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Federalism with Two Languages

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“Federalism with Two Languages”¹
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An after dinner speaker should stimulate the mind without disturbing the digestion. The title of my talk is “Federalism with Two Languages.” I hope the topic of federalism will stimulate the intellect, and I hope to succeed in discussing two languages without disturbing anyone’s digestion.

Federalism is a system of sharing governance at difference levels, especially the federal or central level, and the provincial or state level. Canada, the United States, and Germany are examples of federal systems. In contrast to federalism, the unitary state is a system with a single government that divides the nation into departments for purposes of administration. The departments do not have their own governors, merely administrators. France and Japan are usually cited as examples of unitary states. Federalism is a prominent system in the 20th century that I expect to become prominent in the 21st century.

Alexis de Toqueville made penetrating observations of the young American republic, which helped to create its conception of itself. Speaking of the United States de Toqueville said “the federal system was created with the intention of combining the different advantages which result from the magnitude and littleness of nations.” The economic analysis of law reformulates de Toqueville’s problem as “finding the optimal number of governments.”² I will explain this general problem and then relate it to a country with more than one linguistic group.

The Optimal Number of Governments

¹ I wish to thank Chris Swain for transcribing and editing this lecture.

² I introduced this phrase in Part 2 of my book, The Strategic Constitution (2000), upon which this lecture draws.

To explain the phrase “the optimal number of governments,” I turn to ideas developed by Ronald Coase in his classic paper of 1937 on the firm. Consider a manufacturer such as the Ford Motor Company. Ford requires tires to put on its cars. Ford can either make tires in a subsidiary or buy them from another firm. If it makes its own tires, then the firm is vertically integrated and there is only one company. Vertical integration implies relatively deep administration. If it buys tires from another company such as Michelin, then two firms are involved. The decision about whether to make or buy an input is a decision about how many firms should be involved in the production of a good. When two firms are involved, they interact through a market, so administration is not so deep. Thus the decision about whether to make or buy an input is a decision about whether production should occur through administration or a market. The question of the optimal number of firms is equivalent to question of the optimal number of markets.

With relatively more administration, the unitary state resembles the vertically integrated firm. With relatively less administration, the federal state resembles the two firms that transact through a market. For firms, the alternative to administration is the market. For states, the alternative to administration is government. I will only discuss elected democratic governments. In democratic states, administrators belong to the civil service and the government is elected. The unitary state is a system in which there is one central government that is elected, and below it is a deep system of administration. In contrast, a federal system has more governments and more elections, and consequently shallower administration. The choice between a unitary state and federalism is a question of the optimal number of governments, or equivalently, the optimal number of elections.

The space of government can be conceptualized as having two dimensions. One dimension is territory. Thus the unitary state occupies an extensive territory, whereas a federalist state divides the territory into separate governments. The second dimension is function. Different functions of government can be consolidated or separated. With consolidation, many functions are under the control of a single government. With separation, different functions have different governments in the same territory.

To illustrate, the schools and police in a town can be under the authority of a single town council, or the police can be under the authority of the town council and the schools can be under the authority of a separately elected school board. Some states have laws

enabling the creation of special government to perform single functions. For example, residents of Berkeley, California, vote for distinct governing boards to supply schools, water, parks and public transportation. In California there are over 5,000 special district governments each of which supplies a special public good to a particular locality.

Separation of governments by territory and function is a way of combining the advantages of the magnitude and littleness of nations. Thus we can think of the problem of the optimal number of governments as determining the number of governments to be located in the two-dimensional space of territory and function. The problem of the optimal number of governments is to decide how much territory and how many functions different governments should have. The unitary state is broad in territory and function, whereas a federal state contains different governments for different territories and, possibly, for different functions.

A Contractarian Foundation of Federalism

What does “optimal” mean? When I speak of the “optimal number of governments,” I have in mind the maximum satisfaction of the preferences of citizens for laws and public goods. Maximizing the satisfaction of the citizens for laws and public goods, however, is a very general idea. To give the theory more specificity it is necessary to be more precise about the kinds of things that citizens want from their state. I am going to approach this problem from the point of view of a particular philosophical tradition, namely contractarianism.

Contractarianism is a philosophical tradition that is often used to explain why the individual subordinates himself to a government and accepts the obligation to obey its laws. According to contractarian tradition, individuals give up their liberty and join together to create a state because of the distinct advantages they receive. By joining a state, they are able to live better lives than they could in the absence of such a state. Consequently, the state is viewed a kind of contract that gives advantages to the individual citizens. Notice that this theory is usually understood to be a logical reconstruction of the origins of the state, not an historical account of how the state comes into existence.

Similarly, we can regard the federalist state in the same way. We can ask why does a group of people that have a government might want to subordinate that government to a central government. Presumably, the answer to this question is much the same as the answer to the question that contractarianism poses at the level of the individual. Specifically, the group with its own government can benefit itself by subordinating itself to a central government. In other words, by submitting to central authority the government of the group secures for its members a better framework of law and better provision of public goods than it could secure on its own.

Notice that this logical reconstruction of federalism has some of the same attractive properties as the logical reconstruction of the state through contractarianism. Specifically, the groups that subordinate themselves to central authority in the federal government do so from a sense of the advantage that each of them will derive. Consequently we conceive of their union as both beneficial and voluntary.

Also notice that this way of speaking supports the presumption in many legal systems toward decentralization. I have in mind what Europeans call the “subsidiarity principle” and what Americans call the “reserve powers clause” found in the tenth amendment to the US Constitution. The principle of subsidiarity and the reserve powers clause establishes a rebuttable presumption in favor of the lower level unit of government and against the central government. Give this presumption, the central power cannot legitimately assert its authority except to convey an otherwise unattainable advantage on lower level groups.

Advantages of Centralization

Now I want to discuss two of the types of gains obtained by creation of a large central state. The first gain comes from a unified, national market. By a national market, I mean a market in which goods, capital and labor can move relatively freely without obstruction. The advantages of free trade, which were articulated clearly in the 18th century, have been demonstrated forcefully by both the United States and the European Union. In the 19th century, the United States constituted probably the largest national market in the world. This fact is apparently connected to the great prosperity that the United States enjoyed. The events in Europe since the Second World War are even more dramatic. Beginning with a modest common market in coal and steel, the

Europeans expanded their common market to goods, services, capital, and labor. The Common Market has been so successfully that Europe's prosperity is the envy of the world and poverty has almost disappeared from the member states. A substantial amount of common government is required in order to operate a common market. The instruments of government are needed partly to unify a market of goods and more so to unify a market for capital and labor. Indeed, free mobility of labor is almost synonymous with universal citizenship. In addition, the economic successes have brought with them a continual pressure for unified government and a guarantee of peace and human rights.

The second advantage from centralization that I want to mention concerns the military, or the common defense. Military and police activities are often taken by economists as exemplifying a pure public good. The characteristic of a pure public good is that it exhibits very large increasing returns to scale. Large increasing returns to scale implies that centralized provision is most efficient. To illustrate, the unification of military authority in the United States has produced a superpower, whereas the fragmentation of the military in Europe has left the continent relatively weak militarily. (Europe is now beginning to create its own military force, and the future will tell whether Europe will acquire military power commensurate with its economic power.)

In principle, separate nations could agree by treaty to provide for a unified market and a common defense. Collective action by treaty usually requires unanimity among the participating states. Consequently, a treaty system creates many opportunities for holdouts and delays. In contrast, the subordination of states to a central government involves some loss of autonomy and some conformity to majority rule. By yielding some power to the central government, the member states improve their common defense and better unify markets. The resulting gain in prosperity and security is often worth the risk of exploitation and diminished.

Advantages of Decentralization

I have been speaking about the advantages of a central authority and why states might voluntarily subordinate themselves to it. Now I want to turn to the advantages of retaining significant power and autonomy for the states within a federal system. Here I want to focus on the gains from competition among jurisdictions.

A government provides laws and public goods to its citizens in its jurisdiction. Competition among jurisdictions allows citizens to move to those jurisdictions that provide the best laws and the best services relative to the citizens' preferences. Competition among jurisdictions can take the form of mobility or contract. With mobility, citizens physically move to the jurisdiction that they prefer. With contracts, citizens agree to bring themselves under the laws of a particular jurisdiction without physically moving. To illustrate, in the United States corporations receive their charters from states, not from the federal government. Furthermore a corporation can receive its charter from any state, even those in which it has no physical presence.

Does jurisdictional competition results in a race to the top that supplies better government, or a race to the bottom that provides worse government? Corporate chartering competition among U.S. states has been investigated by scholars. Some critics complain that the level of competition is deficient and its should be increased, for example by providing the additional option of incorporating at the federal level. However, I don't hear even the most severe critics arguing that the system of state incorporation should be abolished in favor a system of federal incorporation. In other words, I hear arguments about how to improve jurisdictional competition for corporate charters, but I do not hear arguments favoring the abolition of jurisdictional competition. I conclude that jurisdictional competition is a good way to organize corporate law. Thus the Europeans would be well advised not to create a European corporation with exclusive powers, but rather to create a framework for competition among the European nations for providing corporate charters.

Competition through physical mobility has some especially interesting characteristics with respect to local public goods.³ Different local governments supply different combinations of public goods, which allows people with similar taste to cluster together. To take two examples, the Castro district in San Francisco, which is well known as a center of gay culture, is replete with restaurants, bars, theaters, movies and other urban amenities. In contrast the small enclave of Piedmont in the East Bay has especially good schools, but few restaurants, bars theaters and the like. Consequently

³ Here I sketch some features of a theory developed by Tiebout.

people who want to enjoy urban amenity can live in the Castro and people who want good schools for their children can live in Piedmont.

Given competition among jurisdictions, constraint can increase choice. The example of town architecture makes the point. I recently returned from a trip to Santa Fe, New Mexico, where strict aesthetic zoning ensures that all buildings conform to the Spanish colonial style. A person in Santa Fe who wants to build a Frank Lloyd Wright house is prohibited from doing so. In order to build a Frank Lloyd Wright house, the person might have to move down the road to Albuquerque, which has a full diversity of architectural types. Aesthetic zoning in Santa Fe thus constrains the individual's exercise of choice. However, without aesthetic zoning, Santa Fe would presumably look much like Albuquerque. In other words, the constraints imposed locally in Santa Fe create the option to choose to live in a place that is different from Albuquerque.

I have explained that local constraints against diversity can increase the number of choices among types of communities that the individual can make. In order to make these choices, it is necessary that mobility be easy and cheap. Without mobility, the individual is unable to escape local constraints by changing jurisdictions. Consequently the need to protect liberty against community constraints depends directly on the costs of mobility. To illustrate by our example, the complaint of a Santa Fe resident that esthetic zoning restricts his liberty loses force if he can easily build a Frank Lloyd Wright house in a neighboring town. Conversely, if the resident cannot move somewhere else, then his complaint will gain in force.

De Toqueville asked how to combine the different advantages resulting from the magnitude and littleness of nations. I have explained that centralization of some functions, specifically the national market and the common defense, creates large gains for citizens. I have also explained the advantages of jurisdictional competition in the supply of many laws and local public goods. Now I turn to the particular problem of language.

Language and Culture

Computer technology has made many of us appreciate the way in which different elements of a network increase the value of each element. To illustrate "network effects."

concretely, consider my use of computers.⁴ I obtained the first personal computer in the Berkeley law school, which was an IBM running on a Microsoft operating system. I used the Microsoft operating system for more than 20 years and then I recently switched to Apple. I am a civilian in the religious wars over operating systems. To me, the problem is one of function and not faith. My experience, however, suggests that Apple has – and has always had -- a superior operating system to Microsoft. Nevertheless, Microsoft has approximately 95% of the market. Consequently, the users of Apple are relatively isolated. Most of the advantages of network effects go with the users of the Microsoft operating system, not users of the Apple system. The situation that I have described also seems stable. Although intrinsically better, the Apple operating system has not gained or lost significant ground against Microsoft in recent years.

These facts suggest several conclusions about computer operating systems. First, some are better than others. Second, multiple equilibria are possible. Third, the equilibrium that we find ourselves in is not necessarily the best one. The actual equilibrium reached is partly a matter of chance or history.

Now I want to relate network effects to languages. In a much quoted phrase by Max Weinreich, “a language is a dialect with an army and a navy.” This proposition suggests that a language establishes itself by military defeat of its rivals. Perhaps this proposition appeals to people because it suggests that languages are superior to dialects in terms of power, not their intrinsic value.

In my own view however, the proposition is true in an entirely different way. In the 19th century Europe was full of dialects that have disappeared. I spent a summer in a small town in Belgium named Wavre. In Wavre there were a few people who could still speak its dialect. Its dialect was presumably related to French but hardly understandable by French speakers. The dialect has almost entirely disappeared and standard French has replaced it. I do not think this happened because the French language had an army and the Wavre dialect had an army, and the French army beat the Wavre army. Instead, the

⁴ Network effects are a form of increasing returns to scale that are well known in economics at least since the time of Marshall who wrote clearly concerning railroad networks.

Wavre dialect was used in the 19th century for various purposes including business and some government activities. In recent years however, there has been no use for the Wavre dialect in business or government. I suspect the dialect died out because its speakers perceived little advantage to their children from knowing it, whereas standard French afforded many advantages for their children. It is as if people who are knowledgeable in the Apple operating system instructed their children to learn the Windows operating system because it would prove to be more useful to them.

This example suggests that Wavre might be a language, instead of a defunct dialect, if it had an army and a navy that operated in the Wavre language. I emphasize the need to *speak* the language in the army and the navy, not *conquest* by an army and navy speaking another language. In other words the preservation of a language involves its functional use, especially its functional use in business and government.

I would like to give another concrete example of what I have in mind. I am occasional visitor to the White River Apache reservation in Arizona. I have a friend there named R.L. who is an Apache speaker married to a Navajo. He and his wife speak English to their children, so their children have grown up not speaking Apache. Recently the reservation government decided that the tribal council should conduct its important business in Apache, so that fluency in Apache is necessary to serve on the tribal council. When this happened, my friend R.L. decided that he should talk more to his children in Apache. In other words, when he saw that there was a function for the Apache language that conveyed an advantage on his children, he wanted to them to speak it.

This analysis suggests why federalism might be good for the preservation of languages. By having a multiplicity of governments, the possibility exists for those governments to carry on their administration in different languages. In this way, a function is given to the language that provides a reason for its preservation. Some languages may be preserved without having a governmental or commercial function. For example, holy languages that are needed by religious groups may have this character. However, many languages are not holy. Speaking secular languages depends on function, not faith.

A state that has an official language that is different from the other states may be rather like the town of Santa Fe that has aesthetic zoning that is different from other

cities. By constraining its citizens to use a particular language in the affairs of state, it may create choices for people that otherwise would not exist. The choice in this case is to live where the language at issue is part of a living culture. In the Canadian context, the use of French as the official language in Quebec may create a place where people who are particularly committed to French culture can live congenial lives.

At the same time the framework of federalism that guarantees mobility also allows native French speakers who do not wish to live in that kind of culture to move away. Cosmopolitan people who want to be in a multi-language setting can also achieve their goals. (As for me, I prefer living in a cosmopolitan place with many languages and vacation in a parochial place with one unusual language.)

I have explained that a federalist framework makes the preservation of different languages more possible than the unitary state. Now I want to relate this discussion to legal culture. Like computers, legal systems have network effects. Laws in a single legal system have a kind of coherent order that holds them together, which comparative lawyers study. At the same time, legal systems continually borrow from each other. Here I am reminded of the phrase that biological evolution proceeds by the elimination of the unfit whereas cultural evolution proceeds by the emulation of the most fit. In law there is a continual transplanting of rules from one system to another in an attempt to emulate the best rules.

In the conception of the unitary state, law has to be uniform throughout a jurisdiction. For example, some scholars today advocate the adoption of a uniform civil code for all of Europe. Another possibility is represented by federalism. A federalist system ideally shares a common legal culture, but not necessarily the same laws. There is scope for different states to have different laws, and for jurisdictional competition to take place. Thus in the United States the legal culture is so unified that person can study law in California, move to New York, and prepare to take the New York Bar Exam in a few months. The difference between California civil law and New York civil law is relatively minor. Similarity results from the common legal culture, not from central authority imposing uniformity on the states.

There is no reason why a common legal culture has to occur exclusively in a single language. For example, the old common law of Europe known as the *Ius Commune*, was

taught in the various universities of Europe. Much of the discussion occurred in Latin, which educated people shared. However, there was also substantial development of the law in local languages and dialects. Consequently, there was a common legal culture which contained linguistic variation within its scope.

The existence of more than one language in a federal system can be a source of strength in the sense of preserving legal diversity and legal competition. The trick is to ensure that there are enough federal institutions to ensure the preservation of a common legal culture.

Conclusion

I want to conclude with some comments on the relationship between the language of the law and the language of economics. Economic rationales do not lose their persuasive power at national boundaries. As a consequence the economic analysis of law is relatively unified throughout the world, just as economics is relatively unified throughout the world. If I present a lecture in Bombay or Boston, an audience educated in economics can immediately understand the assumptions that I am making and follow the development of the model. In this respect I have a large advantage over lawyers who travel from one country to another and give lectures. Comparative lawyers must spend much labor in establishing the shared understanding through which they can develop their arguments.

When God destroyed the Tower of Babel, the lawyers in different countries could no longer understand each other, whereas the economists in different countries could still understand each other but no one else could understand them. Since economics is a universal language among those trained in it, it has an important role to play in the unification of legal culture. The growth of international trade will, I hope, spread prosperity and peace in the world much as it has already done in Europe. As that happens, I hope that the economic analysis of law will help to unify the legal culture of the world. If these possibilities are realized, we may see a truly remarkable new form of federalism in the world at the end of this century.