



# The Conservative Case for the Constitution, Part III: How the Constitution Promotes Consensus

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## Key Points

- The Constitution promotes consensus as an alternative to simple majoritarianism in at least four ways, two of which were hypothesized by James Madison and two by moderate nationalists at the Constitutional Convention.
- Madisonian consensus is facilitated by the interplay of factions in an extended republic. The federal government's checks and balances, a process of "ambition countering ambition," prevent dangerous accumulations of power.
- At the Constitutional Convention, nationalists from the small states encouraged the adoption of a federal system that directly involves states in national lawmaking through the Senate. This facilitates consensus by broadening the coalition necessary to govern in Congress.
- Moderate nationalists also limited national authority to strictly national issues, thereby reducing the potential scope of political conflict and making consensus easier.

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In the second report in this series, I posited that consensus was the central premise of the American system of government—as opposed to alternatives such as simple majoritarianism or a government of mixed estates.<sup>1</sup>

Before reviewing consensus' advantages and disadvantages, it is important to examine how the Constitution forces factions in society to bargain with one another. Some of these are familiar to students of American politics from James Madison's explanations in the *Federalist Papers*. His notion of the extended republic in theory secures consensus through the nation's size and diversity. America would be too large for any single group to dominate, forcing factions to find common ground. Madison's theory of checks and balances, discussed in *Federalist* 51, has a similar effect on the

agents in government: They will not be able to accumulate undue powers for themselves, because each can check the others. They will have to work together if they want to enact policies.

While Madison forcefully advocated for consensus, he was far from the only one. Many of Madison's opponents at the Constitutional Convention worried that his proposals would not do enough to forge consensus in the political community. Their concerns are partly responsible for the federal nature of the American system. Moderate nationalists from small states—such as John Dickinson of Delaware and Oliver Ellsworth of Connecticut—agreed with Madison that the national government had to grow more powerful. But they worried that Madison's idea of the extended republic would not prevent dangerous majorities from forming. Thus,

the Senate, in which each state receives exactly two votes, was created to protect smaller states and further ensure that public policy receives broad support. Likewise, the efforts to limit the scope of national power made common ground easier by limiting the scope of conflict in federal politics.

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The Madisonian vision of consensus, discussed on an introductory level in the second report in this series, is premised on a wager—the more diverse the polity, the less likely a majority will reflect a single faction’s self-interested views and the more likely it will represent the interests of the people at large. *Federalist* 10, quoted in the second report, merits recapitulation here.

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.<sup>2</sup>

This is an empirical guess based on Madison’s understanding of human nature and his read of the history of republics: An individual’s selfishness is limitless—and thus poses a constant threat to the stability of a just government. But one individual’s selfishness can be checked against another’s, and another’s, and another’s. The more this is done—the more one “extend[s] the sphere”—the less likely any specific group will be hegemonic. With no faction able to dominate, compromises will have to be made. Consensus will have to be found.

The republic’s diversity is not the only incentive for consensus in the Constitution. Power is divided among two branches of Congress and an executive, all of which ultimately serve at the pleasure of the people, but for different lengths of time and—at least at the Constitution’s initial ratification—in different manners (the House elected by the people, the Senate by state legislatures, and the president by the Electoral College). This ensures governing majorities can manifest themselves only across several elections. And the people do not rule

directly; rather, they govern through elected representatives “whose wisdom,” Madison argued in *Federalist* 10, “may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”<sup>3</sup>

There are three layers of protection embedded in our extended republic’s design: A diverse polity makes it harder for a majority faction to develop, the separation of public power across three governing branches requires the public to make sustained demands for policy action, and trustee politicians intervene to filter out the selfish or shortsighted views of the people. If one adopts a conservative view of human nature, which doubts the individual capacity for wisdom or virtue, this is a brilliant solution to the essential problem of government. It has its limits—for the problem is reducible to human selfishness, which Madison rightly notes is incurable—but there is a clear logic. The Constitution endeavors to empower only broad, deep, and considered majorities to govern, under the belief that their views will be most consonant with the public interest.

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Madison’s vision of republicanism is not limited to checking dangerous majorities but also selfish elites. In *Federalist* 51, he praises the “auxiliary precautions” embedded in the Constitution’s intermingling of executive and legislative authorities.<sup>4</sup>

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. . . .

It is equally evident that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges,

not independent of the legislature in this particular, their independence in every other, would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. . . .

A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.<sup>5</sup>

Madison argues in *Federalist* 51 that constitutional usurpations by one branch from another will be self-correcting, at least to some extent. If the executive should try to steal power that rightly belongs to the legislature, for instance, the latter has tools for self-defense. Just as importantly, the natural selfishness of members of Congress will make them eager to check such an assault.

This argument has ramifications beyond constitutional disputes (a role that the Supreme Court has since taken on, anyway). It suggests a layer of protection against the principal-agent problem inherent to government. In a typical principal-agent problem, a principal deputizes another to act as their agent in some matter; but it is costly for the principal to monitor the agent's actions and know if they are doing as instructed. Voters face a similar problem. Keeping track of the business of government is time-consuming, and voters might not know whether their elected leaders are doing what they were chosen to do. However, other agents in government might possess this knowledge, and in our constitutional system of checks and balances, they are empowered to use their authority to check one another.

Madison's argument in favor of checks and balances has an interesting analogue to his theory of the extended republic. In the latter, selfish factions are checked by other selfish factions; majoritarian tyranny is more difficult, and consensus becomes the most viable path forward. By intermingling powers among the branches, the Constitution allows those wielding political power to undermine one another's selfish, self-aggrandizing motives. So a version of oligarchy (or the rule of the rich) becomes more difficult, and consensus among the elites becomes the most viable path forward. Because no branch can fully dominate the others, each works to find common ground.

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This Madisonian vision of consensus gets a full treatment in his *Federalist* essays. He considers the necessity and wisdom of the extended republic in essays 10, 14, and 18–20, while the system of checks and balances is developed across essays 47–51. Of course, Madison wrote more than these 10 essays for the *Federalist*. *Federalist* 40–46 in particular deal with federalism, or the sharing of power between the state governments and the new national government.

One might think Madison would have jumped at the chance to explain in these entries how federalism facilitates consensus. But his treatment of the connection is indirect at best—likely for a few reasons. The essays aimed to defend the Constitution against its Anti-Federalist critics, who mainly were strong supporters of a limited federal footprint and believed the Constitution would destroy the states' role. So Madison did not need to make a case for federalism but needed rather to explain how the Constitution did not threaten to extinguish the power of the states. He also personally opposed the federated nature of the plan of government at the Constitutional Convention. His

plan of government, commonly known as the Virginia Plan, gave Congress sweeping powers over the state governments and denied the latter any direct role in national authority. These had been compromised away in the debates in Philadelphia; the Senate was now apportioned equally among the states, and the national government's power was more limited. These changes deeply frustrated Madison, so his defenses of these compromises in *Federalist* 40–46 can come across as strained.

While there was no great essayist to champion the relationship between federalism and consensus, such a connection nevertheless exists. Perhaps its most cogent and forceful defender was Dickinson of Delaware, who stood at the Constitutional Convention for the interests of his tiny state against the centralizing ideas of the Virginia Plan. Federalism found other useful proponents in Roger Sherman and Ellsworth of Connecticut, who suggested a compromise over congressional apportionment that guaranteed state equality. From these delegates and others—those committed to forging a stronger union but with a guaranteed role for the states—a logic of federalism becomes evident, one that has reinforced the basic commitment of government by consensus throughout American history.

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Madison's theory of the extended republic was just that—a theory. It was predicated on a keen understanding of human nature and a careful read of political history. But it had been untested, and it was reasonable to be skeptical of it in 1787. After all, no republic of the size Madison was proposing had ever been sustained. Madison could have been wrong.

If he had been wrong, his own economic and political interests would not have really suffered—because he was from Virginia. By far the largest state in the young nation in population and land, Virginia was large enough to make its own weather. Its interests would likely be secure if Madison's theory turned out errant and a diverse nation did not protect the rights and serve smaller political communities' interests. But what about Delaware, Connecticut, and New Jersey? These states were not only much less populous than mighty Virginia

was but they also had much less room to grow due to their small sizes. Virginia had little to lose if Madison's theories proved faulty, but the small states would have been utterly destroyed.

Still, many delegates to the Constitutional Convention from the small states agreed with Madison's main points. They believed the federal government's power had to grow and agreed that if its laws were to operate directly on the people, then the people must be represented in it. They were, in other words, nationalists like Madison. But as nationalists from states whose populations and territories were just a small sliver of the nation's, they feared they would be the biggest losers in a majoritarian tyranny. Gunning Bedford of Delaware asked, "Will not these large states crush the small ones whenever they stand in the way of their ambitions or interested views?"<sup>6</sup> David Brearley of New Jersey warned that proportional representation may seem fair, "but on a deeper examination was unfair and unjust," for the large states "will carry every thing before them."<sup>7</sup> William Paterson of New Jersey asserted that proportional representation was "striking at the existence of the lesser states."<sup>8</sup> William Johnson of Connecticut suggested that if the states should continue to exist, "they must be armed with some power of self-defense."<sup>9</sup>

Madison tried to talk them out of their fears. The large state–small state divide, he urged them, had no analogue in the typical cleavages of politics. If Massachusetts, Pennsylvania, and Virginia aligned against the small states, it would have to be out of some mutual interest Madison could not think of.

In point of situation they could not have been more effectually separated from each other by the most jealous citizen of the most jealous state. In point of manners, religion and the other circumstances, which sometimes beget affection between different communities, they were not more assimilated than the other States. In point of the staple productions they were as dissimilar as any three other States in the Union.<sup>10</sup>

This must be why, he reasoned, "the journals of Congress did not present any peculiar association of these states in the votes recorded"; they had

nothing in common except their large sizes.<sup>11</sup> If anything, their sizes would drive them apart: “Among individuals of superior eminence and weight in society, rivalships were much more frequent than coalitions.”<sup>12</sup> Ditto among independent nations; England and France were the most preeminent nations in Europe, and they hated each other. The “great division of interests in the United States” was not regarding the size of the states, Madison noted, but between the North and South.<sup>13</sup> This “resulted partly from climate, but principally from the effects of their having or not having slaves.”<sup>14</sup> As the small states were split between slave (Delaware and Maryland) and free (Connecticut, New Hampshire, New Jersey, and Rhode Island), all this rhetoric about threats was misplaced.<sup>15</sup>

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But the delegates from the small states were unwilling to take that risk. Dickinson spoke for many when he pointed out the centrality of states to the national political community. Ever the moderate, Dickinson agreed that proportionality was an appropriate standard for the House of Representatives. Instead, he took his stand over the Senate, in which he did more than oppose Madison’s plan. He offered an alternative vision for the new Constitution—one with antecedents in the British system. The British monarch, he explained to his fellow delegates, enjoyed stability due to the “attachments which the Crown draws to itself.”<sup>16</sup> Americans did not have a monarch who garnered the affection that gave weight to the British government, but they did have the states. The country’s division into 13 states had been a historical accident, but a lucky one, for they could offer a “principle source of stability” to the constitutional project.<sup>17</sup> If the proposed Constitution was the solar system, then the states should be the “planets, and ought to be left to move freely in their proper orbits.”<sup>18</sup>

As the Convention wore on, the delegates finally reached the compromise implied by Dickinson and worked out by other moderate nationalists such as

Ellsworth and Sherman. The states would retain a direct role in creating and administering federal laws—through the Senate. The House would be apportioned by population, while the Senate would be equally divided among the states, with each receiving two votes.

The Senate is often criticized as a non-majoritarian institution, but that is exactly its point. It was created by men worried about democracy’s tendency to produce outcomes inconsistent with the standards of justice and a vision of the true public good. They feared the tyranny of government by majority faction. Importantly, so did Madison. His theory of the extended republic was a way to tamp down on this tendency by promoting diversity. He believed that among many small factions no group could dominate, so the people’s representatives would have to compromise until they found consensus.

Although the Senate is not Madisonian in that it runs contrary to the theory of the extended republic, its purpose is the same: to promote consensus in public policy. The small states feared that a purely majoritarian system, even in a diverse republic, would not fairly represent all views in the councils of government. So they asked for, and received, a special role in Congress to make that more likely and therefore increase the odds that Congress’ actions reflect the country’s interests, broadly understood.

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The Convention also adopted a more federalist approach in the scope of powers granted to Congress. Madison’s Virginia Plan called for granting Congress authority to legislate in all cases in which the harmony of the union was at stake or the states were deemed incompetent. It also endowed Congress with a veto over state legislation, similar to the royal prerogative the British sovereign wielded over the American colonies. As the Convention wore on, however, this expansive scope of national authority was tightly curtailed. While the Convention tentatively accepted Madison’s proposal of a general grant of power early in its proceedings, the Committee of Detail—chaired by John Rutledge of South Carolina—chose instead to enumerate the government’s powers. The Convention accepted this alteration without much fuss, and it subse-

quently rejected many of Madison’s proposed enumerations, including chartering corporations, founding a university and seminaries, sponsoring scientific research, and promoting agriculture and industry through rewards and immunities.

Worse from Madison’s perspective, the Convention flatly rejected his recommendation of a congressional veto over state laws. This seemed to him like a killer blow at the time, for he judged such an authority “essential to the efficacy and security of the general government.”<sup>19</sup> The problem, he argued, was the states’ tendency to pursue their own interests against the good of all. He warned the delegates that this “propensity will continue to disturb the system, unless effectually controlled.”<sup>20</sup> He likened the congressional veto to the prerogative of the British Crown, whose veto over colonial laws helped “maintain the harmony and subordination of the various parts of the empire.”<sup>21</sup> Without the veto, Madison warned, the states would continue “to violate national treaties, to infringe the rights and interests of each other, (and) to oppress the weaker party within their respective jurisdictions.”<sup>22</sup> But it proved too much for the delegates. Luther Martin, the attorney general of Maryland who reviled centralization, called the power “improper and inadmissible.”<sup>23</sup> Sherman, the moderate nationalist from Connecticut, considered it “unnecessary.”<sup>24</sup> But even Gouverneur Morris, a staunch nationalist from Pennsylvania, was dubious. He thought it would “be terrible to the states.”<sup>25</sup> The Convention seemed to think that Madison’s proposal was unnecessary and that investing Congress with enough authority would keep the states in line.<sup>26</sup>

Morris and Sherman were probably right. The states would never consent to have their power

stripped so thoroughly away. Madison’s assurance that the states could retain their powers on local matters depended ultimately on Congress’ discretion as to what those matters were. It was hard not to conclude that Madison effectively proposed transforming the states into vassals of the national government. While he had good philosophical reasons for this suggestion, it was bound to be a non-starter.

And despite Madison’s objections, the Convention’s final position on the scope of national power was consistent with his basic goal of consensus. Limiting the scope of national political conflict to truly national issues would make it easier for the various factions to find common ground. Insofar as the national government meddles in local affairs, it is bound to draw those communities’ ire and resentment, undermining the political process’ ability to find the common ground necessary for consensus.

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The Constitution promotes consensus in other ways, but these four are no doubt among the most significant: the extended republic to minimize the danger of majoritarian factions, a system of checks and balances to prevent dangerous accumulations of power within government, a guaranteed participatory role for the small states in the government, and a clearly delineated scope of federal power. With a better appreciation of the precise manner of consensus in the American system, we can go on to enumerate its defects and merits, which will be the subject of the next two reports in this series.

## About the Author

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## Notes

1. See Jay Cost, “The Conservative Case for the Constitution, Part II: The Role of Consensus,” American Enterprise Institute, March 12, 2021, <https://www.aei.org/research-products/report/the-conservative-case-for-the-constitution-part-ii-the-role-of-consensus/>.
2. *Federalist*, no. 10 (James Madison), <https://founders.archives.gov/documents/Madison/01-10-02-0178>.
3. *Federalist*, no. 10 (James Madison).
4. *Federalist*, no. 51 (James Madison), <https://founders.archives.gov/documents/Madison/01-10-02-0279>.

5. *Federalist*, no. 51 (James Madison).
6. Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966).
7. Farrand, *The Records of the Federal Convention of 1787*.
8. Farrand, *The Records of the Federal Convention of 1787*.
9. Farrand, *The Records of the Federal Convention of 1787*.
10. Farrand, *The Records of the Federal Convention of 1787*.
11. Farrand, *The Records of the Federal Convention of 1787*.
12. Farrand, *The Records of the Federal Convention of 1787*.
13. Farrand, *The Records of the Federal Convention of 1787*.
14. Farrand, *The Records of the Federal Convention of 1787*.
15. Farrand, *The Records of the Federal Convention of 1787*, 446–49.
16. Farrand, *The Records of the Federal Convention of 1787*.
17. Farrand, *The Records of the Federal Convention of 1787*.
18. Farrand, *The Records of the Federal Convention of 1787*, 86, 153.
19. Farrand, *The Records of the Federal Convention of 1787*.
20. Farrand, *The Records of the Federal Convention of 1787*.
21. Farrand, *The Records of the Federal Convention of 1787*.
22. Farrand, *The Records of the Federal Convention of 1787*.
23. Farrand, *The Records of the Federal Convention of 1787*.
24. Farrand, *The Records of the Federal Convention of 1787*.
25. Farrand, *The Records of the Federal Convention of 1787*.
26. Farrand, *The Records of the Federal Convention of 1787*, 27.

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