As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves...
James Madison was the leading force behind the Constitution, wrote the Bill of Rights, and served as President for eight years. He believed the greatest danger the nation faced was faction. In *Federalist* No. 10, the best essay in political theory penned on this side of the Atlantic, Madison explained how the structure of the new federal republic would bring the worst effects of faction under control.

Faction, according to No. 10, is "a number of citizens ... who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Self-interested voting is a scourge of all republics, breeding contention, oppression, local favoritism, beggar-thy-neighbor policies. It has brought down efforts at democracy around the globe, and throughout history. It must be conquered—yet, Madison thought, it cannot and must not be conquered.

Self-love dominates even when people know intellectually that virtuous conduct is better. Often self-interest should dominate (it leads to Adam Smith's Invisible Hand, with benefits for all). And when the conflict between self and virtue is irreconcilable, cognitive dissonance leads people to conclude that civic virtue and personal ends coincide. Once this mental transformation occurs they are impervious to rational argument.

Faction is not only strong but also beneficial, and therefore must be tolerated. The division of labor is a boon yet also the source of faction. Landholders, farmers, merchants, academics, and so on all stake out claims. To have prosperity we need separation of function. Religion and other ingredients of moral life also ensure faction. Differences are to be treasured, are a hallmark of freedom, are an objective of our government. Yet they are faction, and in the end may destroy our government.
How can we escape this fate? We do not want to extinguish the differences we cherish, and if we wanted to do so we could not without eliminating the role of the governed in public choice—without the tyranny this republic was established to avoid. Madison and his colleagues in the Convention sought to ameliorate rather than eliminate faction in two principal ways: indirect democracy and fragmentation of the electoral base.

Yet Madison’s predictions about the relation between the national government and faction have not come true. Private-interest legislation is common today, much more so than in 1787, and more common at the national level than among the states. Why?

1. Representatives’ willingness to put virtue ahead of constituents’ interests and the belief that groups cannot coalesce at the national level depend on slow communication and costly transportation. These impede coordination and monitoring by the time groups learn of legislative proposals, it may be too late. Times have changed; now factions monitor their representatives by C-Span. Congress has evolved a structure that reduces members’ leeway. Members serve on committees, which as gatekeepers to the floor and the principal drafting institutions are highly visible to factions. Interest groups can monitor the behavior of a few committee members much more closely than they can track all members of Congress. The Administrative Procedure Act, hailed by many on “good government” grounds because it exposes agency action to public view and invites input, is anti-Madisonian. Extended rulemaking procedures and numerous oversight hearings augment the relative power of faction.

2. Cheap transportation and communication mean a larger market. This cuts the power of states (exit is easier) but increases the division of labor. More specialization enhances productivity but also produces more, and more powerful, interest groups. Recall that Madison defined faction as a group with a special interest, something they shared but the general public did not. Greater specialization in production means more factions, and each faction will be more cohesive, for reasons developed immediately below.

3. The gravest obstacle to faction is free riding. People who could influence legislators, if they tried, need a good reason to try. If other persons similarly situated will do the job, any particular member of the group can sit on the sidelines.

The plan elaborated in Federalist No. 10 thus lies in the design of political institutions, which can bend self-interest to the public good.

Direct democracy will fall victim to faction, Madison thought, for it encourages everyone to vote his own preferences. Government by elected representatives, whose self-interest is not at stake for the vast majority of votes, and which at any event is not identical to the interest of the constituents, may solve the problem. Mediating among many factions, the representative answers to none.

Elections from different states with different factions dilute the power of faction. Merchants may dominate in Pennsylvania and tobacco growers in North Carolina—neither dominates the larger republic. “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.” Diversity that is a source of faction locally thus becomes the security in a larger jurisdiction. Fragmentation is to be pursued in a thoroughgoing manner. Different states establishing different qualifications for voting; different districts to represent (portions of states for representatives, whole states for senators, the entire nation for the President); different electors (the people for representatives, state legislatures for senators, the electoral college for the President); different tenures (from two years for representatives to life for judges).

The plan elaborated in Federalist No. 10 thus lies in the design of political institutions, which can bend self-interest to the public good. Adam Smith believed that competition in markets would bend self-interest to the public good. Madison’s diagnosis and prescription are the same. Smith lauded competition among producers of private goods and services; Madison sought to promote competition among suppliers of public services. The effort to cope with and even exploit, rather than deny, the effects of self-love, coupled with a belief that the design of political institutions matters a great deal, make Madison the progenitor of modern public choice.
reaping the benefits without incurring the costs.

Your group prevails if its free riding problem is less serious than that afflicting your rivals. In many ways the most powerful groups are those that the conventional wisdom treats as powerless: for example, minorities that have limited agendas, and from which dropping out is not an option, and dairy farmers who are small in number and whose upbringing and way of life make dropping out of the group very costly. Gains per person are larger in small, cohesive factions.

Madison was concerned about, and designed the government to avoid, capture by majority factions. Madison was right in appreciating that the structure of this society would produce interests and sects in profusion, but he did not appreciate how easy it would become to organize these groups from coast to coast.

4. Although as Madison observed the national government is harder to capture—there are more contending interests, many with powerful reasons to resist factions’ demands—there is also a greater gain in sight. No state could effectively regulate the price of labor or the cost of automobiles. People and plants can move too easily, and the Constitution denies states the power to erect tariffs at their borders with other states. Because it is much more costly to emigrate from the United States than to move to another state, the national government has much more potential power, creating a reason for factions to concentrate their efforts there.

Factions strive mightily to suppress the power of exit. National legislation is ideal for this purpose. In the last analysis there is no reason to conclude that the federal government is less vulnerable to faction once the factors that created agency space in which virtuous legislators could operate have fallen. The national government will enact fewer private-interest laws than the aggregate of state and local governments—but the costs of each will be greater.

5. The value of factional legislation at the national level has risen with the government’s command of resources. The Sixteenth Amendment, authorizing an income tax without apportionment among the states, gives the national government control of whatever portion of the economy it wishes to exercise. This makes it the prime target for faction. Simultaneously, the Seventeenth Amendment cut down the constraints by removing state legislatures from any role in the selection of senators.

What can we learn from these developments? Madison set out to design a governmental structure that would harness faction to public ends. Two centuries of experience yield many implications for those who share Madison’s vision of a republic in which the choice of institutions can reduce the influence of faction.

1. Altogether too much of the contemporary discussion about the allocation of governmental functions is cast in terms of claims about what the Constitution commands or permits. Perhaps it is inevitable that lawyers and professors of law would turn to the most fundamental law when looking for answers to the most fundamental questions. But as the founding generation recognized, the price of establishing an enduring Constitution is a high level of generality. Beyond dividing the government into branches and establishing a few rules for their operation, the Constitution has little to offer—or so the Supreme Court has come to conclude. Debating the constitutional boundaries is an interesting intellectual exercise, and an important one for questions of legitimacy under the existing Constitution. But if we wish to know how governance proceeds, we must concern ourselves with the functional questions that occupied Madison and not become preoccupied with a debate about the meaning of the words Madison left us.

2. An unproductive rhetorical to-and-fro about administrative agencies should not detain us. On the one hand are those who say that agencies bring us expert administration, specialists free from political sway to enforce the law correctly and make expert discretionary judgments. This is the public argument for agencies, and it appears in judicial opinions incessantly. On the other hand are those advancing the claim that a unitary executive will promote energy in public administration, that government without a single coordinating hand is internally divided, weak, even incoherent, and of course irresponsible (because there is no one to take the blame).

This debate is beside the point. The choice is not expertise versus vigor and coordination. These are ideals, claims based on virtue in government. Proposals based on these ideals—to appoint better people, to produce more openness, and so on—miss the genius of Madison’s recognition that ideals of virtuous administration direct attention away from how government operates in practice.

Consider for a moment the case of administrative agencies. We must discard claims based on “expertise” and “vigor” so that we may see the real effect of “independence.” The most important feature of the “independent” agency is not the tenure of its members but their isolation from the executive branch. A President may resist claims by factions in the way Madison envisioned: by adding other items on the agenda. Agencies devoted to single industries lack threats; they cannot promise to veto Bill X if Congress takes step Y. The absence of logrolling means that committees in Congress have extra influence—more to the point, that power has been transferred from the President (with a national constituency) to the committee chairmen, who serve longer and are on average farther from the national median view of politics. (Chairmen are tied to the very local interests that Madison dubbed faction; Presidents are not.)

If you doubt this, consider the case of antitrust enforcement, a natural experiment because carried out by both an agency (the Federal Trade Commission) and a unit of the executive branch (the
Antitrust Division of the Department of Justice). Antitrust law is supposed to ensure that consumers receive the benefits of competition. But it may be used to suppress competition: a prosecutor may initiate actions against firms that are competing too strongly, to the detriment of producers. From Madison’s time to ours, students of politics have recognized that producers are concentrated relative to consumers and so can overcome the free rid-
ing problem that obstructs collective action more readily than consumers. Thus, a Madisonian prediction, fortified by twentieth century public choice theory, is that producers have considerable influence over many localities, but that representatives elected from the entire nation (principally the President) are more inclined to favor consumers. Because the seniority system in Congress gives the representatives of a few localities more influence over the FTC than the Antitrust Division, we should expect the FTC to do more to protect producers and the Antitrust Division to do more to protect consumers.

This is what a series of careful empirical studies has found. When the FTC challenges a merger, the stock prices of firms in the industry rise, which one would expect if the challenge is designed to aid producers; when the Antitrust Division challenges a merger, the stock price falls, what one would expect if the action is designed to assist consumers. The judiciary, with its wider constituency, has been in recent years on the side of consumers, being deeply suspicious of suits filed by producers against their rivals. But despite changes in Administrations and dramatic philosophical differences among Presidents, the FTC has been responsive to producers’ interests—particularly if the producer has a plant in the district of a member of the legislative committee thatsuperintends the FTC’s budget.

Findings like these show the wisdom of Madison’s plan, with administration of the law answering to the national constituency. Today, however, the legislature has found ways to wean even line agencies of the executive branch away from the President through private rights of initiation, intervention, and participation. The APA, the FOIA, the Government in the Sunshine Act, and the extensive provisions for judicial review, all ensure that factions have many points of access and influence. They monitor intensively; insulation from factions’ influence has become an objection to the behavior of all public officials. Failing to wait for group monitoring and input is seen as a reason to set aside the agency’s decision. From a public choice perspective, it can be no surprise that those members of Congress with the most seniority vigorously resist presidential efforts to coordinate executive action through the Office of Management and Budget. Anything that increases the role of a broader national constituency in rule making, and that removes important aspects of decisions from “the sunshine” (that is, from monitoring by factions), reduces the support these legislators can garner.

None of this is to deny that we ought to be suspicious of what public officials do behind closed doors. Recall one of Madison’s most famous lines: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.” Mistrust of public officials leads many public spirited persons to prescribe closer monitoring. Yet it should by now be apparent that closer monitoring comes at high cost. By “auxiliary precautions” Madison had in mind the division of governmental powers rather than anything like the APA.

3. How should regulatory authority be divided between state and national governments? Once again much of the legal literature lavishes attention on formal questions about the legal entitlements of states under the Constitution. Other scholars inquire whether government “close to the people” is superior. From Madison’s perspective we should be asking: what are the conditions of competition among jurisdictions?

Competition depends on movement: consumers can turn to other vendors, producers can turn to new sources of supply or build new plants in different places. Inputs into production move, finished goods move, capital and labor move. The
role of private ownership in this process is widely understood. Less recognized, but no less vital, is the ability of laws themselves to move—or, what is the same thing, of money, goods, and people to move to the laws. A corporation dissatisfied with one state's law can reincorporate in another, effectively choosing the rules of law that govern its operations. Under the McCarran-Ferguson Act, insurance companies can move to favorable laws, and persons who want insurance may shop for the combination of price and regulatory benefits they prefer. When governments become sufficiently plentiful, and when the scope of laws matches the domain of their costs and benefits (that is, when costs and benefits are all felt within the jurisdiction enacting the laws), competitive forces should be as effective with governments as they are with private markets.

Granted there are not enough governmental units, the populations of jurisdictions are not sufficiently homogenous, and externalities are common, so the competitive ideal cannot be achieved. A market economy, too, does not look like Adam Smith's atomistic competition. The question is not whether we can achieve perfect competition but how to use the power of competition to deal with the costs of monopoly in government, just as markets in goods deal with the costs of private monopoly. The ratio of rhetoric to data is high when lawyers and professors and legislators talk about law. Instead of relying on a rhetorical equilibrium, we can employ the forces of competition.

If the level of government should be matched to the consequences of legal choices—large enough to prevent significant effects from escaping to impose costs on outsiders, and small enough to keep rules under competitive pressure from within or without—then we should be searching for trans-border consequences. Not just any consequences; there are always some, but using small effects to justify national regulation enhances the power of interest groups (by stifling jurisdictional competition) without affording a prospect of significant benefits.

Pollution control and defense are natural candidates for national regulation from this perspective. Surprisingly, so are some property taxes. (Montana has market power in coal and will therefore levy taxes that fall on persons out of state who buy the coal.) Regulation of production presumptively is local, to facilitate movement of both assets and goods, unless a state happens to have market power in some resource that is hard to move. Regulation of the market in finished goods, or of ownership of resources, as opposed to the process of production itself, presents multi-state issues. Thus antitrust policy should be national and not local.

The distinction between production and trading may be elusive. It is the possibility of movement that places pressure on state and local regulation. If capital, goods, and people can move freely, interest groups seeking state and local regulation cannot achieve much; they will simply drive people and production elsewhere. Ability to regulate the process of movement, by contrast, creates the situation in which faction can succeed.

Consider a merger of two firms with plants scattered throughout the nation. Particular states may attempt to hold the merger hostage while insisting, as a condition of approval, that the firms allocate the benefits of the transaction to those states—perhaps by promising to increase employment there. Sometimes transactions that create aggregate benefits for the nation impose local costs (plant closings being the prime contemporary example). Whenever the benefits of a transaction come from activities in many states, it is possible for particular states to take hostages, and in the process perhaps to disrupt the creation of the benefits. This is the mirror image of pollution: in one case harms created locally flow out of states; in the other benefits created nationally are inviting targets for local capture; in both cases the optimal jurisdictional size transcends state borders.

4. Public choice holds other implications for our understanding of the laws—not only how to interpret them, but also of the institutions that do the interpretation. I mention only one: that when faction dominates the creation of laws, judges cannot interpret laws to serve the public interest. Shocking? Certainly to the Harvard legal process tradition exemplified by the work of Henry Hart and Albert Sachs. When Madison's institutions fail to thwart interest groups, and when civil virtue fails to carry the day, statutes reflect the outcome of a bargaining process among factions (and their representatives). They are compromises, and compromises lack "spirit."

If judges cannot serve the public interest by finding and implementing a legislative intent, what is appropriate? Beady eyed readings designed to pull the teeth from political deals? Readings designed to fortify any public-interest elements in the legislative packages? A public interest counterweight in which canons of construction add a little to the lot of the less fortunate members of society?—but only a little, not only because judges lack the mandate to follow their own preferences but also because if they add a lot Congress will notice and start subtracting to counteract the judicial thumb on the scale. Each poses substantial questions for implementation and legitimacy. But these are the questions we must today be asking, questions lurking since 1787 and thrust into prominence by the insistent logic of public choice as the Constitution's own mechanisms of faction control continue to lose their effectiveness.

Frank H. Easterbrook '73 is a judge on the United States Court of Appeals for the Seventh Circuit. He is a senior lecturer at The Law School and a member of the Board of Trustees of the James Madison Memorial Fellowship Foundation. This essay is derived from "The State of Madison's Vision of the State," 107 Harvard Law Review 1328, and is © 1995 by Frank H. Easterbrook.