It took all of Madison's cool reason and tactical acumen, reinforced by the support of such prominent Virginians as Governor Edmund Randolph and John Marshall, to prevail. On June 27, 1789, Virginia ratified, 89 to 79. Again, the delegates petitioned Congress for amendments.

Unbeknownst to the Virginians, the ninth state, New Hampshire, had approved the Constitution four days earlier. Success in Virginia, however, was a special cause for celebration. John Quincy Adams noted in his diary that when Boston heard the news from Richmond, enthusiastic Federalists took to the streets, firing muskets into the air for hours on end.

Accepting the New Order

On July 4, towns and cities around the country celebrated the ratification with elaborate "federal processions." Philadelphia's was the grandest of all. A mile and a half long, it was crowned by the "Grand Foederal Edifice," an imposing structure supported by 13 Corinthian columns, three left unfinished, borne through the streets on a carriage pulled by 10 white horses.

Still, without New York, the Union would suffer a fatal geographic split. And the Antifederalists there enjoyed a two to one edge in the state convention, held in Poughkeepsie. On July 26, the Constitution was put to a vote. It squeaked by, 30 to 27. The prospect of later amendments and the last-minute support of Governor Clinton, who feared secession by New York City and the southern counties if his state failed to ratify, provided the margin of victory.

North Carolina and Rhode Island, the last holdouts, finally ratified in 1789 and 1790.

Almost everywhere, acceptance of the Constitution was at-

A. E. Dick Howard, 53, a former Wilson Center Fellow, is White Burkett Miller Professor of Law and Public Affairs at the University of Virginia. Born in Richmond, Virginia, he is a graduate of the University of Richmond (1954) and received his law degree from the University of Virginia (1961). A former law clerk to Mr. Justice Hugo L. Black, Professor Howard was the chief architect of Virginia's current (1971) constitution. His books include The Road from Runnymede: Magna Carta and Constitutionalism in America *(1968) and* Commentaries on the Constitution of Virginia *(1974).*

tended by a spirit of reconciliation. At a raucous meeting of "Henryites" in Richmond, the great orator told his followers that he had done his best to defeat the document "in the proper place." He added: "As true and faithful republicans you had all better go home." Some Antifederalists would remain bitter foes of the new order, but they kept their dissent within bounds—an important political success for the young Republic.

When the first Congress under the new Constitution met in New York City in March 1789, Representative James Madison redeemed the Federalists' pledge, drawing up nine amendments based on proposals by the states and on existing provisions of various state constitutions. Ultimately, Congress submitted 12 amendments to the states. Ten were ratified by December 1791; two were rejected.*

Midnight Appointments

The Constitution created a distinctively American array of legal and political arrangements to combat what Madison called (in his famous Federalist No. 10) the "mischief of factions." The formulas that the Framers designed—federalism, the separation of powers, and checks and balances—work to ensure that no social class or interest group can entirely control the government. Each of these devices plays a part in dispersing or containing power while permitting effective government; for almost two centuries, the system has proved to be, as Madison predicted, "a Republican remedy for the diseases most incident to Republican Government."

The Framers also recognized the need for what Madison called "useful alterations [to the Constitution] suggested by experience."

One vehicle for such change is the formal amendment. Article V provides that amendments may be proposed by a two-thirds vote of both houses of Congress or, upon application by two-thirds of the states, by a national convention.† To take effect, an amendment must be agreed to by three-fourths of the states. This arrangement, Madison argued, "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."

Since the first Congress, more than 5,000 bills proposing constitutional amendments have been introduced, providing for everything from public ownership of the telegraph system to the restoration of prayer in the public schools. Only 33 proposed amendments

*One of the failed amendments would have increased the membership of the House of Representatives. The other would have required the approval of two successive Congresses before the legislators could increase their own pay.

†Congress is required to call a constitutional convention if two-thirds (34) of the states request it. Between 1975 and 1983, 32 states petitioned Congress for a convention to consider a balanced-budget amendment. It is uncertain, however, whether such a convention's agenda could be restricted to only one amendment.

EXPORTING THE CONSTITUTION

"The most wonderful work ever struck off at a given time by the brain and purpose of man." That was British prime minister William Gladstone's generous assessment of the U.S. Constitution in 1878.

Around the world, many political leaders before and after Gladstone shared his admiration, borrowing liberally from America's founding document for their own constitutions. The U.S. prototype may be, as Rutgers's Albert Blaustein says, "the nation's most important export."

Ironically, Britain is one of only six nations in the world today that have not followed the U.S. example of adopting a "written" constitution. Like Britain, New Zealand and Israel are committed to unwritten constitutions that can be altered by simple acts of parliament; Saudi Arabia, Oman, and Libya claim the Koran as their supreme law.

Historically, writing constitutions has proved far easier than preserving them. In 1791, Polish politicians authored the world's second written national constitution, echoing the Americans in their claim that "all authority in human society takes its beginning in the will of the people." But Russia's Catherine the Great saw the Polish experiment as a threat; a Russian invasion killed the plan before it could be implemented.

Constitutionalism fared little better in France. During the summer of 1791, reformers including the Marquis de Lafayette, George Washington's old comrade-in-arms, drafted a charter providing for a limited monarchy under King Louis XVI. Owing to the immense popularity of Benjamin Franklin, U.S. envoy to Paris during 1776–85, the French borrowed much more from the constitution of Pennsylvania (e.g., a unicameral legislature) than from the work of the Framers. But the 1791 plan lasted only a year before it was swept away in the nation's continuing revolutionary turmoil. Subsequent charters did not survive much longer; the French drew up more than a dozen before writing their most recent one for General Charles de Gaulle in 1958. To the French, historian C. F. Strong wrote some years ago, a constitution is "a work of art . . . the order and symmetry must be perfect."

have won enough votes in Congress to be sent to the states for their approval, and only 26 of these have been ratified.*

While few in number, the 26 amendments have dramatically transformed the constitutional landscape. The Bill of Rights has not only worked to limit federal power, but, through judicial interpretation, has come (with limited exceptions) to apply to the states as well. Following the Civil War, the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth—were added to protect the newly

*Of the seven rejected amendments, two—described earlier—were proposed as part of the Bill of Rights. The other amendments would have stripped Americans who accepted foreign titles of nobility of their citizenship (1811); banned future amendments empowering Congress to interfere with "states' rights" (1861); authorized Congress to regulate child labor (1924); guaranteed absolute legal equality for women (1972); and granted the District of Columbia elected representation in Congress (1978).

The U.S. example had a more direct impact in Latin America. The early constitutions of Venezuela (1811), Mexico (1824), and Argentina (1853) leaned heavily on the U.S. model. Results were mixed. The Mexicans, unfamiliar with self-government, failed at their first try at a federal system. Their unhappy experience led Tocqueville to compare the U.S. Constitution to "those exquisite productions of human industry which ensure wealth and renown to their inventors, but which are profitless in any other hands."

More successful was Brazil's homegrown constitution of 1824. It combined a monarchy with limited popular rule, surviving until 1889.

Ever since Thomas Jefferson and Thomas Paine advised the French in 1791, American consultants have spread the gospel abroad. By and large, they have recognized that American-style institutions often do not work in other lands. For example, when lawyers on the staff of General Douglas MacArthur drafted (in only one week) a new plan of government for occupied Japan in 1946, they outlined a *parliamentary* democracy.

The world's longest (300 pages) and possibly most complicated constitution is the product of its largest democracy. India's 1949 constitution, prepared with the help of U.S. advisers, includes not only fundamental rights, which correspond almost exactly to the provisions of the U.S. Bill of Rights (revised to reflect U.S. Supreme Court interpretations), but also several "positive" rights. Long-oppressed castes, for example, are guaranteed fixed percentages of the parliamentary seats in New Delhi.

India's is one of only 29 national constitutions (out of 162) that are more than 26 years old. But neither the longevity of a charter nor the mere fact of its existence is always cause for celebration. Argentina's 1853 constitution, for example, has simply been ignored during some harsher periods of the nation's history. And many constitutions, notably those in the Soviet bloc and some in the Third World, make no provision for democratic government, or proclaim rights, such as free speech, that citizens have no real prospect of exercising.

Still, 200 years after the Framing, the democratic constitutions of Nigeria (1979), El Salvador (1983), and the Philippines (1987)—all prepared with U.S. help—testify to the continuing appeal of the American experiment.

freed slaves. No constitutional amendment has been the vehicle for more judicial interpretation than has the Fourteenth, with its guarantees of "due process of law" and "equal protection of the laws."

The courts have taken on a central role in interpreting and enforcing the Constitution. Indeed, in many ways, the history of the Constitution since 1789 is that of the Supreme Court. In creating the federal courts, the Framers did not explicitly confer upon them the power of judicial review—the authority to declare a law unconstitutional. Article VI of the Constitution, however, states that the Constitution and laws "which shall be made in Pursuance thereof" shall be the "supreme Law of the Land."

In 1803, in *Marbury* v. *Madison*, the Supreme Court, under

Chief Justice John Marshall, used the logic of Article VI formally to lay claim to the power of judicial review.

The case arose under unusual conditions. After Jefferson's Democratic-Republican Party swept to victory in the election of 1800, despairing Federalists looked to the judiciary as the country's last bastion against "mob" rule. In a series of midnight appointments just before leaving office, President John Adams named several new judges to the federal bench. But one of them, William Marbury, was never presented with his commission, and Jefferson's secretary of state, James Madison, refused to deliver it.

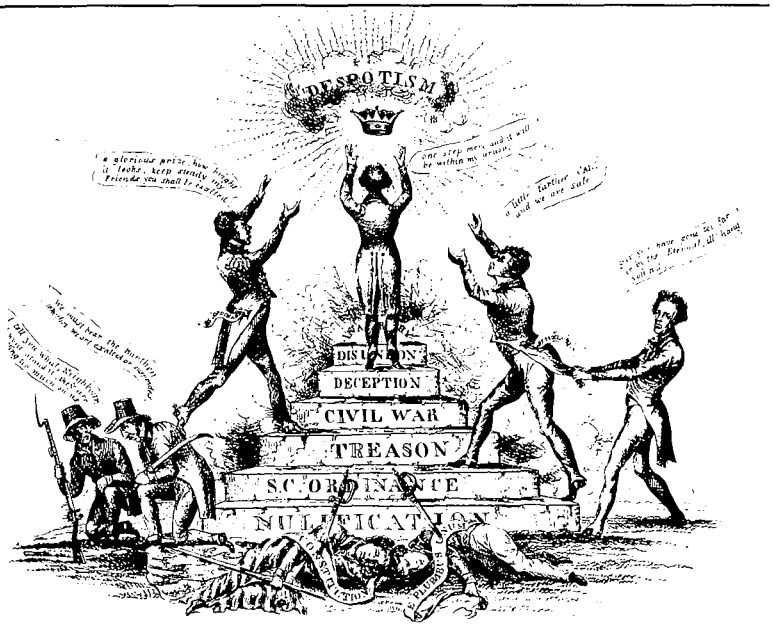
The immediate issue in *Marbury*—whether the writ that William Marbury sought could properly issue from the Supreme Court—was a narrow one. But Marshall seized the opportunity to criticize Jefferson's administration for actions "not warranted by law." Then, he wheeled around and ruled that the act of Congress under which Marbury was seeking a writ was unconstitutional. "It is," Marshall declared, "emphatically the province and duty of the judicial department to say what the law is."

'A Drag upon Democracy'

Marshall's deft handling of the case disarmed his critics. He asserted the Court's right to judicial review, but voided the congressional statute on the grounds that it had granted the Court *too much* power, thus averting a confrontation with Jefferson that the Court would have been sure to lose.

But, after *Marbury*, the Court often found that exercising its powers aroused wrathful opposition. In 1821, in *Cohens* v. *Virginia*, Marshall rejected the state of Virginia's claim that the Supreme Court lacked the authority to review the Cohens brothers' conviction, under Virginia state law, for illegally selling lottery tickets. In a twist reminiscent of *Marbury*, Marshall then upheld the Virginia conviction, sending the Cohenses to jail. This did not quiet Marshall's critics. Judge Spencer Roane of Virginia denounced *Cohens* as "a most monstrous and unexampled decision," which could only be explained by "that love of power which all history informs us infects and corrupts all who possess it, and from which even the upright and ermined judges are not exempt."

Although it is most often attacked for arrogating power to itself, the Supreme Court has also greatly expanded the authority of the other branches of the national government, especially that of Congress. In Article I of the Constitution, the Framers enumerated 17 legislative powers, from levying taxes to establishing post offices. To that list they added the seemingly innocuous authorization for Congress to make such laws as were "necessary and proper" for executing the stated powers.



One of many early controversies: Do states have the right to nullify parts of the Constitution? This 1833 cartoon attacks South Carolina's John C. Calhoun for his advocacy of the nullification doctrine.

Thomas Jefferson compared the potential mischief of this clause to children playing at "This is the House that Jack Built." "Under such a process of filiation of necessities," he wrote, "the sweeping clause makes clean work." As the subsequent expansion of government interests and activities indicates, his fears were not groundless. In *McCulloch* v. *Maryland* (1819), Chief Justice Marshall rejected a challenge by the state of Maryland to Congress's authority to create a Bank of the United States. The "necessary and proper" clause, he wrote for the unanimous Court, does not limit Congress to "absolutely indispensable" legislation. "We must never forget," he wrote with a flourish, "that it is a *constitution* we are expounding."

During the first 70 years after *Marbury*, the Supreme Court availed itself of judicial review on relatively few occasions, overturning, for example, only 10 acts of Congress. By the late 19th century, however, during the heyday of laissez-faire capitalism in America, conservative lawyers and judges were regularly using the commerce clause and the due process clause of the Fourteenth Amendment to defeat the work of reformist federal and state legislators.*

*The commerce clause (Article I, Section 8) grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The due process clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

In *Lochner* v. *New York* (1905), for example, the Court struck down a protective state labor law that forbade bakers to work more than 60 hours per week, declaring it an abridgment of what it called the "liberty of contract." Justice Rufus W. Peckham, for the majority, dismissed New York's statute as "mere meddlesome interference with the rights of the individual" to work whatever hours he chooses.

In one of the most famous dissents in the Court's history, an exasperated Justice Oliver Wendell Holmes, alluding to the leading conservative thinker of the day, reminded his brethren that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's *Social Statics*." Outside the Court, frustrated liberals assailed the Court's "judicial activism." In 1922, Senator Robert LaFollette, the Wisconsin Progressive, argued that the Court had secured the power of judicial review by "usurpation"; as late as 1943, historian Henry Steele Commager called judicial review "a drag upon democracy."

New Protections

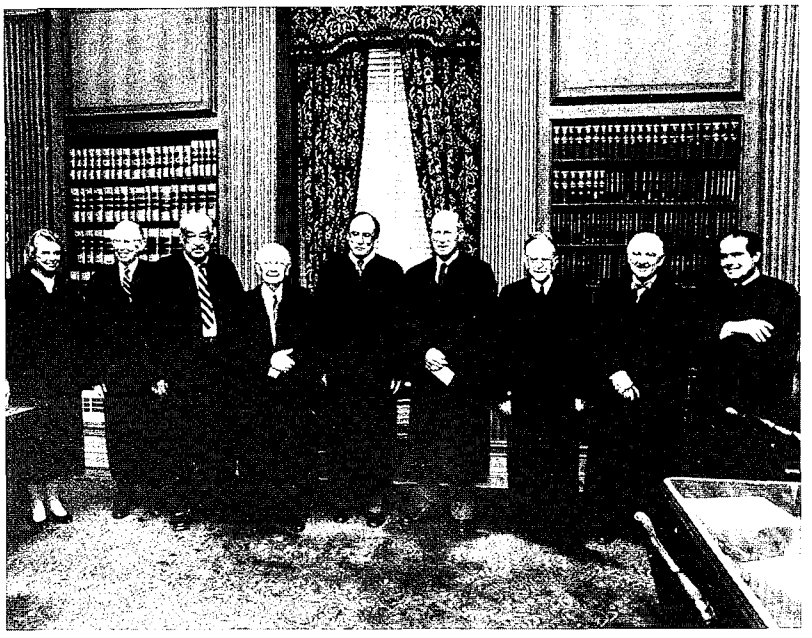
The inevitable showdown came in 1937, the sesquicentennial year of the Constitution's drafting. Chief Justice Charles Evans Hughes and his colleagues had invalidated several major elements of President Franklin D. Roosevelt's New Deal, including the National Industrial Recovery Act. In February, Roosevelt presented Congress with his famous "Court-packing" plan, asking, in the name of helping the Court to clear its crowded docket, for the authority to appoint an additional justice for each member of the Court over 70 years of age.* To FDR's surprise, even many of his allies in Congress opposed the measure. "Too clever—too damned clever," said one pro–New Deal newspaper. Roosevelt never got his wish.

In the meantime, however, the Supreme Court appeared to experience a sea change in attitude—what one wag called "the switch in time that saved nine." On April 12, 1937, the Court upheld, against a commerce clause challenge, the National Labor Relations Act. It signaled the beginning of a new era.

During the half-century since those New Deal cases, the Court has left state and federal legislators free to experiment very much as they chose with solutions to economic problems. Justice Hugo L. Black's opinion in *Ferguson* v. *Skrupa* (1963) sums up the modern Court's attitude: "We refuse to sit as a super-legislature to weigh the wisdom of legislation. Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, or Lord Keynes or some other is no concern of ours."

Although the Court has abandoned "judicial activism" in the

*The Constitution does not fix the size of the Supreme Court. In 1789, Congress established a six-member Court, and it subsequently moved the number up and down six times before finally arriving, in 1869, at nine, the present composition. FDR's plan would have added six justices to the Court.



The Rehnquist Court. Despites its conservative majority, it has yet to make major departures from the judgments of the liberal Warren Court.

economic sphere, it has made vigorous use of the Constitution to police governmental acts in other areas. In a sense, it has turned its attention from "property rights" to "human rights."

The first hint of this new approach came in 1938. In a famous footnote in *United States* v. *Carolene Products*, Justice Harlan F. Stone suggested that there might be "more exacting judicial scrutiny" of legislation that restricted the political process or that reflected prejudice against "discrete and insular minorities."

The paradigm of judicial intervention to protect a racial minority is the Court's 1954 decision in *Brown* v. *Board of Education*. The Court held that "separate but equal" public schools for blacks and whites violated the Fourteenth Amendment's equal protection clause. *Brown* encouraged the emerging civil rights movement, as blacks sought equal treatment beyond the schoolroom. The Court consistently supported them. In 1955–56, Martin Luther King, Jr., emerged as a national leader when he led a boycott of the segregated city bus system in Montgomery, Alabama. In November 1956, the Court ruled that segregation of public transportation was unconstitutional. Congress's major civil rights initiatives—the Civil Rights Act of 1964 and the Voting Rights Act of 1965—were a decade away.

The example of *Brown* was not lost on other groups. By the late 1960s, feminists, the handicapped, prisoners, environmentalists, and other groups that had failed to achieve all of their goals through the political process began to take their grievances to the federal courts. The women's movement, for example, pursued its agenda on several fronts: constitutional amendment (the Equal Rights Amendment), legislation ("equal pay for equal work"), and litigation.

The Fourteenth Amendment was designed to protect the interests of the slaves freed by the Civil War. But it does not speak in terms of race. No state, it says, shall "deny to any person within its jurisdiction the equal protection of the laws." Thus, beginning in the early 1970s, the Supreme Court used the equal protection clause to strike down both state and federal measures found to discriminate against women. In 1971, it overturned an Idaho law that gave preference to men in naming administrators of estates; in 1973, it ruled unconstitutional a federal statute that automatically provided married men in the U.S. armed forces with allowances for dependents but required service*women* to prove that their families were dependent.

Searching for Meaning

In 1973, Justice William J. Brennan, Jr., argued that gender discrimination ought to be tested by the same standard of "strict scrutiny" that the Court applied in race cases. A majority of the justices would not go that far, choosing instead an "intermediate" level of scrutiny.

These decisions were handed down by a Supreme Court presided over by Chief Justice Warren Burger, one of four justices appointed by President Richard M. Nixon to halt the Court's much-criticized "activism." But the Burger Court proved to be as willing as its famous predecessor, the Warren Court (1953–69), to find creative uses for the Constitution. To be sure, the Court during the Burger years did modify some of the Warren Court's more liberal judgments, notably those broadly construing the Fourth Amendment's ban on unreasonable searches and seizures. But the Burger Court rediscovered, and found new uses for, the Fourteenth Amendment's due process clause.

Indeed, the Burger Court's far-reaching decision in *Roe* v. *Wade* (1973) sparked more public outrage than any other Supreme Court ruling in recent memory. Dissenting justices Byron R. White and William H. Rehnquist (now chief justice) branded *Roe* an "extravagant exercise" of "raw judicial power." In *Roe*, the Court said that the due process clause implies a constitutional "right to privacy" that protects a woman's right to have an abortion during the first two trimesters of pregnancy without interference by the state. In other decisions, the Court has taken steps that enlarge the "right to pri-

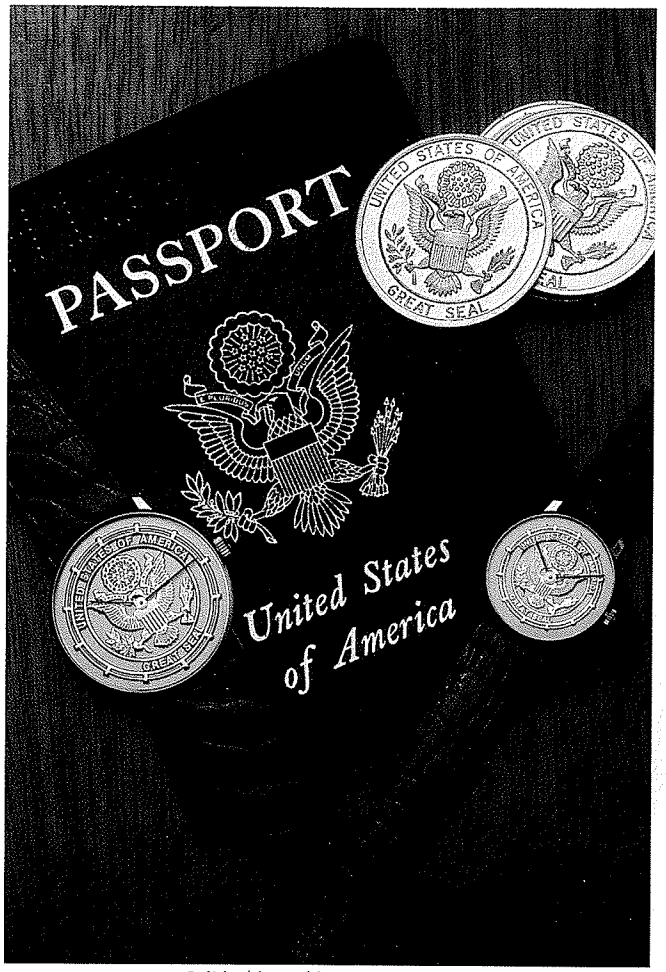
vacy," striking down state laws that restrict access to contraceptives, or that overregulate marriage and divorce.

These decisions, too, sparked controversy. In a dissent against another "privacy" case in 1965, Justice Black wrote that the Court's talk of a "right to privacy" reminded him of the "natural law–due process" philosophy that the Court had used 60 years earlier in *Lochner*. Black's statement underscored the perpetual dilemma of the Supreme Court. Must it judge solely on the basis of what is written in the Constitution and what is recorded of the original debates over it and its amendments? Or can it refer to overarching natural law, enforcing "principles of liberty and justice," as Stanford's Thomas Grey writes, even when they are "not to be found within the four corners of our founding document"?

The Court has often split the difference. It grounds some of its decisions, such as those interpreting the First Amendment's establishment of religion clause, in the thinking of the Framers. Other judgments seem to reflect contemporary attitudes. Thus, the modern Court has extended the First Amendment's protection of free speech to "symbolic" speech (e.g., burning draft cards) and to commercial speech (advertising).

It is hard to know what the Framers would have made of all this. When the delegates met at Philadelphia in 1787, they knew that they were embarking upon a great experiment. Obviously, they did not intend the Constitution to be infinitely elastic; the rule of law could not survive such malleability. The barriers they erected against facile amendments testify to that. But they also knew, as Chief Justice Marshall later put it, that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human nature." And so it has been.

The *AmeriCoin*™ Quartz Watch



Solid 14 kt. gold (By Conrad Neiman)
Restricted Edition of 1,000 timepieces (800 men's sizes and 200 ladies' sizes)
Gold filled and gold overlay also available, prices start at $395.00.

(One out of every 30 Americans has purchased a collectible coin of the **Charleston Mint** during the past decade.)

A **Charleston Mint** Exclusive
39 Broad Street, Charleston, SC 29417
Correspondence:
P.O. Box 31143
Charleston, SC 29417
(803) 577-2982