

COMMENTARY ON “CATHOLIC SOCIAL THOUGHT AND THE AMERICAN REGIME”

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Holloway and Shankman ask the right questions in trying to figure out whether and to the extent to which Catholic social thought is compatible with the American regime. By directing our attention to fundamental disagreements between the Church and modern political philosophers such as Hobbes and Locke, Holloway and Shankman render a great service. In portraying Madison as overly Hobbesian, though, Holloway implies that the tension between Catholic social thought and the Federalist is more pronounced than it actually is. And in endorsing a common law approach to judging, Shankman ignores the serious reservations against such an approach voiced by Madison, other Founders and case law.

Introduction

In an attempt to gauge whether and the extent to which Catholic social thought is compatible with the American political regime, Carson Holloway and Kimberly Shankman compare Pope Leo XIII's *Rerum Novarum* with political documents they consider influential in shaping an American way of life. Since neither of their articles mentions any encyclical besides *Rerum Novarum*, Catholic social thought, for purposes of this symposium, is operationally defined as that encyclical. Holloway compares *Rerum Novarum*'s teaching on how to attain justice between different economic classes with James Madison's take on the issue in *Federalist* #10. Shankman juxtaposes the encyclical's teaching on property rights with the opinion handed down by the United States Supreme Court in *Lochner v. New York*.

After detecting a decisively Hobbesian influence on Madison and, by extension, on the American democratic republic, Holloway then goes on to consider whether the Hobbesian account of human nature jibes with Catholic social thought. Similarly, after uncovering a Lockean influence on American political thought and in the opinion of the Court in *Lochner*, Shankman then proceeds to compare and contrast the Lockean version of natural law with the

strand articulated in *Rerum Novarum*. Neither of the articles under review has anything good to say about Hobbes's *Leviathan* or Locke's *Second Treatise on Civil Government*, on the one hand, or anything bad to say about Pope Leo's *Rerum Novarum*, on the other. It is therefore not at all surprising that Holloway and Shankman discover a tension between the political teaching of modernity and Catholic social thought. More particularly, as they see it, the former tends to lead to isolated individualism and conflict while the latter emphasizes brotherly love and the harmonizing interdependence of human society. Holloway persuasively argues that Hobbes's anthropology is utterly incompatible with that taught by the Church, and Shankman rejects what she calls "the attenuated and impoverished Lockean version of natural law" in favor of the more fruitful strand she finds championed in *Rerum Novarum*.

A tension between Catholicism and modernity, however, does not necessarily imply that Catholicism and the American regime must be as incompatible as are Catholicism and modernity, unless modernity and the American regime are virtually synonymous, as Holloway and Shankman seem to assume. Holloway presents an unambiguously Hobbesian, i.e. wholly modern, interpretation of *Federalist* #10. There is little to dispute regarding, and a great deal to learn from, his excellent analysis of *Rerum Novarum* and Hobbes's *Leviathan*. His interpretation of *Federalist* #10, however, while persuasive in some ways, is not as plausible. After this interpretation is analyzed I shall then consider Shankman's comments on the judiciary.

Rerum Novarum, the Leviathan, and Federalist #10

Parts IV and V of Holloway's article bring to our attention important and far-ranging differences between the anthropologies contained in Pope Leo XIII's *Rerum Novarum* and Hobbes's *Leviathan*. It is not altogether surprising, however, that the comparison/contrast Holloway presents between an encyclical and a political treatise is more illuminating than that it presents between an encyclical and a newspaper article. After all, unlike works that are more self-contained, such as *Rerum Novarum* and the *Leviathan*, *Federalist* #10 was written as a part (i.e., an essay) of a larger whole (i.e., a series of eighty-five essays). In fact, at the time *Federalist* #10 was printed in the *New York Daily Advertiser*, approximately eighty-eight percent of *The Federalist* had yet to be written. To the extent that *Federalist* #10 was no more intended to stand on its own than were any of the other separate *Federalist* essays, it does not lend itself as readily to be compared and contrasted with more self-contained works.¹ Therefore, in order to understand the American regime, it behooves us to consider more than one *Federalist* essay.

The reasons Holloway provides in support of his thesis that, as he puts it, "Madison's account of the parts of the soul, or the elements of human nature,

runs parallel to Hobbes's to a remarkable extent" are original, and to some extent also plausible. Nevertheless, there are more convincing reasons to think his article overstates an apparent similarity between Hobbes's and Madison's take on reason. To be sure, Holloway's depiction of the Hobbesian denigration of reason is on target. Still, however much a sentence or two in *Federalist* #10 might give one the impression that Madison joined Hobbes in subordinating reason to self-interest and passion, observations Madison made elsewhere in the *Federalist*, (e.g. in *Federalist* #49) suggest otherwise: "it is the reason of the public alone that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."²

Hobbes would have probably agreed with Madison that the sovereign state should clamp down upon the passions of its subjects, or at least those passions that the sovereign finds useful to manipulate. However, Hobbes would not have sanctioned Madison's statement that citizens should use their reason to hold the government in check. If the power of Hobbes's sovereign is to be limited at all, it certainly is not to be limited by the reason of the public. As Holloway's article makes clear, the Hobbesian sovereign goes to great lengths to discourage his subjects from using their capacity to reason because he fears that their use of this capacity is more likely to lead to harmful than to beneficial results. In contradistinction to Hobbes, Madison *encourages* rather than *fears* the citizens' use of reason, chiefly because it places a check on government.

In *The Political Philosophy of James Madison*, the most recent book-length treatment of Madison's political philosophy, Garrett Ward Sheldon asserts that "[o]ne might wish to attribute Madison's skepticism toward human nature to Thomas Hobbes and his vision of avaricious creatures in the state of nature, but there is no evidence of a Hobbesian influence on Madison."³ Holloway's article makes a compelling case that the assertion that Hobbes did not influence Madison at all is untenable. It will be argued below, however, and largely in Madison's own words, that the overly Hobbesian portrait of Madison painted by Holloway may differ as much from the real Madison as the Madison-as-wholly-uninfluenced-by-Hobbes version of the Founder articulated by Sheldon.

Madison on an Extended Republic & the Alleged Novelty of That Arrangement

Holloway's article also overstates the extent to which Madison relied on institutional contrivances, and most especially the extended republic, to help protect liberty. Holloway asserts that "[i]n seeking to control the violence of faction, Madison *places his confidence* in the proper organization of government institutions" and that Madison "*relies* on an institutional scheme" (emphases added). There is no doubt that Madison placed some degree of confidence in

institutional arrangements. This is not to say, though, that Madison simply “plac[ed] his confidence in” them. Put differently, Madison certainly includes an institutional scheme among his proposals, but he never said that his proposals *rely* on such a scheme. In fact, in *Federalist* #51, Madison explicitly refers to the components of this institutional scheme as setting up merely “auxiliary precautions.”⁴ This phrase is used in the following context: “A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.” Holloway disregards the “primary control,” and treats the “auxiliary precautions” as if they were the “primary control.” While these “auxiliary precautions” are necessary, they are subordinate to “the primary control of the government.”

Madison did not think that it was unreasonable to depend *chiefly* upon the people and their representatives to safeguard liberty, and only secondarily upon institutional arrangements. He went so far as to point out in *Federalist* #55 that “[r]epublican government presupposes the existence of these qualities [namely, the qualities which justify a certain portion of esteem and confidence] in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us, [namely, by the enemies of republican government] faithful likenesses of human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.”⁵ Madison here affirms that the citizens have “sufficient virtue” for popular, representative government. Likewise, in *Federalist* #10, he points out that the citizen’s representatives would help to preserve republican government by “refin[ing] and enlarg[ing] the public views” through their extraordinary wisdom and virtue.⁶

Holloway asserts that Madison was “no doubt fully aware” of “the novelty” of his proposal to extend the sphere of the republic. In *Federalist* #14, however, Madison denied that this proposal was novel: “Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world.”⁷ The striking parallels between Madison’s extended republic and arguments contained in a couple of David Hume’s political essays, which had been published more than a decade before *Federalist* #10 hit the papers, lend credence to Madison’s claim that his proposal was not novel.⁸

Madison on Religious Appeals, and Our Sense of Justice and Unity

Holloway maintains that Madison considered religious appeals to be “practically useless.” This assertion, which is part of an interpretation that Holloway acknowledged states Madison’s position more strongly than Madison chose to do so himself, overlooks that statesman’s words and actions. If

Madison thought religious appeals are “practically useless,” it is hard to understand why he made at least one religious appeal in the *Federalist*, a work written to persuade citizens to support the proposed Constitution. Madison was well aware that many of those making up his intended audience took God seriously. In *Federalist* #37, Madison emphasized the role of prophetic phenomena in shaping human history: “It is impossible for the man of pious reflection not to perceive in it [i.e., the new Constitution] a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution.”⁹

In a similar vein, Holloway asserts that Madison suggests “that concern for justice and the common good have *no force* in the human soul” (emphasis added). Not only is this remark nowhere backed up with any explicit reference to the *Federalist*, but it is also at odds with observations made by Madison in *Federalist* #51: “Justice is the end of government. It is the end of civil society. It has ever been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.”¹⁰ These observations strongly suggest that Madison thought many of his fellow Americans would be concerned enough for justice to pursue it mightily.

There are also reasons to think that the “friendliness, good feeling and brotherly love” that Pope Leo XIII calls for in *Rerum Novarum* are more likely to be found in the political regime established by the American Founders than Holloway’s article would lead us to expect. Holloway reminds his readers that Madison stated in *Federalist* #10 that it would be imprudent and/or impossible to force citizens living in a republican government to hold the same opinions. It is fair enough for Holloway to point this out. However, other *Federalist* essays, such as *Federalist* #s 2, 14 and 46, suggest that the American people, at least those living in the late eighteenth century, had interests sufficiently homogeneous to sustain republican government and a high level of agreement over matters of opinion. John Jay remarks in *Federalist* #2 that “Providence has been pleased to” make Americans “a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, [and a people who are] very similar in their manners and customs.”¹¹ These qualities have the tendency to elicit good feeling among such a people as those described above and are consonant with friendliness and brotherly love. Likewise, Madison argued in *Federalist* #14 that “the kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their Union and excite horror at the idea of their becoming aliens, rivals, enemies.”¹² Finally, it is clear in *Federalist* #46 that Madison fully expected friendship to flourish within the states: “And with the members of these [i.e., the states] will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments.”¹³

Those Who Would Disagree with Publius

As anyone knows who has tried to carefully read *Federalist* #10, Madison provides detailed reasons in an attempt to support his vision of good government. By scrutinizing and challenging these reasons, Holloway honors Madison. In the *Federalist*, Publius draws a distinction between two groups of those who have found fault with the work of the Constitutional Convention; (1) citizens who provide plausible reasons to disagree about the desirability of particular Constitutional principles, and (2) those who do not provide plausible reasons for their disagreement, but who do not let that stop them from disagreeing. He referred to those in the first group as “the more respectable adversaries,” “the more candid opposers,” and “the most intelligent of those who have found fault.”¹⁴ Were Holloway one of Madison’s contemporaries, there is reason to think the latter would have regarded the former as belonging in the first group.

Publius’s Conception of the Judiciary as “the Least Dangerous” Branch

Kimberly Shankman’s thoughtful article deplores a phenomenon well worth deploring, namely that so many modern Justices and judges have routinely engaged in a freewheeling Constitutional “interpretation” that has allowed them to legislate from the bench. These unelected judicial legislators thereby advance what they consider to be basic goals for American society, and they are not at all hampered in imposing these goals by considerations such as whether or not they are consistent with the *Constitution*. When Justices and judges decide cases upon the arbitrary basis of their own personal predilections, they replace the democratic republic established by the American Founders with a judicial dictatorship. For all the right reasons, Shankman calls for judicial discipline and restraint.

The *Federalist* calls for the same judicial characteristics. According to Publius, of the three political departments of government established in our country, the judiciary is “the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.”¹⁵ Although he considered the judiciary as “least dangerous,” Publius went on to recommend that the “arbitrary discretion” of the courts should be “bound down,” and that “strict rules and precedents” should further “serve to define and point out their duty in every particular case” that would come before them.¹⁶ In addition to these strict rules and precedents, Publius also provided the other departments of government with various means to hold the judiciary in check.

As had been the case from 1895 to 1937, however, and for approximately the past four decades as well, American Justices and judges have

been marked more by their judicial creativity than by their exercise of judicial discipline and restraint. Meanwhile, the two other branches of government have been derelict in their duties to hold the judiciary in check. A small body of judges has ruled over us as it thinks best, and not only is this inconsistent with the genius of republican government but Shankman reminds us that the judiciary has been more responsible than any other department of government for ushering in what Pope John Paul II calls “the culture of death,” which is, as Shankman points out, “hurrying us down the paths of death and destruction.” In other words, the “least dangerous” department of government arguably has become the most dangerous. Shankman poses the right question. Is there any way to reverse, or at least slow down, this downward spiral?

Quelling Judicial Imprudence: The Appropriate Role of the Judiciary in Interpreting the Constitution

Shankman and Publius agree that when Justices and judges come across the many clear-cut and self-explanatory provisions of the *Constitution*, they should decide cases based on the words of the text. Shankman identifies a few flies in the Constitutional ointment, however, when she calls to our attention “a few [Constitutional] provisions which seem inherently—that is, both by the subjective (what was on their minds and in their arguments) and objective (what the words were commonly understood to mean) intent of the framers—to point outside the ‘four corners of the constitution.’” Shankman cites the due process clause, the privileges or immunities clause and the Ninth Amendment to the *Constitution* as examples of such open-ended provisions, and she maintains that they “seem to require judges who would interpret them—if *the judges want to be faithful to the textual intention of the Constitution itself*—to essentially step back and examine the whole structure of the *Constitution* . . . if they are to have any chance of legitimately answering the question of what the *Constitution* itself means when it refers to the privileges or immunities of the United States, or the rights retained by the people” (emphasis in original).

It is far from clear that these open-ended provisions of the *Constitution* were intended to be judicially enforceable, though Shankman seems to assume they were. In a democratic republic, why should it be left up to the courts to try to explain what the open-ended provisions of the *Constitution* mean? Shankman’s article does not contain a single statement by anyone at the Constitutional Convention or at the ratification debates who stated an intention or displayed an understanding that any of these three open ended-provisions were intended to be judicially enforceable. This does not necessarily rule her assumption out of court, however. We shall consider later the view that Madison’s argument on the floor of the House in defense of the Amendments

to the *Constitution* presents the possibility that he intended at least some of the clauses in these Amendments to be judicially enforceable. Let us consider the “rights retained by the people” clause of the Ninth Amendment, one of the open-ended provisions Shankman identifies.¹⁷

It is a truth universally acknowledged that the *Constitution* would not have been ratified without Madison’s promise of Amendments. The first Ten Amendments added to the *Constitution* in 1791 might therefore be seen as the brainchildren of the Anti-Federalists and Madison. In addition to conceiving of the Amendment, Madison also served on the committee of the House of Representatives that revised his original conception of the Amendment. The Ninth Amendment declares that “[t]he enumeration in the *Constitution*, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁸

Shankman mentions in footnote number 12 of her article that Judge Robert Bork has maintained that open-ended provisions like these are “so vague as to have no effectively discernable meaning, and therefore should never be interpreted by judges at all.” In other words, according to Bork, since it is not clear what rights are protected by the Ninth Amendment, Justices and judges should ignore the Amendment. In response, Shankman contends: “it is equally a subversion of the *Constitution* to judicially eliminate a provision as it is to judicially make one up.” Shankman and Bork agree that judges ought not to make up Constitutional provisions. However, it is not clear what Shankman means by “judicially eliminate a provision.” This phrase could mean that a court declares that (1) not only is a vague Constitutional provision not to be interpreted by the judiciary, but it also is not to be interpreted by either of the other two departments of government, or (2) a vague Constitutional provision is not to be interpreted by the judiciary, but it *may be* interpreted by either or both of the other two departments of government. Practitioners of judicial self-restraint such as Bork would argue that in the first case the court has clearly overstepped its bounds, but in the second case it has merely and rightly declined to assign meaning to the clause. On a related matter, Shankman asserts: “while the *Constitution* both rests on and subsumes natural law principles, these principles are mediated, from the perspective of the framers, by prudential considerations.” In reply, it could be pointed out that “prudential considerations” do not necessarily require the judiciary to be the decision maker. Why could not they be carried out entirely through the political realm?

The most plausible reason to conclude that these “prudential considerations” are not likely to be carried out well, if at all, through the political process is because Madison argued that “[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.”¹⁹ This observation suggests that legislatures pose such a serious threat to rights that they are not to be exclusively relied upon to protect

them. This is where Madison's vaunted "independent tribunals of justice" become relevant. In defending his proposed Amendments before the U.S. House of Representatives, Madison observed:

If they [i.e., the Amendments he proposed] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.²⁰

The passage above strongly suggests that Madison intended at least some of the rights described in the Amendments to be judicially enforceable. However, it is not clear whether the rights that are not enumerated, but that are nonetheless retained by the people, are also judicially enforceable. Madison's use of the phrase "rights expressly stipulated" suggests that only those rights are judicially enforceable, and that the rights that are not so stipulated are not judicially enforceable.

Madison on the Relation between the Common Law and the U.S. Constitution

It is certainly possible that Madison believed that rights that are not expressly stipulated are judicially enforceable, but his comments regarding the difficulty entailed in incorporating the common law wholesale into the U.S. *Constitution* lead one to suspect that he did not see it this way. At the Constitutional Convention, Madison explicitly argued that the common law is only contained in the *Constitution* to the extent that it is "expressly adopted."²¹ Madison went on to explicitly denigrate the practice of using the common law to provide a standard for defining particular provisions of the *Constitution*, on the grounds that such a practice would secure neither "uniformity nor stability in the law."²² Moreover, Madison also wrote that the Constitutional Convention did not incorporate wholesale the common law into the *Constitution* in part because doing so "would have brought over from G[reat] B[ritain] a thousand heterogeneous & anti-republican doctrines, and even the *ecclesiastical hierarchy itself*, for that is a part of the common law" (Madison's emphasis).²³ Finally, in the Virginia report (1798), Madison maintained the view he had articulated earlier and left little doubt about his thoughts regarding the wholesale incorporation of the common law to the U.S. *Constitution*: "[P]articular parts of the common law may have a sanction from the *Constitution* so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government," but the common law was not incorporated beyond these technical phrases.²⁴ In Madison's view, if the

common law were to have been incorporated as a Constitutional obligation, it would have granted “the judicial department a discretion little short of a legislative power.”²⁵

To the extent that Madison disapproves of allowing the judicial department to exercise legislative power, it seems unlikely that he would approve of independent tribunals of justice ruling on the basis of unenumerated rights or parts of the common law that have not been explicitly incorporated into the *Constitution*. In concluding this essay, let us consider more of Madison’s own words on the topic:

[T]he common law never was, nor by any fair construction ever can be, deemed a law for the American people as one community ... It is, indeed, distressing to reflect that it ever should have been made a question, whether the *Constitution*, on the whole face of which is seen so much labor to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law—a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sap the foundation of the *Constitution* as a system of limited and specified powers. A severer reproach could not ... be thrown on the *Constitution*, on those who framed, or on those who established it, than such a supposition would throw on them.²⁶

These observations strongly suggest that Madison would not agree with the common law approach to judging endorsed by Shankman. “The Father of the *Constitution*’s” view may not be enough to settle the debate over the place of common law in American jurisprudence. However, Thomas Jefferson and most of the other American Founders, as well as relevant case law, have found good reasons to agree with Madison’s take on this issue.

Catholic Social Thought and the American Political Regime

Holloway and Shankman ask the right questions in trying to figure out whether and the extent to which Catholic social thought is compatible with the American regime. By directing our attention to fundamental disagreements between the Church and modern political philosophers such as Hobbes and Locke, Holloway and Shankman render a great service. In portraying Madison as overly Hobbesian, though, Holloway implies that the tension between Catholic social thought and the *Federalist* is more pronounced than it actually is. And in endorsing a common law approach to judging, Shankman ignores the serious reservations against such an approach voiced by Madison, other Founders and case law.

Notes

1. Madison explicitly refers back to *Federalist* #10 four times in his later essays (twice in *Federalist* #14, and once each in *Federalist* #'s 37 and 63). The following remark contained in *Federalist* #63 suggests that to a considerable extent, Madison qualifies the well-known argument he made in *Federalist* #10 promoting the extended republic, (an argument summarized in Holloway's article): "It may even be remarked that the same extended situation which will exempt the people of America from some of the dangers incident to lesser republics, will expose them to the inconveniency of remaining for a longer time, under the influence of those misrepresentations which the combined industry of interested men may succeed in distributing among them." See Jacob Cooke's edition of *The Federalist*, (Middletown, Connecticut: Wesleyan University Press, 1961), pp. 425-26. Unless otherwise indicated, all references in this essay to *The Federalist* are to the Cooke edition.
2. *The Federalist* p. 343.
3. *The Political Philosophy of James Madison*, by Garrett Ward Sheldon (Baltimore: The Johns Hopkins University Press, 2001), p. 130, footnote #13.
4. *The Federalist*, p. 349. Four years after the *Federalist* was published Madison made a similar point regarding institutional arrangements: "In bestowing the eulogies due to the partitions and internal checks of power, it ought not the less to be remembered that they are neither the sole nor the chief palladium of constitutional liberty. The people, who are the authors of this blessing, must also be its guardians. Their eyes must be ever ready to mark, their voice to pronounce, and their arm to repel or repair aggressions on the authority of their constitutions" ("Government of the United States," *National Gazette*, February 4, 1792, in the *Papers of James Madison*, volume 14, p. 218).
5. *The Federalist*, p. 378.
6. *The Federalist*, p. 62.
7. *The Federalist*, p. 88.
8. Douglass Adair made a compelling case that Madison's argument for an extended republic borrowed heavily, in terms of both substance and style, from political essays written by David Hume. See Adair's "'That Politics May Be Reduced to a Science': David Hume, James Madison, and the Tenth *Federalist*" in *Fame and the Founders*, edited by Trevor Colbourn, (New York: Norton & Company, Inc., 1974), pp. 93-106, and chapter six, entitled "The Extended Republic," from his dissertation *The Intellectual Origins of Jeffersonian Democracy*, edited by Mark E. Yellin, (Maryland: Lexington Books, 2000).
9. *The Federalist*, p. 238.
10. *The Federalist*, p. 352.
11. *The Federalist*, p. 9.

12. *The Federalist*, p. 88.
13. *The Federalist*, p. 316.
14. *The Federalist* #47, p. 323 ; #61, p. 410 ; and #76, p. 512.
15. *Federalist* #78, p. 522.
16. *Federalist* #78, p. 528.
17. Regarding the Fourteenth Amendment's "privileges or immunities" clause, in *Butchers' Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co.* [the Slaughterhouse Cases] (1871), the Court narrowly limited the scope of the "privileges or immunities" clause, and it has not expanded the clause's scope since that decision was handed down.
18. My analysis of the Ninth Amendment draws heavily from *The Rights Retained by the People: The History of the Meaning of the Ninth Amendment*, Randy E. Barnett, ed. (Virginia: George Mason Press), pp. 1-49.
19. *The Federalist* #48, p. 333. See also 1 *The Debates and Proceedings in the Congress of the United States*, p. 454 (J. Gales and W. Seaton, eds. 1834).
20. Gales and Seaton, p. 457.
21. *The Records of the Federal Convention of 1787*, vol. II, p. 316 (Max Farrand, ed, 1966). The view presented here of Madison's opinion regarding the common law has benefited tremendously from Gary L. McDowell, *Equity and the Constitution* (Chicago: The University of Chicago Press, 1982).
22. *Ibid*, vol. II, p. 316.
23. James Madison to George Washington, October 18, 1787, in Robert A. Rutland and C.F. Hobson, eds., *The Papers of James Madison* (Chicago: University of Chicago Press, 1977), volume 10, p. 196.
24. Marvin Meyers, ed. , *The Mind of the Founder: Sources of the Political Thought of James Madison* (Indianapolis: Bobbs-Merrill, 1973), p. 318.
25. *Ibid*, p. 324.
26. *Ibid*, p. 325.