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TO SECURE THESE (UNALIENABLE) RIGHTS

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Although it may not be obvious from the title I have given this paper, my concern here, like that of this symposium, is with "the normative bases of the United States Constitution." This program reflects a concern with, perhaps even an apprehension concerning, the condition of the normative bases—which is to say, the moral foundations—of the Constitution and, therefore, of the Constitution itself. And our political prosperity is utterly dependent upon the Constitution.

The Constitution of the United States is unique among the world's written constitutions. To say nothing of its longevity—over half of the other 157 have been written since 1974—we alone are *constituted* by a constitution. Constituted by it in a way that France, for example, is not constituted by the constitution of the Fifth Republic. By which I mean, France is not France, and the French are not French because of that constitution; they are not what they are because of that constitution or any of its predecessors. But we Americans are what we are because of the Constitution and the principles it embodies. Without the Constitution, we have nothing on which to rely—no history that is not a constitutional history; except in certain effete southern circles where the names of Jefferson Davis or John Taylor of Caroline are memorialized, no heroes that are not constitutional heroes (Washington, Hamilton, Lincoln, Roosevelt, Kennedy, men who either framed the Constitution or defended it or held office under it); no thought equivalent to the thought of Pascal, Moliere, or Descartes, thought that formed the character of Frenchmen but is independent of the various French constitutions. No principles—at least, no *American* principles—other than those stated in the Declaration of Independence and embodied in the Constitution. Destroy the Constitution and we destroy those principles—and then what?

Are we Protestants? If so, what are we going to do with the Catholics among us? Are we Christians? If so, what are we going to do with the Jews among us? Are we Judeo-Christians? If so, what are we going to do with the Muslims among us? Are

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we whites? If so, what are we going to do with the blacks among us? In short, what are we other than a nation, a people, brought forth on this continent by "our fathers" four score and seven years before 1863, in 1776, a nation conceived in liberty and dedicated to the proposition that all men are created equal insofar as they are equally endowed by their creator with certain unalienable rights. We are a nation that, in order to secure those rights, in 1787 instituted the government of the United States. What are we other than a people of *this* Constitution founded on *this* foundation?

In one way or another—and not least of all because he was willing to take the nation into what proved to be the worst of its wars out of a concern for the vitality of its principles—Abraham Lincoln insisted that we were a nation built on the Declaration. Paradoxically, the truth of that "proposition," as Lincoln called it at Gettysburg, was confirmed by Alexander H. Stephens, Lincoln's old friend who, without losing his respect for Lincoln, became his political enemy. Speaking as Vice-President of the so-called Confederate States of America, Stephens repudiated the Declaration and went so far as to dissociate himself from Thomas Jefferson, his fellow Southerner and its principal author. "The prevailing ideas entertained by him and most of the leading statesmen at the time of the formation of the old Constitution were," Stephens said, "that the enslavement of the African was in violation of the laws of nature." That idea, he said, was "fundamentally wrong," and he went on to point out that his new (Confederate) government was founded *not* on the principle of the equality of rights, but, rather, "upon exactly the opposite idea . . . ; its foundations are laid, its corner stone rests, upon the great truth that the negro is not equal to the white man."[1]

These words were spoken three weeks before the firing on Fort Sumter and the beginning of the Civil War, but that fact should not obscure the measure of agreement between Stephens and Lincoln. They agreed on the connection between the Constitution and the Declaration and, therefore, the rights of man. That is why they were willing to go to war over the Constitution: Lincoln to defend and preserve it and Stephens to destroy it. Fortunately for us, that dispute belongs to history.

1. Alexander H. Stephens, speech at Savannah, Ga. (March 21, 1861), *reprinted in* 1 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS 44-49 (F. Moore ed. 1864).

So, too, does the dispute as to whether blacks as well as whites are men endowed with unalienable rights. The *Dred Scott* decision broached that dispute legally; the Civil War, at least, resolved it politically; and, the first sentence of the fourteenth amendment resolved it constitutionally. This marked the only correct resolution. For, there is no respect in which all men, except black men, are equal: they are not equally white, equally British, equally intelligent, equally beautiful, equally anything except in the possession of the rights of nature. And if black men do not have rights, white men do not have rights; and if white men have rights, black men have rights. This is why Chief Justice Roger B. Taney, writing for the majority in the *Dred Scott* case, effectively denied that black persons were human persons.[2] As usual, Lincoln saw clearly the implications of that decision:

> Now, when [by means of the *Dred Scott* decision], you have succeeded in dehumanizing the Negro; when you have put him down and made it forever impossible for him to be but as the beasts of the field; when you have extinguished his soul, and placed him where the ray of hope is blown out in darkness like that which broods over the spirits of the damned; are you quite sure the demon which you have roused *will not turn and rend you?* What constitutes the bulwark of our own liberty and independence?[3]

What, indeed, other than the equal possession of rights? For an understanding of the Constitution we, like Lincoln, must turn to its source: the Declaration of Independence where those rights are delineated.

Who, then, is Nature's God, the god who is said to have endowed us with our rights to life, liberty, and the pursuit of happiness: the old God or some new god, the Biblical God or the god who reveals himself only in the order of the universe? It makes a difference, a political difference.

What is meant by the laws of nature that entitled us to a "separate and equal station" among the powers of the earth: the natural law as understood by Thomas Aquinas[4] or the laws

2. Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1856).

3. Speech at Edwardsville, Ill. by Abraham Lincoln (Sept. 11, 1858), *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 473 (R. Basler ed. 1946).

4. SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, Q. 94.

of nature as understood by Thomas Hobbes[5] and John Locke?[6] The difference is considerable.

What is meant by the motto, *novus ordo seclorum* (or new order of the ages)? Forrest McDonald, who wrote a book under that title,[7] thinks it refers to the new political structure, federalism, but the words were inscribed on the Great Seal of the United States in 1782, well before our federal system was devised. How new was this country, and how new were the principles comprising its foundation? Knowing that would help us to know what is meant by the rights to life, liberty, and the pursuit of happiness.

Clearly, America was (and is) the first new nation; the founders said as much.

> It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.[8]

America's Constitution is the product of political science, specifically, as we are told in *The Federalist* No. 9, a new and improved "science of politics." A science of politics that makes it possible for the first time in history to retain the "excellences of republican government" and avoid its "imperfections," the imperfections so vividly displayed by "the petty republics of Greece and Rome."[9] A science of politics that has nothing to say about civic education but, instead, employs new or perfected institutions—the separation or distribution of powers, checks and balances, representation, an independent judiciary—to resolve the persistent political problems, institutions that work only within the extended territory that is the United States. And a science of politics that depends on merchants and lawyers. And that is new.

Mechanics and manufacturers, or factory workers, we are told in *The Federalist* No. 35, "know that the merchant is their natural patron and friend; and they are aware, that however great the confidence they may justly feel in their own good

5. T. HOBBES, LEVIATHAN, ch. 14.

6. J. LOCKE, TWO TREATISES OF GOVERNMENT, II, § 6.

7. F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 262 (1985).

8. THE FEDERALIST No. 1, at 1 (A. Hamilton) (E. Earle ed. 1941).

9. *Id.* No. 9, at 47-49 (A. Hamilton).

sense, their interests can be more effectively promoted by the merchant than by themselves."[10] But that's only part of the story. The merchant's way will be America's way because "[t]he prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares."[11] In fact, protecting the unequal faculties of acquiring property is "the first object of [this new] government."[12]

How new? Here is Aristotle on merchants: "[I]n the state which is best governed . . . the citizens must not lead the life of mechanics or tradesmen, for such a life is ignoble, and inimical to virtue." Only if necessary, he says, should merchants be allowed to vote and hold office, and then only if they can show that they had "retired from business for [the previous] ten years."[13]

This new science of republican politics puts no limit on consumption, and relies not on sumptuary laws but on lawyers. As we know from the records of the Constitutional Convention, this, too, was not an oversight. "Mr. Mason moved to enable Congress 'to enact sumptuary laws.' No government," he said, "can be maintained unless the manners [of the people] be made consonant to it."[14] Only three of the states present in the Convention supported his motion. On September 13, four days before the Convention concluded its business, out of his concern with "the extravagance of our manners [and] the excessive consumption of foreign superfluities," Mason tried again, but nothing came of his effort.[15] Instead, the framers cast their lot with lawyers, a fact duly noted by Alexis de Tocqueville: "I hardly believe that nowadays a republic can hope to survive unless the lawyers' influence over its affairs grows in proportion to the power of the people."[16]

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10. *Id.* No. 35, at 213 (A. Hamilton).

11. *Id.* No. 12, at 70 (A. Hamilton).

12. *Id.* No. 10, at 55 (A. Hamilton).

13. Aristotle, *Politics*, in THE BASIC WORKS OF ARISTOTLE 1328 b35ff, at 1288; 1278 a25-6, at 1183 (R. McKeon ed. 1941).

14. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 344 (M. Farrand ed. 1966).

15. *Id.* at 606.

16. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 266 (G. Lawrence & J. Mayer trans. 1969). Here is Plato on lawyers:

> And yet what greater proof can there be of a bad and disgraceful state of education than this, that not only artisans and the meaner sort of people need the skill of first-rate physicians and

This new science of republican politics eschews any effort to avoid factionalism, or class warfare, by promoting a uniformity of interests, or ethnic or religious warfare, by restricting the size of the country or controlling immigration. On the contrary, America was to be huge, occupying an "extensive territory; [f]or it cannot be believed that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece."[17] It was not to be Sam Adams's "Christian Sparta," but a haven "for all sorts and conditions of men."[18]

Our Constitution makes the President Commander and Chief of the army and navy, and of the militias when called into federal service, but does not require military service or training of its citizens. Again, this was no oversight. Americans differ sharply from the citizens of the "ancient republics of Greece," we are told in *The Federalist* No. 8:

> The industrious habits of the people of the present day, absorbed in the pursuits of gain, and devoted to the improvements of agriculture and commerce, are incompatible with the condition of a nation of soldiers, which was the true condition of the people of those republics.[19]

The Constitution facilitates private pursuits, with a view to private gains, not public pursuits or public spirit.

The Constitution forbids religious tests for office holders and, as well, laws respecting an establishment of religion, but guarantees its free exercise. A government instituted to secure the rights to liberty and pursuit of happiness is required to

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judges, but also those who would profess to have had a liberal education. . . . Of all things, he said, the most disgraceful.

Would you say "most," I replied, when you consider that there is a further stage of evil in which a man is not only a life-long litigant, passing all his days in the courts, either as plaintiff or defendant, but is actually led by his bad taste to pride himself on his litigiousness; he imagines that he is a master in dishonesty; able to take every crooked turn, and wriggle out of the way of justice: and all for what?—in order to gain small points not worth mentioning . . . . Is not that still more disgraceful?

Yes, he said, that is still more disgraceful.

PLATO, THE REPUBLIC, 405a, at 119-20 (The Modern Student's Library 1928). THE FEDERALIST No. 63, at 413 (A. Hamilton or J. Madison) (E. Earle ed. 1941).

17. THE FEDERALIST No. 63, at 413 (A. Hamilton or J. Madison) (E. Earle ed. 1941).

18. Letter from Samuel Adams to John Scollay (Dec. 30, 1780), *reprinted in* 4 THE WRITINGS OF SAMUEL ADAMS 238 (H. Cushing ed. 1904).

19. THE FEDERALIST No. 8, at 44 (A. Hamilton) (E. Earle ed. 1941).

guarantee free exercise; its authority does not extend to the care of souls.

Here again, the framers were influenced by John Locke, this time Locke's *Letter Concerning Toleration*: "The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests . . . [such as] life, liberty, health, and indolency of body; and the possession of . . . money, lands, houses, furniture, and the like."[20] The whole jurisdiction of the magistrate, Locke adds, "reaches only to these civil concernments"[21] and not to the condition of souls. "The care . . . of every man's soul belongs unto himself."[22] Which is another way of saying that each of us defines the happiness that he has a right to pursue. And if, in doing this, he neglects the care of his soul? Locke answers, so what? Except insofar as the condition of souls affects behavior toward the "civil interests" of others, it is no business of the magistrate. Or, in Jefferson's words, "[t]he legitimate powers of government extend to such acts only as are injurious to others."[23]

No classical republic could afford this sort of indifference to the character of its citizens or, apparently, to be so unconcerned with the promotion of public spiritedness. What passes for *public* spiritedness is respect for another's *private* interests—self-interest rightly understood, in Tocqueville's words.[24] Securing rights means securing *private* rights, the rights to life, liberty, and a privately defined happiness. Those rights define or describe a private sphere where government is forbidden to enter, a sphere narrower in size and scope than that of the state of nature, true, but far wider and far more extensive than that of any previous political society. Again, when secured, the rights to life, liberty, and the pursuit of happiness describe a private sphere greater in scope than any that had ever existed.

How are these rights secured? By *surrendering* certain rights to a government of a certain sort. "Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order

20. J. Locke, A Letter Concerning Toleration 15 (M. Montouri rev. ed. 1963) (1689).

21. *Id.* at 17.

22. *Id.* at 45.

23. Jefferson, *Notes on the State of Virginia*, in 8 Jefferson's Complete Works 400 (H. Washington ed. 1854).

24. A. de Tocqueville, *supra* note 16, at 525.

to vest it with requisite powers."[25] Surrender, or "cede," these rights not, as Hobbes had it, to a Leviathan but, rather, following Locke's advice, to the legislative. In the state of nature and under the law thereof, each of us is empowered to do whatever he thinks necessary to preserve himself (and the rest of mankind); this power "*he gives up* to be regulated by Laws made by the Society, so far forth as the preservation of himself, and the rest of that Society shall require. . . ."[26] In the state of nature and under the law thereof, each of us is also empowered "*to punish the Crimes* committed against that Law."[27] This right, or this power, "he wholly *gives up*."[28] Gives it up, as Locke emphasizes time and again, to a commonwealth governed by "establish'd *standing Laws*, promulgated and known to the People, and not by Extemporary Decrees; by *indifferent* and upright *Judges*, who are to decide Controversies by those Laws; And to imploy the force of the Community at home, *only in the Execution of such Laws*. . . ."[29] Where there is no law, Locke writes, there is no liberty[30] (which is to say, security for private pursuits); and liberty is better secured under the laws of civil society than under the law of nature which—in the absence of "*a known and indifferent Judge*" and the power to back and support his judgments—is unenforceable or, at a minimum, is difficult to enforce. Knowing this, a rational man will exchange his natural liberty for civil liberty.[31]

There is safety—or security for unalienable rights—when these other rights are ceded to the legislative, and if the legislative power is vested in an assembly whose members serve for fixed terms and are subject to the laws they themselves enact, and especially if the people give their consent to these laws through representatives subject to their suffrage. Here is the meaning of that slogan made famous during the American Revolution, "no taxation without representation." In short, safety is to be had by exchanging natural rights or powers for the constitutional right to be represented in the process by which the laws are made. And that process cannot be altered without the consent of the people, which is to say, the majority. In Locke's words, "[t]he *Legislative* neither must *nor can transfer*

25. THE FEDERALIST No. 2, at 8 (J. Jay) (E. Earle ed. 1941).

26. J. LOCKE, TWO TREATISES OF GOVERNMENT, II, § 129, at 352 (P. Laslett ed. 1988) (3d ed. 1698) (emphasis in original).

27. *Id.*, § 128, at 352 (emphasis in original).

28. *Id.*, § 130, at 353 (emphasis in original).

29. *Id.*, § 131, at 353 (emphasis in original).

30. *See id.*, § 57, at 305-06.

31. *Id.*, § 125, at 351 (emphasis in original).

the Power of making Laws to any Body else, or place it any where but where the People have."[32] For example, they may not transfer it to the bureaucracy—*delegata potestas non potest delegari*, as Americans used to say when saying it might possibly have had some effect—or to the judiciary.

However, not everyone can be represented in the law-making process because not everyone—for example, not the Ayatollah Khomeini, not Charles I, not Oliver Cromwell, not Meir Kahane or Yassir Arafat—is willing to accept the end of representative government, which is limited government or security for the rights of life, liberty, and the pursuit of happiness. Not everyone is willing to let his neighbor alone.

Strictly speaking, *causes* cannot be represented, or what Tocqueville would have called *great* causes, embodied in "great parties." America, he said, was blessed by the absence of great parties.[33] And that, too, was not by chance, not an oversight. By separating church and state the framers excluded the sort of great parties that had plagued the Europe with which they were familiar and had given rise to civil war and revolution in seventeenth-century Britain—and had inspired Hobbes and Locke to search for a remedy.

American politics would be characterized by "small" parties with interests that *can* be represented. "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, [and] many lesser interests. . . . The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."[34] America would be a commercial republic, and in it the animosity of the old-fashioned religious factions, each pursuing a great cause, would be replaced by the peaceful competition of economic interests.

The right to be represented means the right to have one's interests weighed in the making of the laws, interests that can be regulated and accommodated because, ultimately, they are not incompatible. Karl Marx to the contrary notwithstanding, class struggle is not inevitable. There would be rich persons, sure, but the American rich, unlike the rich of the past, would have no interest in keeping the poor down. There would be poor persons, but the American poor, unlike the poor of the past, would have no interest in bringing down the rich, not if it

32. *Id.*, § 142, at 363 (emphasis in original).
33. A. DE TOCQUEVILLE, *supra* note 16, at 174-77.
34. THE FEDERALIST No. 10, at 56 (J. Madison) (E. Earle ed. 1941).

required them to destroy the liberty that allowed the rich to become rich and by which they hoped to become rich themselves. But causes, as I have defined them, cannot be accommodated because they are incompatible. To paraphrase Calvin Coolidge, America's business is, on the whole, business, not causes, and that, too, is not by chance.

To repeat: rights can be secured by surrendering some of them in exchange for the right to be represented in the making of the laws which, in our case, are made by constitutional majorities. These majorities assembled from among the representatives of the people rather than from among the people themselves. Will it work? Will this Constitution, this constitutional system, "establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty [not only to the framers and their immediate posterity, but to succeeding generations of Americans]"?[35] Will it work regardless of the sort of people we are or become?

To judge from what they did in 1787, one might conclude that the framers were confident that it would work. In *The Federalist*, they acknowledged the necessity of a virtuous citizenry—"Republican government presupposes the existence of [virtue] in a higher degree than any other form [of government],"[36]—but as I indicated above, they left virtue unendowed. Their Constitution is silent on the subject: nothing is said about education, the family, public service, moral qualifications to vote or hold office, and the like. In fact, nothing whatever is said about citizenship.

To judge from what they said, however, one would have to conclude that they thought that something in addition to these new scientific institutional arrangements were needed if free government were to be preserved. "[V]irtue or morality is a necessary spring of popular government," President Washington said in his Farewell Address, and whatever the case with respect to "minds of peculiar structure," such as his own, presumably, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."[37] And here is Jefferson on the same subject: "[C]an the liberties of a nation be thought secure when we have removed

35. U.S. CONST. preamble.

36. THE FEDERALIST No. 55, at 365 (A. Hamilton or J. Madison) (E. Earle ed. 1941).

37. G. WASHINGTON, FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, S. DOC. NO. 5, 96th Cong., 1st Sess. 19 (1979).

their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"[38] But note the qualifications. Washington seems to exempt himself—and others of minds of peculiar structure—from the necessity, and Jefferson says *not* that these liberties *are* of the gift of God, but that the people should believe they are.[39]

Jefferson's point was elaborated by his fellow Virginian, St. George Tucker, in his widely read edition of *Blackstone's Commentaries*. (Read by lawyers who in turn made the laws.) What is needed, Tucker wrote, is a "rational and liberal religion; a religion founded on just notions of the Deity, as a Being who regards equally every sincere worshipper, and by whom all are alike favoured as far as they act up to the light they enjoy."[40] In other words, a god whose only command is, worship sincerely, a command that can be obeyed by one of any religious persuasion. Go to the church of your choice, as our billboards say. "It is," Tucker continues, "only this kind of religion that can bless the world, or be an advantage to society."[41]

But perhaps the framers relied on the states here, relied on them to do what they had traditionally done—and what their state constitutions did not, or did not yet, forbid them to do—to promote public spiritedness or the habits appropriate to republican citizenship. I have in mind here the kind of laws Tocqueville speaks of: sumptuary laws, or laws "concerned with the maintenance of good behavior and sound mores in society."[42] If not the sort of laws adopted by the democratic legislatures of seventeenth-century New England—Tocqueville mentions laws punishing blasphemy, adultery, sorcery, idleness, drunkenness, impiety[43]—then, at least, their modern equivalents. Such laws were still in effect in the late eighteenth

38. Jefferson, *supra* note 23, at 404.

39. This raises the following question: can the people hold this opinion when they are told that it is useful that they hold it? Especially when, with respect to this subject, they have a constitutional right to hold any opinion they choose?

40. 2 G. TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 9 (Rothman Reprints 1969) (Philadelphia 1803).

41. *Id.* One is reminded of the Roman situation as described by Gibbon in his *Decline and Fall of the Roman Empire*: "The various modes of worship which prevailed in the Roman world, were all considered by the people, as equally true; by the philosopher, as equally false; and by the magistrate, as equally useful." 1 E. GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE, ch. 2, at 34 (H. Milman ed. 1883).

42. A. DE TOCQUEVILLE, *supra* note 16, at 42.

43. Id. at 41-42.

century—for example, laws having to do with the family and the relations between generations—and, as I say, perhaps the framers relied on the states to retain and enforce them. But whether they did or not became irrelevant by an event—judicial intervention in the legislative process—arising out of the framers' failure to resolve the slavery question.

Originally, blacks were governed, but they were not represented in the law-making process and, consequently, were not part of the constitutional majorities that made the laws. Stated otherwise, they were deprived of their right to be represented with the consequence that their interests were not weighed in the fashioning of the laws. They were not part of the people of the United States.

This, presumably, was changed by the fourteenth amendment which, in its second section, promises to punish the states that continued to deprive them of their right to be represented. But that provision has *never* been enforced;[44] it was not until 1965 and the passage of the Voting Rights Act that Congress became serious about the "right of any citizen of the United States [regardless of race, color, or previous condition of servitude] to vote."[45] But, in the meantime, the Supreme Court had intervened to do what the Congress had failed to do.

What the Court did was to create *rights*—the right to vote in primary elections,[46] the right to attend nonsegregated public schools,[47] and so forth. Then, inspired by the success attending these decisions, it began to create rights of every description—for example, the right of a woman to terminate a pregnancy[48]—and it failed by a single vote to create a right of homosexual sodomy.[49] We have become a society ridden with judicially-created rights.

This has consequences that ought to concern us. Whereas the framers intended a politics of interests that would be weighed and could be accommodated in the legislative process—a process that, depending as it does on the necessity to find or build majorities, fosters compromise and, therefore, moderation—we now have a politics of rights, a politics that

44. In fact, the Supreme Court refused to enforce the provision. *See* Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946) (No. 916).

45. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1981)).

46. Smith v. Allwright, 321 U.S. 649 (1944).

47. Brown v. Board of Educ., 347 U.S. 483 (1954).

48. Roe v. Wade, 410 U.S. 113 (1973).

49. Bowers v. Hardwick, 478 U.S. 186 (1986).

excludes compromise and moderation. It is a zero-sum politics with one winner. The wife gains a right to terminate a pregnancy, which leaves nothing for the husband who has an interest in becoming a father. Interests, as Madison pointed out in *The Federalist* No. 10, had to be and, in his judgment, *could* be regulated,[50] but rights cannot be regulated, which is why interests, and not rights, are represented in the legislative process. When the Court "creates" a right, it carves out a sanctuary for a private activity, an area isolated and insulated from the law and, therefore, from regulation.

But that is not all. By carving out these various sanctuaries—for Thelma Levy,[51] Fanny Hill,[52] Paul Cohen,[53] and many others—the Court has to strike down those state laws having to do with legitimacy and illegitimacy and therefore the family, with obscenity and pornography and therefore the family, with public profanity and therefore civility and our ability to live together in peace. In short, the Court has created a sanctuary from the legal efforts of states to somehow preserve one of the "normative bases of the United States Constitution."

50. THE FEDERALIST No. 10, at 54-58 (J. Madison) (E. Earle ed. 1941).
51. Levy v. Louisiana, 391 U.S. 68 (1968).
52. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413 (1966).
53. Cohen v. California, 403 U.S. 15 (1971).