



The Conservative Case for the Constitution, Part II: The Role of Consensus

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Key Points

- Since the ratification debates of 1787–88, critics of the Constitution have often complained that its elaborate network of checks and balances undermines democratic accountability and stifles true republican government.
- These critics have failed to appreciate that the founders designed the system to secure consensus.
- The founders believed that policy proposals representing a strong, broad, and durable majority were more likely to be in the public interest and thus should be privileged over policies backed by smaller, narrow, or fleeting majorities.
- So while the Constitution’s design can seem perplexing and byzantine, its rules nevertheless are intended to force society to achieve consensus as a prelude to government policy.

The United States federal government is a complicated system of interlocking branches, widely dispersed powers, and confusing lines of authority. No other feature of the American system has attracted more criticism. During the ratification debates of 1787–88, Anti-Federalist critics of the Constitution complained that it was overcomplicated, too difficult for the average person to understand, and thus likely to be dominated by economic and social elites. They believed republics should be simple in design so the people can exercise their sovereignty. Progressives such as Woodrow Wilson offered similar critiques from the end of the 19th century into the early 20th century. Progressives in the 21st century echo these older grievances when they talk about how the Constitution, through its intricate array of checks and balances, thwarts “democracy.”

As it is, none of the *Federalist Papers*, written by Alexander Hamilton, James Madison, and John Jay in defense of the Constitution, offer a comprehensive response to this critique. “Publius,” the nom de plume they used to publish the essays, focuses on the need for a national union and then a more detailed defense of particular governmental institutions—as these were the main critiques leveled by the opponents to the Constitution in 1787–88.

One may be forgiven, therefore, in thinking that the whole of the Constitution is less than the sum of its parts and that there is not an underlying logic that animates the creation of not just a national union but also this specific form of a union. However, there is a unifying principle to the constitutional system, one grounded in the framers’ particular understanding of republican government. The system is purposeful in its demand that consensus

among the people be achieved before government action. In that way, the Constitution reduces the chances that the government is corrupted into a majoritarian tyranny.

The two basic functions of government are securing justice and promoting the common good. Admittedly, other systems of government endeavor to achieve other tasks, or at least have a more capacious idea of these concepts. A theocratic government, such as those that existed in Europe during the Middle Ages, would see one function of government as coordinating with religious authorities to promote piety or faith. A Marxist government ostensibly endeavors to eliminate all vestiges of class conflict. Liberal governments, such as those that prevail in Western democracies and the United States, have a more narrow definition of the purposes—protecting personal rights from violations, solving collective action problems, and promoting material prosperity—rather than psychological or spiritual states of well-being.

Regardless of any given government's objective, it exists because human beings cannot spontaneously achieve these objectives among themselves. Government is thus created as a third party with the power to force individuals to conform to these public purposes. The problem with this, which was termed the "essential problem of government" in my previous report, is that the very factor that requires the creation of government tends to corrupt it: human selfishness.¹ Because government is helmed by human beings, it too struggles to work for the good of all members of society. This problem informs Aristotle's typology of governments, laid out in *Politics*, as run either for the good of all or those in charge of the government. The former are proper forms of government while the latter are corrupt.

The ancients believed that each proper form of government was easily corrupted such that monarchies, aristocracies, and polities (just rule by the one, the few, and the many) could be turned into their perverted forms: despotisms, oligarchies, and mob rule (corrupt rule by the one, the few, and the many, respectively). Ancient thinkers proposed mixing the various governing forms so the defects of one form might be checked by the others. In the

early modern era, the English adopted this idea—retrofitting it to their ancient system of feudalism to balance types of rule by social factions—whereby the many were represented in the House of Commons, the clergy and nobility in the House of Lords, and above them reigned the monarch.

The system of mixed estates was a poor fit for the post-Enlightenment West. The rapid economic expansion brought about by the age of exploration, followed in short order by industrialization, proliferated and transformed wealth in a way that made granting special governmental authority to landowners antiquated. The Protestant Reformation, and the religious pluralism that evolved as a consequence, made the privileged position of the clergy in the government difficult to justify. Europe transitioned from self-appointed governing institutions to democratic ones, where the people alone rule through representative institutions. Great Britain, for instance, still has a monarch and a House of Lords, but political power rests entirely with the House of Commons. As a result, Britain's government has lost the character of a mixed regime, since the rule of majorities through the House of Commons is essentially unchecked by other institutions or classes.

America broke from the model of mixed government much earlier. Given the lack of a hereditary nobility in the North American colonies, it never was possible to mimic fully the British system. After the rebellion against King George III as sovereign in 1776, Americans became the first society in the West to craft institutions of government where the people alone exercised sovereignty. Yet the Americans did not adopt the simple democratic principle of "majority rule," at least not in the same fashion that Europe eventually would. The American founders were in a deeper conversation with the ancients, who likewise struggled with securing a good and just government. Although they had embraced popular sovereignty as the only legitimate form of government, Americans were still wary of its dangers and put together a more nuanced solution to the danger of republics being corrupted into mob rule. The American idea can be summarized simply as the search for consensus.

At the Constitutional Convention in Philadelphia, Pennsylvania, in 1787, the framers made an empirical wager. It was never explicitly stated at

the fabled conclave, but it underscored many of their debates and informed the ultimate instrument of government they designed. They were aware that degeneration into mob rule was the chief danger to any republic based on majority rule—whereby a majority of the people seize government control for their own benefit, rather than for the good of all citizens. At the same time, they reckoned that the probability of this happening decreased as the body politic became more diverse and the vote threshold before which a majority could act was raised. Both factors could combine to ensure any majority action received the backing of a strong, broad, and durable segment of society.

It was in this way that the founders sought to empower benevolent majorities while restraining selfish ones. They figured that the greater the majority in favor of a proposal, the more likely it reflected the good of the entire nation and therefore the more safely it could be enacted. On the other hand, narrow majorities, they believed, were more likely to be out for themselves and thus should struggle to enact their policies.

This notion of consensus informs much of how our system of government functions. In *Federalist* 10, Madison outlined his vision of the extended republic, which more or less encapsulates how the House of Representatives was intended to act. Madison understood society as a series of self-interested factions that, while having often sympathetic motives, do not reflect the good of the whole nation.

The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate

for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. 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 government.²

The way to reconcile these interests with one another is, essentially, to increase their number in society—so no single group is large enough to dominate—then force them to bargain with one another to find common ground.

The greater number of citizens and extent of territory which may be brought within the compass of republican, than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. 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.³

Madison's intuition was that any proposal that can win the support of such a diverse assembly is more likely to be in the public interest. It is no guarantee. It is rather a "tendency to break and control the violence of faction." So bad laws could still be enacted, but the extended republic makes it less likely.

Madison had formulated this argument before the Constitutional Convention and originally thought both the upper and lower chambers should be apportioned according to population so all of Congress would embody the diversity of the people. However, the small states insisted that the Senate be apportioned equally, thereby reflecting the design of the original Continental Congress. This is not, on its face, consistent with Madison's extended republic—but it helped induce the consensus his theory was meant to achieve. For Congress to adopt any measure, the people must find common ground in two different ways—as citizens of the nation and of their respective states. This further reduces the likelihood that such a law is good for a faction but bad for the nation as a whole.

The timing of elections likewise facilitates the development of consensus. Elections happen every two years for the House but every six for the Senate, so fleeting public passions are more likely to be felt in the House than in the Senate. When the two chambers agree, it is more probable that it is a product of considered and durable public opinion—and a consensus view. In the original design, the state legislatures were intended to supply an additional layer of deliberative insulation to Congress by appointing senators. Corruption in the upper chamber in the late 19th century prompted widespread outrage that the Senate had become inconsistent with republican principles, so the 17th Amendment mandated popular election of senators. But in keeping the six-year terms, the progressive reformers retained the basic intuition that the Senate has a steadier pulse than the House does.

The interaction of the executive and legislative branches is also a manifestation of the founders' emphasis on consensus. The British monarch had an absolute veto over legislation as part of his royal prerogative. The Americans retained the principle of an executive negative, but in giving Congress the opportunity to override it, they reappropriated it for garnering consensus. The president's function is to give legislation a "second look" before it becomes law, and he is obliged to veto it if he believes Congress has not acted in the national interest. On the other hand, if a two-thirds majority in both chambers disagree, the bill becomes law anyway. Two-thirds of the Senate and House is an extremely broad consensus among the people's representatives, large enough to safely reject the president's caution.

Large majorities in both chambers of Congress can likewise exercise sweeping powers over the other branches without their consent. Congress can, all by itself, remove any official in the executive or judicial branches. The Senate can reject appointments offered by the president to both branches. It can redesign the courts, altering not only their size and structure but also their appellate jurisdictions. Similarly, the executive departments are purely the design of legislation and thus subject to congressional input. While it does not have the power to draft treaties, the Senate can reject them. Congress cannot manage wars, but it alone can initiate them. Ultimately, it appropriates money and levies taxes. Virtually the only matter on which Congress alone cannot exercise vast authority is altering the Constitution; it proposes amendments subject to ratification by the state legislatures.

From this perspective, the notion of coequal branches, so popular in contemporary discourse, is errant. Congress is the supreme branch when it reflects a strong, broad, and durable majority. The other branches' role related to Congress is to check its power, but they can do this only when the legislative majority is relatively narrow. The broader it is, the more likely Congress reflects the interests of the whole country and the greater the scope of congressional action.

That Congress does not usually exercise these powers does not mean it cannot. Rather, it illustrates the burden of consensus on our governing institutions. Usually, when a large enough majority

in Congress wants something done, the president and the courts agree. For the best contrary example, one might turn to the Reconstruction Congress of 1867–69. The “Radical” Republicans of the North, who wanted to drive a hard bargain against the South, squared off against President Andrew Johnson, himself a Southerner who wanted to go easy on his home region.

Critics of the Constitution dating back to the ratification debates do not give the framers sufficient credit. Ours might be a complex and difficult-to-understand instrument of government, but the complexity is purposeful. Having accepted the notion that the only legitimate fount of authority is the people, the framers set out to design a system that empowered benevolent majorities but restrained selfish ones. They believed the best way to do this

was to force the people to reach consensus before government acted; so the various checks and balances of our system are, in truth, traps to catch proposals that do not reflect a strong, broad, and durable sense of the people’s views.

It is important to appreciate, however, that consensus is not an end in itself. It is, rather, a means to an end—namely, securing justice and promoting the general welfare, the two basic functions of government. One can, and progressives often do, argue that consensus does not efficiently advance government’s public purposes. One might also claim that while consensus is a good strategy, the Constitution’s particular approach to securing it is lacking. These sorts of criticisms are not unreasonable, so a full defense of the Constitution requires a detailed look at the minuses of its particular system of forging consensus. This will be the subject of the subsequent report.

About the Author

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Notes

1. See Jay Cost, “The Conservative Case for the Constitution, Part I: The Problems of Human Nature,” American Enterprise Institute, January 21, 2021, <https://www.aei.org/research-products/report/the-conservative-case-for-the-constitution-part-i-the-problems-of-human-nature/>.
2. *Federalist*, no. 10 (James Madison), <https://founders.archives.gov/documents/Madison/01-10-02-0279>.
3. *Federalist*, no. 10 (James Madison).

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