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THE STATE OF MADISON'S VISION OF THE STATE: 
A PUBLIC CHOICE PERSPECTIVE

Frank H. Easterbrook.*

An enduring tradition in political theory depicts "the state" as the holder of a monopoly of legitimate force. Many of the most thoughtful early British writers sought to explain not only why there is (and ought to be) a government, but also why that government ought to be unitary and under the command of a single monarch. Hobbes named the state Leviathan.¹ Locke likewise supported a unitary state.² Although their reasons differed, Hobbes and Locke agreed on the model of "the state."

Even modern thinkers in the liberal tradition, such as Rawls, conceive of government as a unitary institution, one that grows out of a social contract among all the people and that settles allocation of power for the long run.³ That current runs deep in contemporary society — and among lawyers. To see how far this understanding extends one need not go beyond the papers presented at this conference, most of which treat "the state" as a single entity. Perhaps such a tendency is inevitable for scholars accustomed to the perspective of law, for the Supreme Court has often treated state and national governments alike when it has applied the Bill of Rights to state and local governments. Courts would thus treat as equally oppressive a national law that established a national religion (with an accompanying tax) and a state statute that permitted a congregation to object to the propinquity of a tavern⁴ — even though moving a short distance would take care of the latter problem, but only changing one's moral commitments or emigrating from the United States would overcome the former. When the portion of the Constitution to which contemporary scholars pay the greatest attention is understood to equate national and local measures, it is only natural for lawyers to assume that the government is unitary in fact.

No surprise, then, that the monopoly-of-force idea is still in use, and that the concept of government-as-Colossus appears frequently in

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legal discourse. Indeed, this concept is common in schools and in the press too. How many times have you heard the phrase "The government with its infinite resources should not be permitted to overbear the individual by . . . ?" "The" government, as if there were only one, and "infinite resources," as if that government owned all of society's assets (including its human capital).

Treating "government" as a single hierarchical institution might be apt in nations such as France, where that is at least the formal model of the state. It has never been ours. Forget Montesquieu and his recommendation that government have three autonomous branches. He proposed a division of powers within what he assumed would be a single government for a unified nation. The Framers of our Constitution borrowed from Montesquieu when they designed institutions for the national government, but built a model all their own. They had no choice. The states already existed as independent entities, and no proposal for a unified government could have been adopted. Instead of trying to fight the inevitable, the Framers embraced it and added a level of institutional detail that they believed would add virtue to necessity. Powers were allocated to deal with what the founding generation called faction and what we today call interest groups. The Federalist Papers can be thought of as the first chapter in the modern theory of public choice — the study of the interaction between governmental institutions and private efforts to influence them.

Below, I lay out the view of public choice that appears in Madison's contributions to The Federalist Papers, point to some of the ways in which his foresight was imperfect, and finally turn to some of the lessons public choice has for our own understanding of governmental structure and conduct. Madison believed that, in the words of a modern republican, "the core of the political process is the public and rational discussion about the common good, not the isolated act of voting according to private preferences." But Madison was realist

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enough to know that the ideal cannot be realized, and that the design of governmental institutions matters greatly in our second-best world. 8

I. MADISON'S VISION OF FACTION

What is faction, and how is it to be brought under control? Answering these questions is Madison's task in The Federalist No. 10, with echoes in No. 51. 9

Faction, according to The Federalist No. 10, is "a number of citizens, whether amounting to a majority or minority of the whole, 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." 10 Self-interested voting is a scourge of all republics, breeding contention, oppression, local favoritism, and 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.

Faction is strong. People care more about themselves than about others. Although self-interest often should dominate (it leads to Adam Smith's Invisible Hand, with benefits for all), self-love dominates even when people know intellectually that virtuous conduct would be better. 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, people are impervious to rational argument. Faction's power thus does not depend on cynicism. Not only the factions themselves but also those who serve their interests in legislatures come to believe that their goals are aligned with the public's interest. Interest groups that seek to enlarge their influence would not support cynics for election to public office. Cynics are expensive and unreliable, for sale to the highest bidder. A faction therefore offers its support to persons whose ideals overlap the group's interest. Thus:

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 con-

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8 Indeed, the principal difference between the supporters and the opponents of the Constitution lay not in different understandings of how government ought to work and how the people ought to behave, but in different appreciations of the probability of the government's functioning well under different institutional structures. See HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 5–6 (1981).

9 See THE FEDERALIST Nos. 10, 51 (James Madison). Hamilton discussed faction extensively in The Federalist No. 9, but from a perspective so different from Madison's that an attempt to harmonize the two would be futile. See THE FEDERALIST No. 9 (Alexander Hamilton). I bypass Hamilton's contribution to concentrate on Madison's more enduring vision.

nection 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.\textsuperscript{11}

Faction is not only strong but also beneficial, and therefore must
be tolerated. The division of labor is a boon, yet also a source of
faction. "A landed interest, a manufacturing interest, a mercantile
interest, a moneyed interest, with many lesser interests, grow up of
necessity in civilized nations, and divide them into different classes,
actuated by different sentiments and views."\textsuperscript{12} 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 wished to do so we could not without
eliminating the role of the governed in public choice — without bring-
ing about the tyranny this republic was established to avoid. Mitiga-
tion rather than elimination, then, must be the objective. Madison
and his colleagues in the Constitutional Convention sought to check
the power of faction by two routes: indirect democracy and the frag-
mentation of the electoral base.

\section*{A. Indirect Decisionmaking}

Direct democracy will fall victim to faction — not to mention to
the passions that led the Athenian jury of five hundred to condemn
Socrates — for direct democracy encourages people to vote their own
preferences. "[A] pure democracy, by which I mean a society consist-
ing of a small number of citizens, who assemble and administer the
government in person, can admit of no cure for the mischiefs of
faction."\textsuperscript{13} Even voters who begin with the public interest at heart
encounter a serious obstacle to voting in the public interest: the prob-
ability that any one person’s vote will alter the outcome of the election
is so small that it does not make sense to invest a lot of time in
studying the issues and voting.\textsuperscript{14} Rational ignorance among voters,
coupled with the self-interest that prevails in default of a strong
countervailing force, hinders achievement of the public interest under
direct democracy.

Government by elected representatives may solve these problems,
for a representative’s self-interest is not at stake in the vast majority
of votes, and in any event, is not identical to the interests of the

\textsuperscript{11} Id.
\textsuperscript{12} Id. at 79.
\textsuperscript{13} Id. at 81.
constituents. Mediating among many factions, the representative answers to none. Representatives therefore have a larger portion of virtue, especially as their fewness permits selection from among the best in society. In modern terms, Madison’s argument is that representatives, as agents who toil in a distant capital, escape effective supervision by their principals in the electorate. The people will elect the person, not the policy, because they have no other real choice; and worthy persons will vote in worthy ways. Agency slack — in private life, a cost of management that corporations strive to curtail — is a boon in government. And the representatives, being fewer in number than the electorate as a whole, are more apt to conclude that their votes do matter and therefore to make the effort necessary to choose wisely.

B. Fragmentation of the Electoral Base

Elections from different states with different factions dilute the power of faction. Merchants may dominate in Pennsylvania and tobacco growers in North Carolina, but neither dominates in 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 within the population, which is a source of faction locally, thus provides security in a larger jurisdiction. Fragmentation is to be pursued in a thoroughgoing manner: different state qualifications for voting; different districts for officials to represent (portions of states for members of the House, whole states for senators, the entire nation for the President); different electors (the people for members of the House, state legislatures for senators, the electoral college for the

15 "[A]s each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters." The Federalist No. 10, supra note 10, at 82–83. This theme reappears in The Federalist No. 78. See The Federalist No. 78, at 470–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For more on this theme, see George J. Stigler, The Sizes of Legislatures, 5 J. Legal Stud. 17, 17–19 (1976).


17 The Federalist No. 10, supra note 10, at 83.

President); different tenures for officeholders (from two years for members of the House to life for judges).

The constitutional plan elaborated in The Federalist Nos. 10 and 51 thus reflects a careful design of political institutions that 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 theory.

Madison's elaboration of the constitutional plan is the best piece of political philosophy penned on this side of the Atlantic. Recognizing the simultaneous terror, inevitability, and desirability of faction, and proposing conquest by division (the strategy of faction itself), is genius. Madison also anticipates, without quite articulating, the point that a plurality of jurisdictions checks the power of faction even at the local level. Although each local government may control immovable assets (principally land), its ability to take any other step is constrained by exit — in other words, by competition with other jurisdictions. A federal republic strengthens this competition by facilitating movement of assets and persons. Public schools may be the government's tools, but you can shop for the government you prefer!

Dilution of interests through representation, and the inclusion of opposing interests, blunt the power of faction at all levels: locally because states become parts of a common market, and nationally because constituencies are diffuse and terms vary. We can therefore cherish differences in taste, religion, and so on without falling under majority sway. This is Madison's constitutional legacy to us: a vision of the state as attractive today as it was two centuries ago.

II. THE STATE OF MADISON'S VISION

Despite the genius of Madison's plan, his predictions about the relation between the national government and faction have not come true — and not just in the structural, formal sense on which Professor

Lawson elaborates in this Symposium. Private interest legislation is common today, much more so than in 1787, and more common at the national level than among the states — the opposite of Madison's belief about what would happen. This predictive failure can be explained as the result of a variety of factors well known to public choice theory: limits on representatives' freedom from factions' influence; increased specialization in production; free rider obstacles to political participation; the considerable advantages to interest groups of obtaining national legislation; and the failure of collective virtue.

A. Limited Agency Space for Representatives

Improved and cheaper forms of communication and transportation have decreased the distance between representatives and their constituents, and thus between representatives and their constituent factions. As communication and transportation costs fall, groups can both unite for common benefit and monitor the conduct of representatives. High-tech gerrymandering matches representatives to stable groups and undermines the constitutional provision of short terms for representatives; today, members of the House have longer average tenure than senators, in part because districts may be gerrymandered but states may not. "Gerrymandering" is perhaps a loaded word; abandon it and the fact remains that there is widespread support for drawing districts so as to unite rather than disperse voters who share characteristics that influence their preferences for public activity. The combination of rapid communication and the ability to link representatives with districts defined by some common feature of the constituents binds public actors more closely to private interests. Indeed, these effects are so strong that some students of the subject believe that no agency space remains — that one may understand the voting of public officials solely by reference to their constituents' economic interests. Those who object to this conclusion do not do so on the ground that representatives retain substantial discretion; rather, the defense is that representatives retain some discretion, so that a few

22 For some details, see David N. Laband & John P. Sophocleus, An Estimate of Resource Expenditures on Transfer Activity in the United States, 107 Q.J. ECON. 959, 971 (1992). Laband and Sophocleus estimate that approximately one-quarter of the gross national product is consumed by expenditures to obtain, or to prevent, transfers through the government. See id. at 969–70. Tables in the article show the allocation among types of transfer activities. See id. at 959, 962–65.
votes may be explained by their ideology rather than by their voters' private interests. All participants in this discourse agree that Madison's vision of a national legislature in which most members, most of the time, look to "the public good" rather than to the clamor of private interests, has not been realized.\textsuperscript{24}

Congress itself has developed a structure that reduces agency space. Members serve on committees, which as gatekeepers to the floor and as 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 small size of committees also permits the concentration of rewards, whether campaign contributions or other forms of political support. Once assigned to a committee, members rarely lose their places, and leadership on committees depends largely on seniority. These features enable committee members and factions to deal with one another on an enduring basis.

What is true of committees in Congress holds as well for the apparatus Congress creates to administer laws. Interest groups can monitor agencies readily and assure delivery of deals bought and paid for. For example, the Administrative Procedure Act (APA),\textsuperscript{25} hailed by many on "good government" grounds because it exposes agency action to public view and invites input,\textsuperscript{26} is anti-Madisonian. Extended rulemaking procedures and numerous oversight hearings in Congress reduce agency space and therefore augment the relative power of faction.

\textbf{B. Increased Division of Labor}

Improved communication and transportation have fed the growth of more, and more powerful, interest groups. Cheap transportation and communication mean a larger market. Although a larger market decreases the power of states by making exit easier, it also increases


\textsuperscript{26} Susan Rose-Ackerman's contribution to this symposium, \textit{American Administrative Law Under Siege: Is Germany a Model?}, 107 Harv. L. Rev. 1279 (1994), praises an elaborate, open rulemaking process on exactly these grounds. \textit{See id.} at 1279–80.
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 shared by its members but not by the general public. Greater specialization in production means more factions, and these factions will be more cohesive, for reasons developed immediately below.

C. The Free Rider Problem

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 and reap the benefits without incurring the costs. As the group grows in size, free riding becomes first serious and then intractable — unless a solution can be found. Factions in Madison's time were large and not particularly cohesive. Madison spoke of the "landed interest" and the "manufacturing interest." Overcoming free riding is easier when the group is small, cohesive (ideally, when dropouts are impossible), able to target large benefits on each member and to exclude non-members from sharing in these benefits, and able to spread the costs widely so that the costs do not stir up opposition.

A group prevails if its free riding problem is less serious than that afflicting its rivals. In many ways the most powerful groups are those

27 The classic formulation of this point is that of Adam Smith in The Wealth of Nations. See Smith, supra note 19, at 31 ("The division of labor is limited by the extent of the market."); see also George J. Stigler, The Division of Labor Is Limited by the Extent of the Market, 59 J. POL. ECON. 185, 187–93 (1951) (exploring the theory of the firm and its relationship to market conditions).

28 Many examples are available. Consider the large portion of American industry that makes pollution-control equipment and therefore lobbies for tighter controls on pollution, even though we might think that "the manufacturing interest" seeks to use air and water as free inputs into production and therefore would oppose control. Or consider the large portion of industry that is so specialized that it buys components from around the world and therefore favors free trade even though the normal conception is that domestic manufacturers favor import restrictions. For example, Apple Computer was bitten hard by a rule that raised the cost of active matrix displays — a decision taken by the Department of Commerce and the International Trade Commission at the behest of a very specialized domestic industry that was involved in such screens and mostly indifferent to consumers' interests, but that was so concentrated and specialized that it could override larger producers such as Apple and IBM. See Certain High-Information Content Flat Panel Displays and Display Glass Therefor from Japan, USITC Pub. 2413, Inv. No. 731-TA-469, at 1 (Aug. 1991).

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.\[^{30}\] If a faction is organized for reasons other than influencing the government — if it is defined by race or a similar characteristic, for example, or if it has a function in industry — it is more costly to leave or take a free ride, and it is also cheaper to add lobbying to existing activities. A more elaborate division of labor means more small factions, defined by economic characteristics that make dropout costly, which means more cohesive, and thus more effective, political action.

Madison, however, feared and designed the federal government to avoid capture by majority factions. "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."\[^{31}\] In The Federalist No. 51 Madison describes the constitutional structure as one that:

> by comprehending in the society so many separate descriptions of citizens . . . will render an unjust combination of a majority of the whole very improbable, if not impracticable. . . . [In the United States,] society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. . . . The degree of security . . . will depend on the number of interests and sects.\[^{32}\]

Madison recognized 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. Coalitions of small factions — an unprovided-for case — turn out to be the real threat in the United States.\[^{33}\]

### D. The Greater Gains in Influencing National Legislation

The prevalence and prominence of interest groups in national politics today can also be explained in part by the greater gains promised by national, as opposed to state or local, legislation and regulation. Although, as Madison observed, the national government is the hardest to capture — there are more contending interests, many

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\[^{30}\] For a rare example of a scholar appreciating that, once able to vote, "discrete and insular minorities" hold disproportionately large political power, see Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 715–18 (1985).

\[^{31}\] THE FEDERALIST No. 10, supra note 10, at 80.


with powerful reasons to resist factions' demands — there are also greater gains in sight. No state could effectively regulate the price of labor or the cost of automobiles. People and factories can move too easily, and the Constitution denies states the power to erect tariffs at their borders. 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, which creates a reason for factions to concentrate their efforts there.

The value of factious legislation at the national level has risen with the government's increasing command of resources. The Sixteenth Amendment, which authorizes an income tax without apportionment among the states, gives the national government control of whatever portion of the economy it wishes to command. This makes it the prime target for faction. The Seventeenth Amendment cuts down the potential constraints on influencing national legislation by removing from state legislatures the power to select United States Senators.

Many proponents of national legislation argue that movement between states blocks state governments from taking effective action. Environmental law is an obvious candidate: pollution does not respect state borders, so national law designed to stifle the effects of people and goods moving to new states is common. The ineffectiveness of purely local measures was the explicit justification of the national minimum wage law, both in Congress and in the Supreme Court. Thus the competition among jurisdictions that Madison saw as a faction-stifling benefit of the national confederation now is seen as undesirable because of its very tendency to frustrate legislation. There has of course been a change in the objectives of factions; in Madison's time the fear was "[a] rage for paper money[,], for an abolition of debts, for an equal division of property, or for any other improper or wicked project." But when national legislators share interest groups' goals, the Madisonian barricades to "wicked projects" begin to appear wicked themselves and are more readily disparaged — and disregarded.

Factions strive mightily to suppress the power of exit. National legislation is ideal for this purpose. 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 public interest costs of each such law will be greater.

34 See United States v. Darby, 312 U.S. 100, 102 (1941).
35 See id. at 117–23.
36 The Federalist No. 10, supra note 10, at 84.
E. The Failure to Agree on the Common Weal

Finally, there is a more fundamental explanation for the failure of Madison's predictions regarding the interplay between public and private interest in national government. The core of Madisonian resistance — the common weal to be found and implemented by virtuous legislators — turns out to be empty. It is not simply that Rousseau's concept of general will is hollow.\(^{37}\) It is that there is no virtuous way to aggregate private wills into collective decisions.\(^{38}\) People of good will have no common ground around which to rally! They have their own conceptions of the public interest but no way to insist that the collective choice necessarily reflect their views. We are doomed by the logic of majority voting to aggregate private preferences rather than to find a common public good.

III. PUBLIC CHOICE AND THE CHOICE OF INSTITUTIONS

Two hundred years after the publication of The Federalist Papers, lawyers and fellow travelers begin to rediscover the importance and effect of institutional competition within a government and among governments. Three great books — An Economic Theory of Democracy,\(^{39}\) The Calculus of Consent,\(^{40}\) and The Logic of Collective Action\(^{41}\) — not only sparked interest in the topic but also provided many of the tools that made inquiry fruitful. During the last decade there has been an outpouring of scholarship on institutional competition.\(^{42}\) This is not the occasion to elaborate on that literature. Instead I want to point to a few of its implications for those who share Madison's vision of a republic in which the choice of institutions could reduce the influence of faction.

Altogether too much of the contemporary discussion about the allocation of governmental functions is cast in terms of claims about

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\(^{38}\) See Kenneth J. Arrow, Social Choice and Individual Values 2–6, 59–60, 89 (2d ed. 1963); cf. Farber & Frickey, supra note 7, at 45–47 ("While governments may sometimes give moral leadership, it is probably a mistake to overestimate the pliability of private preferences.").

\(^{39}\) Downs, supra note 14.

\(^{40}\) James M. Buchanan & Gordon Tullock, The Calculus of Consent (1962).

\(^{41}\) Olson, supra note 29.

what the Constitution commands or permits. Perhaps it is inevitable that lawyers and professors of law would turn to the most fundamental law when they look for answers to the most fundamental questions about how law should be made and administered. 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. The Court offers a formal analysis in insignificant cases (such as whether the Comptroller General, appointed by the President but nominally subject to removal by Congress without impeachment, can play a role in the implementation of the laws)\(^4\) and formless balancing in more serious cases (such as whether there may be independent agencies and whether public prosecutors may be liberated from presidential control).\(^4\)\(^4\) 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 — if our goal is not merely legitimacy but also efficiency — 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.\(^4\)\(^5\)

A. Faction and the Choice of Administrator

When we consider which institutions should make and administer laws, an unproductive rhetorical to-and-fro about administrative agen-

\(^4\) See Bowers v. Synar, 478 U.S. 714, 721–34 (1986); see also Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 826–27 (D.C. Cir. 1993) (holding that the Constitution forbids the designation of congressional employees as non-voting ex officio members of an agency).


\(^4\) This adjuration applies to discussions about the judicial branch as well. Pages of law reviews contain extended discussions on the question whether the Constitution, which permits Congress to create inferior courts and make “exceptions” to the jurisdiction of the Supreme Court, tolerates one or another omission from the federal-question jurisdiction. See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 passim (1953); Lawrence G. Sager, The Supreme Court, 1980 Term — Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 passim (1981). These articles make for an interesting formal inquiry, but political forces have prevented excisions from the federal courts' federal-question jurisdiction. What political forces do not prevent is the far more serious threat of additions to federal jurisdiction. A Congress intent on limiting judicial review of some controversial topic could do so by putting a flood of mundane cases before the Court. Restoring the Supreme Court's mandatory jurisdiction to its state before the Judges' Bill of 1924, Pub. L. No. 68-415, 43 Stat. 936 (codified as amended in scattered sections of 28 U.S.C.), would, as a practical matter, end the Supreme Court's current role in contentious issues. Yet because there is no constitutional “case” for objecting to excessive jurisdiction, scholarly attention has focused elsewhere.
cies should not detain us. The arguments are well known. On the one hand are those who say that agencies bring us expert administration, specialists free from political sway, able to enforce the law correctly and make expert discretionary judgments. This is the public argument for independent agencies, and it appears in judicial opinions sustaining their validity. On the other hand are those who advance 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).

Public choice theory suggests that this whole 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 in government, and so on — miss the point of Madison's argument: ideals of virtuous administration may direct attention away from how government operates in practice.

Consider for a moment the case of independent administrative agencies. Modern public choice theory leads us to 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 its members' isolation from the executive branch. A President may resist claims by factions in the way Madison envisioned: by adding other items to the agenda. But agencies devoted to single industries lack threats; they cannot promise to veto bill X if Congress takes step Y. Because agencies cannot engage in logrolling, committees in Congress gain relative influence. The loser is the President (with a national constituency), and the principal beneficiaries are committee chairmen, who hold, on average, beliefs 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 carried out by both an agency, the Federal Trade

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46 Recall the recent political controversy over the North American Free Trade Agreement (NAFTA). See, e.g., Attention NAFTA Shoppers!, TIME, Oct. 25, 1993, at 33, 33-34. Lower tariffs aid consumers, but they injure producers of products that compete with imported goods. Legislators from districts that would be adversely affected opposed the agreement, but their opposition was overcome by side deals — "pork" to the uncharitable — in which the districts that received net benefits from NAFTA made transfers to the districts that suffered injuries. See, e.g., Peter Behr, Final Deals Produce Surge of Support, WASH. POST, Nov. 17, 1993, at A8; Keith Bradsher, Trade-Pact Battle Lines: Wheat vs. Corn, N.Y. TIMES, Nov. 5, 1993, at A1; Gwen Ifill, How Clinton Won: 56 Long Days of Coordinated Persuasion, N.Y. TIMES, Nov. 19, 1993, at A27. An agency restricted to the subject of trade could not have made comparable bargains: it was necessary to add non-trade items to the agenda so that political and economic accounts could be balanced.
Commission (FTC), 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 also be used to suppress competition: a prosecutor may initiate actions against firms that are competing too strongly, to the detriment of other producers. From Madison’s time to ours, students of politics have recognized that producers are concentrated relative to consumers and so more readily can overcome the free riding problem that obstructs collective action. Thus a Madisonian prediction, fortified by twentieth-century public choice theory, would be that producers would have considerable influence over many localities and their representatives, but that officials elected from the entire nation (principally the President) would be more inclined to favor consumers. Because the seniority system in Congress gives the representatives of a few localities greater influence over the FTC than over 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, stock prices of firms in the industry rise, exactly as one would expect if the challenge were designed to suppress competition and aid producers; when the Antitrust Division challenges a merger, stock prices fall, which is what one would expect if the action were designed to assist consumers. Despite changes in administrations and dramatic philosophical differences among Presidents, the FTC has been consistently responsive to producers’ interests—particularly if the producer has operations in the district of a member of the legislative committee that superintends the FTC’s budget.

Findings like this reinforce the wisdom of the original constitutional plan, with administration of the law answering to the national constituency and the making of law insulated from faction through agency slack. Yet continuing developments in administrative law run the other way. Notice the direction of movement in current political life: even line agencies of the executive branch are to be weaned away

49 The judiciary, with its wider constituency, has been in recent years on the side of consumers, and has been deeply suspicious of suits filed by producers against their rivals. See, e.g., Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2592–98 (1993); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 336–45 (1990); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582–85 (1986).
50 See Coate, Higgins & McChesney, supra note 48, at 468–78, 481–82.
from the President through private rights of initiation, intervention, and participation. The APA, the Freedom of Information Act, the Government in the Sunshine Act, and the extensive provisions for judicial review all ensure that factions have many points of access and influence. Factions monitor intensively; agency space given to public officials has become a point for objection. 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 members of Congress (particularly of the House) 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 rulemaking, 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 power within the national government (and the federal structure of the republic), rather than anything like the APA or the Sunshine Act.

Two of the other papers for this Symposium indirectly illustrate some of these points. Cass Sunstein's contribution contains a table showing the cost of saving one life under different regulatory schemes. The costs range from $100,000 to $5.7 trillion per life saved. The latter figure approximates the gross national product of the United States for a year. No system of virtuous public administration can explain these differences; an official interested in the public

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52 Id. §§ 551, 552, 552(b), 556, 557.
54 The Federalist No. 51, supra note 32, at 322.
welfare would withdraw money from the more expensive rules and pour it into those areas in which marginal improvements in safety can be had at lower costs, producing more safety for the same expense (or the same safety for less expense). Factions have ensured, however, that the government is internally divided and that regulations therefore reflect interest groups' strength rather than benefits to the public. According to Susan Rose-Ackerman, Germany's model of administrative action looks more like the Madisonian ideal. Administrators answerable to the cabinet, who thus have a national constituency, use a process with low public visibility. Professor Rose-Ackerman believes that the German model suffers from insufficient sunlight — that the public officials have too much slack and are apt to use it to favor industry over consumers. Public choice suggests that removing rulemaking from the limelight may well have the opposite effect. I propose a test. Let us examine the German experience and construct a table of cost per life saved under different regulations. I think the range will be much more compact than it is in the United States.

B. Factions and the Choice Between Federal and State Regulation

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 instead 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. What is less recognized, but no less vital, is that laws themselves can move — or, what is the same thing, money, goods, and people can 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 but leaving the operations themselves unaffected. Under the McCarran-Ferguson Act, insurance companies also can move to favorable laws, and

56 Lest I be misunderstood, I add that features of the American political system, in addition to the influence of factions, contribute to these dramatic cost differences, and that any comprehensive solution requires steps beyond those mentioned in the text. See Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 1-51 (1993).
57 See Rose-Ackerman, supra note 26, at 1289-96.
would-be insureds 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 that enacts the laws), competitive forces should be as effective with governments as they are with private markets.

Granted, the competitive ideal cannot be achieved — there are not enough governmental units, the populations of jurisdictions are not sufficiently homogenous, and externalities are common. 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.

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 focus on the trans-border consequences of legislation. There are always some consequences, 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 — in other words, trade — or of ownership of resources, as opposed to the process of production itself, presents multi-state issues. Thus antitrust policy should be national, not local.

The distinction between production and trading is not clear-cut. It is the possibility of movement that places pressure on state and local regulation. If capital, goods, and people can move freely, interest


60 See Charles E. McLure, Jr., Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1980 Term, 1 S. CT. ECON. REV. 69, 87–89 (1982).

61 One-state market power is infrequent, but it exists. According to the Court's opinion in Parker v. Brown, 317 U.S. 341 (1943), California produced almost all of the nation's (and half of the world's) raisins. See id. at 345. The state orchestrated a "prorate" program that reduced output and permitted domestic producers to extract monopoly overcharges from consumers in other states. See id. at 346–48. It is hard to imagine that producers in Minnesota or Vermont would be able to take competitive advantage of the policy. California's resource, a favorable combination of weather and soil, is not portable.
groups seeking state and local regulation cannot achieve much; they will simply drive people and production elsewhere. An ability to regulate the process of movement, by contrast, creates the situation in which faction can succeed. This is plain enough in the series of cases under both the Privileges and Immunities Clause and what has come to be called the “dormant” commerce clause, in which the Supreme Court prevents states from discriminating against goods or persons from out of state.\(^2\) State actions in the name of competition similarly may be designed to close borders. Consider a merger of two firms with plants scattered throughout the nation. Particular states may attempt to hold the merger hostage by 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.\(^3\) This situation 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.\(^4\)

IV. Conclusion

Public choice holds manifold implications, not only for how to interpret laws, but also for how we view the institutions that do the interpretation. I mention only one: when faction dominates the creation of laws, judges cannot interpret laws to serve the public interest.

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\(^4\) State regulation also affects non-residents even if no state tries to appropriate benefits created elsewhere. Neither law nor facts nor economic consequences are clear; there is a range of possibilities. National law applied in the national courts gives the mean over a run of cases; false positives (transactions condemned on antitrust grounds even though they do not injure consumers) and false negatives (transactions that could properly have been condemned but are not) occur in similar numbers. Markets slowly undercut the market power created in the false-negative cases. With local administration of competition policy, by contrast, false positives become much more numerous, because the transaction will be blocked unless every jurisdiction approves. A glut of false positives — which markets do not undermine, slowly or otherwise — may block many beneficial transactions. Notice the difference between this effect and the beneficial form of interstate competition that occurs for plants and corporations. When people shop for places to build plants or make investments, the transactions are voluntary and the costs are borne by those who incur them. When regulation occurs after the investments have been made, this process is less effective. Antitrust law is non-consensual.
Shocking? Certainly to the Harvard legal process tradition exemplified by the work of Henry Hart and Albert Sacks. When Madison's institutions fail to thwart interest groups, and when civic virtue fails to carry the day, statutes reflect the outcome of a bargaining process among factions (and their representatives). Statutes 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 ask, questions that have lurked since 1787 and that have been thrust into prominence by the insistent logic of public choice as the Constitution's own mechanisms of faction control continue to lose their effectiveness.