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A QUARTERLY MESSAGE ON LIBERTY

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The Madisonian System: A Republic If We Can Keep It

JONATHAN TURLEY

James Madison was a profoundly gifted and brilliant man with a wide array of intellectual influences. Perhaps the least well known was the influence of Sir Isaac Newton. I have been writing about the influence of Newtonian physics on Madison in the context of constitutional theory. Madison's records show his fascination with Newtonian physics, including elaborate charts of orbital bodies and their gravitational pull. He viewed our tripartite political system—legislative, executive, and judicial—in such planetary terms: that they were locked in an orbit. The three branches create a stable system through their inverse gravitational pull.

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The problem is that now this balance is being thrown off in two important respects. First, we've seen the rise of what I've called an "uber-presidency," a dominant presidency within the system.

Presidents have been usurping power, particularly from the legislative branch, for decades. Second, we have seen the rise of a type of "fourth branch"—the domination of federal agencies that have become increasingly independent in their actions and policies. Today you are 10 times more likely to be adjudicated in an administrative proceeding than you are in a real court of law. There are roughly 100,000 adjudications in the federal system each year, and a million done by agencies. The vast majorities of direct limitations and regulations in your life are coming from agencies, not direct legislation. Yet, these agencies are insulated in a way that really challenges the basic representative democratic values that the Framers believed in.

> "Congress is the very thumping heart of the Madisonian system."

A lot of people misunderstand the separation of powers as a protection, somehow, of the institutional powers of the three branches. That's not how the Framers viewed it. The Framers viewed the separation of power as a protection of liberty. Why? Because they viewed the concentration of power as the existential danger for any free nation. They needed to create a system that could guarantee that these powers would never become concentrated in any one person or any one branch, and Madison particularly believed in that. He believed that ambition could combat ambition. It's very hard to get me to say that Madison was wrong about anything, but on this one, unfortunately, our contemporary politicians may have proved him wrong.

One of the most unnerving moments for me came with the State of the Union a couple of years ago when President Obama went in front of Congress and said he was tired of Congress not doing enough on immigration, not doing enough on healthcare, not doing enough on any of his proposals, and that he had decided that he would act unilaterally. To my amazement, what followed was rapturous applause by half the body. I sat there in disbelief as members of Congress gave a standing ovation to their own functional non-entity status. It was like giving a human wave for your own institutional obsolescence. It was a moment that challenged the very foundational beliefs of Madison and the foundational principles of our system of government.

Much of what Madison tried to do was based on his idea of human nature. He believed that the instability of most systems came from factions, and that factions were a natural part of being human. We did not invent the separation of powers, but what we did differently was create a system designed to bring factions out in the open. Instead of ignoring them, we bring them to the surface, so they can be addressed. In our system, these factional pressures implode in Congress rather than explode on the streets of Washington. That's what makes it so dangerous

when you see authority being siphoned out of Congress. Congress is the very thumping heart of the Madisonian system. It is for this reason that the conflict with the president is much more dangerous than some type of turf fight between a president and Congress. It challenges the very thing that gives stability to our system.

> "What the president is doing is not *one* of the dangers the Framers were concerned about; it is *the* danger the Framers were concerned about."

Madison said, "Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." What he was saying is that, while these factions may annoy us, they are the very expression of the liberty that sustains us. And that is where my fundamental disagreement with the president lies. There is no license in our system to go it alone. You have only two choices: you can change Congress or you can compromise. What those members were applauding at the State of the Union was a government of a different kind. And it is one that, frankly, I hope my children don't see.

What we are seeing is the rise of what used to be called "the royal prerogative." This was a well-known term to the Framers. For example, King James I would constantly take laws passed by Parliament and change them. His idea was that this is all part of a sort of organic, ongoing process, and he was simply contributing a reasoned interpretation or extension of the law. Of course, people like Sir Edward Coke and others objected that the King was articulating the very inverse of law in exercising such royal license or prerogative. The Framers took the same view. Thomas Jefferson said, "We give them those powers only which are necessary to execute the laws (and administer the government)." When the president becomes a legislator, he becomes a government unto himself. For this reason, what the president is doing is not *one* of the dangers the Framers were concerned about; it is *the* danger the Framers were concerned about.

In testifying in Congress, I am often told that such principles are unrealistic and outdated in the *real* world. Members often say that the Framers did not have to live with the type of gridlock or poisonous environment we have today. I often have to struggle to contain myself and say "You know what? When the Framers wrote this thing, they were actually trying to kill each other." It wasn't a figure of speech—they had the Alien and Sedition Acts. Thomas Jefferson referred to his predecessor as the "reign of witches." Our Constitution wasn't just written *for* times like ours, it was written *in* a time like ours. In fact, it was

written for the worst times. Indeed, our dysfunctional politics is due in large part to the erosion of constitutional principles, particularly the concentration of powers in the executive branch and the federal agencies.

I'm writing a book on what I call a conarchitectural view of the Constitution, which actually harkens back to architectural theory. The fascinating thing about architectural theory and

constitutional theory is that they use the same terms and have the same concerns. They talk about "functionalism" and "formalism." Most professors are functionalists, which has contributed greatly to our current morass. Functionalists treat the lines of separation in a more fluid sense and tend to disfavor judicial review to maintain clear lines of separation between the branches. I favor a more formalist approach, which makes me a bit of an academic dinosaur and a member of a very small minority of professors. I believe that the separation of powers, the lines of division, are essential to the protection of liberty and the maintenance of stability in our system. Indeed, I view the current mess in Washington as further proof of the genius of Madison and why those lines of separation have to be maintained. To quote Robert Frost, "good fences make good neighbors."

So I found myself looking more closely at the concept of structure and that took me to architectural theory. There I found a strikingly parallel discussion to the one started hundreds of years ago by Madison and his contemporaries. I was particularly drawn to the theories of how structure influences behavior in so-called "deterministic designs." How we structure things influences not only how people move, but how they relate to each other—we relate differently in an open room than a room that is divided. Winston Churchill said, "There is no doubt whatever about the influence of architecture and structure upon human character and action. We make our buildings and afterwards they make us." Churchill, as usual, was incredibly insightful.

It is time to return to basics and consider the role of structure in our constitutional system. I believe that the Framers viewed our tripartite system as a type of deterministic architecture. It sort of funnels action and energies; it structures how we relate to each other. It forces us to deal with each other in a way that brings stability and dialogue. That's why this functionalist approach is so dangerous. We're removing these barriers from the design, and the result

is chaos. The result is a series of muscle plays between presidents and Congresses. The courts have removed themselves from these debates. We have a lack of stability, but we also have a lack of movement. Because the president can simply go outside the system, he doesn't have to negotiate with Congress. He doesn't have to compromise. It not only fuels partisan brinkmanship but poorly crafted laws and regulations. For example, by any measure, the Affordable Care Act was a uniquely bad piece of legislation when it was passed. It was filled with conflicts, gaps, and errors. Even Democrats, I think, will tell you privately that it was a fairly raw piece of legislation. Why? Because it never went through a bipartisan scrubbing, and negotiation, and compromise. It was a muscle play. And the result was a uniquely bad piece of legislative work.

Madison believed that by tapping into human emotions, tapping into this tendency toward factions, playing factions against each other, he had achieved a stable constitutional system for one of the most pluralistic nations on Earth. It was in fact the system that we need today—just as we needed it then. However, we lost faith in the values that support our Constitution. The branches themselves are no longer fighting for their institutional integrity, as he expected. When you look at those members applauding the president in his pledge to go it alone, you realize how far out of faith we have come.

In watching our system descend into confusion and chaos, one is often brought back to one of the most chilling scenes in our history. It occurred when Benjamin Franklin was coming out of the Constitutional Convention in Philadelphia, a woman by the name of Mrs. Powell went up to him and said "Dr. Franklin, what have you wrought, a republic or a monarchy?" and he turned to her and said "A republic, madam, if you can keep it." I always tell my students that's the scariest thing a Framer ever said or wrote, because what Benjamin Franklin was saying is that they could do nothing more than give us a system that could protect our liberties. However, every generation has to keep it for the generation that follows. For the first time in my life, I am deeply concerned about the system my children will inherit. We are failing them in our weakness and our partisanship.

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The question is, "What can we do about it?" And the answer is found in institutions like Cato and with the people in this room. We have no choice but to try to convince our neighbors that our system is changing. Without a debate, without a whimper of objection, it's changing. And we can't let this moment pass because this remains a republic only if we can keep it. ■

SCHOLAR PROFILE

Walter Olson

WALTER OLSON is a senior fellow at the Cato Institute's Center for Constitutional Studies. Prior to joining Cato, Olson was a senior fellow at the Manhattan Institute. He founded and continues to run Overlawyered.com, widely cited as the oldest blog on law as well as one of the most popular. He has been a columnist for Great Britain's *Times Online* as well as *Reason*. His writing appears regularly in leading publications, and the *Washington Post* has dubbed him the "intellectual guru of tort reform." He is the author of several books, including *The Litigation Explosion, Schools for Misrule*, and *The Rule of Lawyers*.

You've been tackling Maryland's notoriously gerrymandered districts after Gov. Larry Hogan chose you to co-chair his bipartisan redistricting reform commission. Could you talk a bit about that experience?

Libertarians haven't been very active on redistricting issues, yet gerrymandering exemplifies the way an entrenched political class can use government power in self-serving ways to insulate itself against voter discontent and correction. In Maryland, Gov. Larry Hogan campaigned on a promise of reform, and aside from Hogan's fellow Republicans the cause has drawn crucial support in the state from some progressive Democrats as well as good-government centrists. All these groups were represented on our commission, and as we worked through dozens of practical issues of how an independent redistricting body would operate, it was gratifying to help craft recommendations that kept a broad consensus together among diverse participants. Our marching orders were quick—in three months, we held five public hearings and several workshops—and I'm proud that we delivered on time a report grounded in the best scholarship that can serve as a resource for reformers nationally as well as in Maryland.

You supported the move to legalize same-sex marriage but have been critical of some of the gay rights movement in the aftermath of *Obergefell v. Hodges*. Why is that?

Most libertarians I know basically want government to 1) leave gay people alone in their private lives and voluntary interactions, and 2) treat citizens neutrally otherwise, whether it be in hiring applicants for public service based on talents or extending to same-sex couples the same legal statuses that are available to conventional couples. In the United States at this point, for the most part, those goals have been accomplished. Alas, the organized gay movement is following the well-worn track of the movements that claim to speak for women and racial minorities. Unsatisfied with the goal of freedom, public neutrality, and getting on with life from there, it wants government programs galore, heightened identity politics awareness, and continued expansion of coercive state authority—as in the proposed Equality Act in Congress, which would turn each local refusal to cater a wedding into a potential discrimination case in federal court. No thanks.

How did you end up a libertarian?

At age 13, there being no new James Bond novel out, and a friend having recommended Rand, I stopped by a drugstore and used my allowance to buy *Capitalism: The Unknown Ideal*. In retrospect, I'd been primed by years of dinner-table conversation taking for granted values like personal independence, the integrity of work, and what Deirdre McCloskey calls bourgeois dignity, the sense of business as an honorable calling. Much of that came from my mother, but it probably helped too that my father, who immigrated to Michigan from Sweden, had benefited from the American proposition of liberty and opportunity. ■

A New Way to Give

On December 18, 2015, President Obama signed into law the Protecting Americans from Tax Hikes Act of 2015 (PATH Act). The bill's name makes it sound like Christmas came early. To the contrary, the package of tax extenders arrived long overdue—emerging from the December 31, 2014, expiration of more than 50 tax breaks.

Better late than never, right? That's debatable given the size and scope of this legislation. On the one hand, PATH permanently codifies and extends major provisions that ensure we may keep more of what we earn. But this $620 billion tax bill wasn't written for the express purpose of relieving the American taxpayer. Despite positive business expensing and deductibility provisions, PATH preserves wind and solar tax credits, in perpetuity. It also makes the Earned Income Tax Credit (EITC) expansions permanent, thus enshrining additional wealth redistribution into law. Low-income workers would be better served by the removal of government barriers to investment, job creation, and entrepreneurship.

Fortunately for all Americans, PATH acknowledges the virtues of beneficence by permanently extending certain charitable giving incentives. For instance, the bill cements the deduction allowed for charitable contribution of real property for conservation purposes.

It also allows individual retirement account (IRA) owners aged 70 1/2 and older to transfer up to $100,000 annually to one or more charities without having to recognize the distribution as income. Donations will now count as part of the IRA owner's required annual withdrawal. Here's how it works: say the owner's required payout is $20,000 in 2016 and he or she donates half of that to a local school and symphony. Now this patron only has to withdraw the other $10,000 from the IRA. While there's no tax deduction for the donation, the IRS doesn't recognize it as income, either. As the Partnership for Philanthropic Planning observes, this lower income helps "charitably minded donors avoid taxes on Social Security benefits, higher Medicare premiums, higher tax brackets, and surtaxes such as the 3.8% net investment income tax." Distributions can be made only from traditional or Roth IRAs.

Despite the popularity and belated permanence of the IRA charitable rollover, the bill leaves room for improvement. The Council on Foundations issued a statement outlining the provision's shortcomings—it's still limited to taxpayers 70 1/2 or older; the gift amount is capped at $100,000; and donors are specifically prohibited from making charitable rollovers to donor-advised funds, supporting organizations, and private foundations.

Still, absent an expiration date, donors now have the ability to plan their future IRA-required minimum distribution with the knowledge that the rollover is available. The law is retroactive to January 2015, so it blesses IRA transfers made earlier this year. Gifts for 2015 must have been made by year's end. To qualify for the tax deduction, the donor can't receive any goods or services in return for the rollover gift. Consult your financial adviser to determine if an IRA rollover contribution to the Cato Institute would be advantageous. Distributions should be made directly by your IRA trustee payable to the Cato Institute. ■

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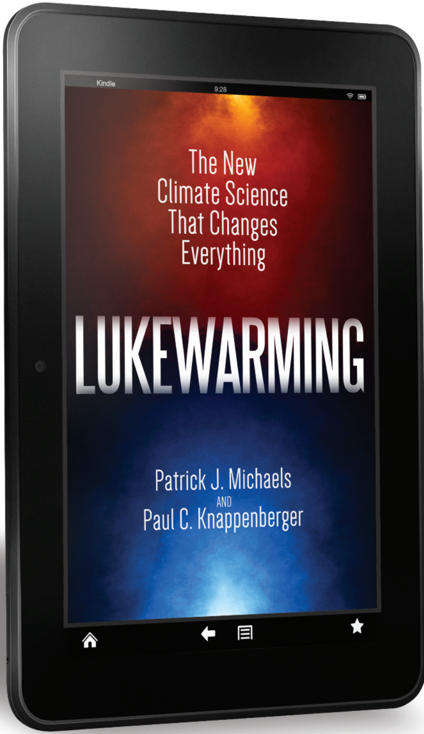

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—TERENCE KEALEY,
Vice Chancellor of the University of Buckingham

In *Lukewarming: The New Climate Science that Changes Everything*, Pat Michaels and Chip Knappenberger explain the science and spin behind the headlines and come to a provocative conclusion: climate change is real, and partially man-made, but it is becoming obvious that far more warming has been forecast than is going to occur. Global warming is more lukewarm than hot. This fresh analysis is engaging and enlightening to readers of all backgrounds and provides an invaluable briefing to those looking to be more informed about global warming and the data behind it.

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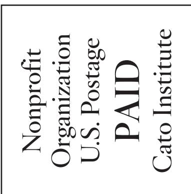

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