Authority Migration in Federations: A Framework for Analysis

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Why does one federation succeed while another fails? Federations may fail for exogenous reasons: foreign invasion, collapse of its currency, or global market forces. If we focus on endogenous factors, the possible reasons for failure include diversity, where populations drift apart or clash too often, or jealousy from redistributive asymmetry, with unequal shouldering of costs or dispersion of benefits, and, of course, corruption and insurrection. While potentially significant, these problems are not particular to federalism; they threaten all democracies. There is, however, one threat that afflicts federations in particular. It is the one that perplexed and animated James Madison in the American context: opportunistic authority migration between levels of government.

Authority may be manipulated by two kinds of actors: the public and the governments themselves. Authority migration can be beneficial: the distribution of authority may be adjusted to make governments more efficient. When initiated by public demand, authority migration demonstrates governmental responsiveness. But it can also be harmful. It can occur not by benevolent design or by majority demand, but instead to
serve particular interests, often at the cost of the general welfare. In these cases, authority migration is opportunistic.

Federalism is a solution designed to protect democracy from tyranny, but it creates a new problem: opportunistic authority migration instigated by governments competing for voter affection. Constitutional designers and students of federalism need to take a two-pronged approach to counter opportunistic authority migration. Of immediate concern is overcoming the problem of non-compliance; we need to compel governments to obey the boundaries set upon their power. But to do so we must enlist a deeper remedy: solving the coordination problem necessary to make compliance remedies work. This essay will first describe the problem of opportunistic authority migration by defining opportunism in federations, establish a claim that opportunism endangers federal unions, and then provide the logic of the motivation to behave opportunistically, despite its threat to the union. The essay will then suggest institutional remedies, beginning with those proposed by the American founders, and continuing with current amendments to the theory. The essay concludes with a discussion of a higher-order necessary condition: establishment of a federal culture as a force to coordinate the safeguards of federalism.

Classifying Authority Migration

In federations, governments may take advantage of other governments in one of three ways (see Figure 1). State governments may try to shirk their responsibilities to the federation: they may fail to implement federal policy or may take it upon themselves to
enact policy that is normally in the federal domain rather than respect the division of powers. States may also \textit{shift the burden} of making the union work onto the shoulders (and economies) of other states, for example by creating barriers to trade between the states, or affecting the mobility of citizens across state borders. Federal governments may centralize, \textit{encroaching} upon the jurisdictions of the states, or decentralize to shift burdens away from the center.

Figure 1: Types of Opportunism

Of the three forms of opportunism, shirking and encroachment are unauthorized acts of authority migration. They involve one government pulling authority toward itself (or perhaps abdicating it) when it suits that government’s interests.
The Hazards of Authority Migration

Opportunistic authority migration troubled James Madison. The union’s inefficiencies under the Articles of Confederation were clear to him. In notes he wrote in April of 1787, known as “Vices of the Political System of the United States” (Rakove 1999, 69–80), Madison recorded some of the symptoms of the ills affecting the union. He lists 12 problems, annotating 11. The first eight describe rivalry between the states and rebellion by the states against their responsibilities to the union. In these notes, Madison describes the states’ opportunism—burden-shifting and shirking—that plagued the union under the Articles of Confederation.

Here I will agree with Madison’s preoccupation with opportunism, arguing that it destabilizes federations, making them vulnerable to endogenous and exogenous attacks.

Federalism combines many of the advantages of unitary and confederal systems. When effective, it offers the military security of a unitary system without sacrificing demands for local autonomy. Arguably, it offers more opportunities for economic growth and protection of individual rights than either other democratic form. Citizen satisfaction with the government weighs all of these factors, among others. Some of these factors, such as security and democratic rights, the government provides directly, while others,

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1 Notes 9, 10, and 11 are dedicated to the problems of representational democracy. Note 11 sketches his arguments in *Federalist 10*. 
most notably wealth or economic growth, the government does not provide directly, but may encourage through its policies.

For the purposes of this essay, let us make the following useful distinction. Varying the distribution of authority can influence allocative efficiency: how the pie is split and whether that distribution agrees with the wishes of the public, admitting that the public’s preferences may not be well defined.\(^2\) It can also influence productive efficiency: how large the pie is. Changes in allocative efficiency are necessarily political. Redistribution means that some will do better while others are worse off. In contrast, all else equal, reductions in productive efficiency are unambiguous. A smaller pie is worse for everyone.

Authority migration can reduce both allocative and productive efficiency. When authority is redistributed opportunistically, it is carried out for strategic reasons, to reallocate resources to the advantage of the opportunistic government’s constituents. Because it is engineered to serve the electoral interests of a particular government, this new distribution of authority may not—and most often will not—improve the union’s productive efficiency. Authority migration through opportunism shifts the federal system to a less efficacious distribution of authority, reducing the benefits of federalism and rendering the union weaker.

\(^2\) In a diverse society—seemingly a prerequisite in federations—it is difficult to rank the alternative allocations of resources and opportunities. The Pareto criterion or the Rawls criterion—both relevant to a governmental form that includes representation of the states and supermajority voting requirements—will not create a complete ordering. Majority rule will likely admit cycles.
Apparently exogenous factors contributing to the failure of federations may be attributable to opportunistic authority migration when examined more closely. While a government may be punished at the polls for initiating a less effective distribution of authority, there is a danger lurking in the background that extends beyond electoral consequences should the government fail to be productive. If the government fails, it is vulnerable to external and internal threats. The government must generate sufficient returns to be able to mount a credible defense against invasion, and it must work well enough that citizens would not accept an alternative. Of particular concern is the threat to democracy. There is no shift of authority more odious than when the people lose control of their government. Federalism is an insufficient armor for democracy’s fight against tyranny if it performs inefficiently: tyranny, either from external threats or internally, looms as a potential alternative.

What Motivates Opportunism?

Opportunistic behavior destabilizes unions. If member governments value the union, why would any one of them engage in destructive behavior? James Madison took up this problem in notes 7 and 8 of the Vices. In Note 7 he makes the following two observations:

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3 Consider the potential correlation between the weak performance of the Argentine federation and its history of military coups; the lack of confidence in the federal division of powers in the United States prior to the civil war and in Canada today; the tenuous hold on democracy in the Nigerian federation.
**Perceived hardship:** “Every general act of the Union must necessarily bear unequally hard on some particular member or members of it. Secondly the partiality of the members to their own interests and rights, . . . will naturally exaggerate the inequality where it exists, and even suspect it where it has no existence.”

**Suspicion leads to opportunism:** “[A] distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all.”

In the first observation, Madison notes that the burden of making the union work falls unequally upon the shoulders of the states; some may be asked to make greater sacrifices than others. All will be sensitive to the hardships of union, and each is likely to believe that it bears more of the burden than the others. In the second observation, Madison laments the inefficient outcome generated by the common knowledge of perceived hardship: each member state will be suspicious that others might shirk—behave opportunistically—in order to deflect some of the burden. If there is a danger that the collective good will not be provided, then it too should shirk. This pairing of observations lead him to conclude that it is impossible to sustain full compliance within the union of states: “It is no longer doubted that a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal Government, ought not be calculated on”
(Rakove 1999, 72). Madison diagnosed the union’s problem as a collective action dilemma, where shirking and burden-shifting are its manifestations.⁴

Federalism is particularly vulnerable to unplanned or unwanted authority migration because it has multiple levels of government that may be put into competition with one another by the electoral system. Paradoxically, it is the democratic nature of federalism that threatens the performance of its democracy. Opportunism is not corruption. It is not a politician using his office to extract rents from taxpayers. To the contrary: opportunism is the government using its position to extract rents from other governments to benefit its taxpayers. Credit assignment is inherently ambiguous in the federal structure, where multiple governments serve the same constituents. Governments want to claim credit for good outcomes and distance themselves from bad. This electoral instinct can put them into competition with one another, and even cause them to try to adjust domains of authority opportunistically. Even in a union that clearly benefits its members, the electoral independence of the governing bodies makes each put the interests of its own constituents over the general body. Authority becomes the object in a tug of war between competing governments, and the ensuing authority migration reduces the efficacy of the union.

⁴ Another result from the public good provision literature further explains the motivation to shirk. If the collective good could be provided without the full cooperation of all, then actors may be tempted to free ride off the efforts of others. In other work, I have shown that under a wide range of circumstances, partial compliance is the best that can be hoped; opportunism is inevitable (Bednar 2004).
Even when the opportunistic authority migration is (incidentally) utility-enhancing, it may destabilize the union, not because of the outcome, but because of the process. With opportunistic authority migration the federation is altered not by design or by popular amendment, but instead due to self-interest of one or more parties to the federation. The commission of any opportunism fuels the suspicions that lead to further acts of opportunism.

**Instituting Compliance**

Madison’s federalism was designed to make republican democracy feasible. Should democracy fail, tyranny would result, either by force, as the union would succumb to a better equipped and organized outside force, or by choice, as the people might willingly abandon the inefficient democratic government in hopes that a home-grown alternative might improve their circumstances. Madison asked the question: How do you structure a sufficiently effective democratic government so that its defense is fearsome to outsiders, and its citizens are not tempted to abdicate authority? That is, how do you guarantee the distribution of authority that maximizes the federation’s productive efficacy?

While a unitary government would seem to be the neatest solution to the problem, elimination of the states was not politically feasible in 1787, just as it is not an alternative for many newly emerging democracies today. It is a throw-out-the-baby-with-the-bathwater solution; it ignores the many benefits of decentralization. A shift from a
confederacy to a federal union, with a stronger and effective federal government and a system of institutions, was designed to overcome shirking and burden-shifting, harmful acts of opportunism that may reduce the efficiency of the union.

But in creating a solution to the burden-shifting and shirking common in the confederation, federalism also created the potential for the third form of opportunism: encroachment. Madison in the Federalist papers was dedicated to defending the design of the union against fears that there were insufficient checks on the power of the federal government. A central government that could capture power from the state governments might also be capable of tyrannizing the states or their citizens in the same fashion that Britain was tyrannizing the colonists. Therefore federalism, unlike a unitary government, has a second authority migration battle to contend with: the tug of war for authority between the states and the federal government.

State shirking is managed in federations constitutionally through the supremacy clause, the dormant Commerce Clause and the unifying clauses of Article IV: Full Faith & Credit, Privileges & Immunities, and the Guarantee Clause. Politically, the states are subordinated to the federal government through their fiscal dependence. A greater threat

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5 In the Guarantee Clause (adopted in some form in many other federal constitutions), the federal government guarantees to its citizens that the governments of the states will remain republican democracies. Apart from justifying certain aspects of the federal government’s interventionist policies during the Reconstruction, the Guarantee Clause has not been relied upon in the United States, causing some legal scholars to argue that its usefulness has withered away. However, in other federations, most notably Argentina and India, the Guarantee Clause has been used frequently to justify federal intervention in state government affairs. The efficiency gains of its use are not clear and its use remains controversial.
to the balance of federations seems to be federal encroachment. In a confederation, states may protect themselves and their citizens through the threat of unilateral secession should the central government become too heavy-handed. But how does one guard against inefficient overcentralization in a federation, where secession is not such a ready option? This problem plagued Madison, and it became the chief form of authority migration that he had to defend against in the Federalist papers. There, he suggested three safeguards of federalism, and I append two more.

*Structural safeguards.* Madison’s checks and balances solution was a combination of fragmentation and joint responsibility. “The different governments will control each other, at the same time that each will be controlled by itself” (*Federalist 51*). “So it is to be hoped,” Madison later wrote in a newspaper editorial, “the two governments possess each the means of preventing or correcting unconstitutional encroachments of the other” (Rakove 1999, 508).

*State supervision.* States will watch what the federal government does, and if any one perceives encroachment it will spread a cry of alarm. Madison wrote in *Federalist 45*: “But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of the single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause.” The 1798 Virginia and Kentucky Resolutions were attempts to trigger this safeguard to resist the Alien and Sedition Acts of the Adams administration. Wechsler
(1954) renewed interest in state supervision by noting the states’ involvement in federal decision-making.

Electoral safeguards. Madison’s goal was an effective representative democracy. He believed that if the people had the right instruments for governance, then no government could better guarantee their individual rights than a representative democracy. He believed that the people could serve as a back-up safeguard of federalism: he relished the electorate’s rejection of the Adams administration after its transgressions (Rakove 1999, 846).

The last two forms of safeguards were not part of Madison’s plan for federalism, but have been introduced by modern scholars.

Political safeguards. Although the states are often fiscally dependent upon the federal government, politically, a reversal of the tables helps balance the federation. A decentralized party system can counter encroachment because the federal government is dependent upon the state party apparatus for support (Riker 1964; Kramer 2000; Filippov, Ordeshook, and Shvetsova 2004). However, political ambitions may reduce the decentralizing tendency of this safeguard as local and state politicians imagine themselves in higher public office and appreciate the expanded authority federal encroachment would provide. It can also affect allocative efficiency when it spurs inefficient distributions of pork.
Judicial safeguards. The court, freed from electoral incentives, may be poised to stop opportunism (e.g., Bednar and Eskridge 1995; Yoo 1997). The ability of the court to interject is determined by its independence. In particular, the court is often viewed as dependent upon the federal government—a “handmaiden of the executive,” in Riker’s (1964) words—a position that jeopardizes its ability to patrol federal encroachment or its credibility in defining shirking.

Each of these institutions operates like a trigger mechanism: in theory, there is a common understanding of acceptable behavior, and if that threshold is crossed, then a punishment—structural, political, electoral, or judicial—is triggered. For example, the decentralized party system is a safeguard of federalism when local and state parties react to attempts by the federal government to overreach its power at their expense. They may withhold support for the federal government’s activities and otherwise signal displeasure as a punishment for overstepping the boundaries on federal authority. Several of the safeguards may themselves trigger electoral responses: public acknowledgment of tension within a party or (in structural safeguards) of disagreements between the branches or between houses in the legislature may alert voters to attempts to unbalance the federation.

The effects of each of these safeguards on opportunistic behavior are not yet fully understood, but their vulnerabilities, many identified above, are known. Therefore, it is improper to consider any one safeguard to be sufficient. They work best in complement to one another. Safeguards may complement one another in coverage: for example, there
may be policy dimensions that the court is jurisdictionally excluded from considering, or excludes itself, via a political question doctrine. Other safeguards will need to fill in to monitor and punish where the court is excluded. Safeguards may also complement one another in the design of the trigger: some may have thresholds that trigger a reaction fairly frequently, but have a mild corrective mechanism, while others may be triggered rarely but with a severe reaction. For example, the court may have a fine-grained lens, triggering often for minor opportunistic acts, but with relatively minor punishment. Civil war, the most severe trigger, would occur only in instances of the most egregious opportunism. Opportunistic authority migration is managed by a combination of these safeguards. When the complementarity is well tuned, the distribution of authority is maintained.

Coordination

The political economy literature on federalism relies heavily on the work of James Madison and, much later, William Riker. Both men were concerned with the appropriate institutional design of federalism. But neither rested his theory entirely on institutional mechanics. Riker argued that the key to the maintenance of federalism is citizens’ shifting allegiance from state to federal government. Madison urged a shift from a compact of the states to a compact of the people. Both arguments join these thinkers with

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6 An example is the Argentine executive’s interventions in provincial governments. The Argentine Supreme Court has long held that these acts are political questions and not subject to their review. Political safeguards serve as the chief restraint on the federal government.
the majority of those who study federalism, most notably Daniel Elazar, Samuel Beer, and Vincent Ostrom, in invoking culture.

The solution to any collective action dilemma, including the problem of opportunistic authority migration in federations, is context dependent (e.g., E. Ostrom 1998). Any institutional remedy—or, most appropriately considered, any combination of institutions—is a legacy of the country’s history. In this sense, culture acts as an exogenous force, determining both the availability of remedies and their usefulness. For example, a country that has a history of a politically dependent court or the dominance of a single party may be poorly suited to rely upon judicial or political safeguards against authority migration. The exogenous factors of political culture, as determined by a shared history, may alter the effectiveness of some safeguards.

But the cultural aspects of federalism that Madison and Riker refer to are endogenous, or at a minimum, dynamic; a successful federation demands a shift in the political culture. For Riker, it is a shift in allegiance, or identification, from state to federation; for Madison, it is a shift in the power base, from a government controlled by the states to a government controlled by the people. For both, it is an exercise in nation-building. This statement of the necessity of a nation is provocative and perplexing. How, logically, would it matter?

In game theory, we typically assume common knowledge of the rules of the game: the players, the strategies available to them, the payoffs, and the assumption that each is a
rational maximizer. When strategies require cooperation—such as group reactions to violations in public good provision—the coordination occurs automatically, as all pursue optimal strategies. But in those settings we presume that there is a single trigger mechanism, and so a unique optimal strategy. If we have several trigger institutions interacting, as we do with the structural, political, electoral, and judicial safeguards of federalism, the number of equilibria is likely to be enormous, and there may even be multiple optimal combinations of institutions. When this is the case, we need refinements to select among the multiple Nash equilibria. Refinements generate (or are a way of logically discussing) common expectations, or the existence of a focal solution.

Played out in practice, the actors who safeguard a federation need to know when to respond to aberrant behavior, and how severely. Shirking, encroachment, and burden-shifting are abstract concepts; we can argue that they damage the stability of the union, but in order to create monitoring devices to limit opportunism, we need to be able to identify it. Some opportunism is egregious but most is ambiguous. Opportunism is always subjective; it involves interpretations. In monitoring, we ask: Does this action represent a shift in authority, or is it a new consequence of an old routine? Does it follow naturally from the country’s history, while from the outside it looks sanctionable? We need a set of common expectations about governmental behavior in order to identify opportunism.

If we want to see how culture might matter, game-theoretically, to the stability of the distribution of authority, then we may argue that it creates a set of common expectations.
That is, the existence of a common culture may legitimize the proclamation of what the law is, and its defense by any of the safeguards. Submitting to authority—and respect of the distribution of authority—is a coordination problem as much as it is a compliance problem. As Chwe (2001, 19) writes, we are more likely to accept authority if we know that it is also accepted by others. Hardin (1989) argues that constitutions serve as coordinating devices, creating the common knowledge of mutual expectations of behavior necessary to make government possible.

However, there is a significant complication in the translation from theory to practice: How do we balance such a variety of mechanisms? That is, how do we adjust the system to achieve optimal complementarity? These questions leap to the frontiers of research in the political economy of federalism. We must confront two problems: first how to design the trigger mechanism, and second, how to cope with a public that openly debates the balance of power within the federation.

Each institutional safeguard is composed of actors with interests that may not align with maximization of the federation’s productive efficiency. That is, they may be willing to trade off productive efficiency for a redistribution that favors them. The incentive scheme that boosts the federation’s performance depends upon a particular subset of the population, with specialized interests, to carry out each trigger. An effective federation demands that these triggers be balanced. If one trigger gets out of line, then the system of triggers is not optimal, and the federation is not as effective as possible.
The second consideration takes us to the public debate about federalism. The people are not of one mind when it comes to the appropriate balance of the federation: different distributions of authority generate different outcomes, with asymmetric effects. And so legal scholars, politicians, and citizens debate the appropriate balance of power between states and the federal government, and they often disagree with one another about the role of each safeguard in maintaining that distribution.

So is culture a red herring? With orchestration of the safeguards against opportunistic authority migration apparently impossible, it would seem that luck alone explains the successful coordination of the US federation’s safeguarding institutions. Madison and Riker and Elazar and others believed otherwise, and so do I. But if there is something to the importance of nationhood, of a common federal culture, then we have to understand how it might exist despite healthy debate about appropriate distributions of authority and blends of safeguards. We would need to know how disagreement might still generate coordination in federations, or how coordination might occur despite disagreement.

Let’s return to the basic sketch of trigger mechanisms. Generally, we consider that a reaction is triggered when behavior crosses some threshold. Let the distribution of authority fall along a single axis ranging from decentralization to centralization, as in Figure 2a. Suppose we could identify a point to correspond to the current balance of authority. If the federal government pulled authority to the right, centralizing, or the states pulled it to the left, decentralizing, then a safeguard would be triggered to defend the distribution at $T$. 

18
Public dispute and self-interested safeguards mean that the threshold is not at a single point, but instead might be a set of points, a range of acceptable behavior, as in Figure 2b. We might all agree and be able to identify extreme authority migration, when authority is decentralized to the left of $T_L$ or centralized to the right of $T_U$, but debate the ideal distribution of authority between these two points.

The range between the two thresholds presents a new disincentive to the government contemplating opportunistic authority migration. While it may at times be able to move authority about in the space between the two thresholds, if it shifts authority outside of this range, it faces a new hazard. Suppose that the distribution of authority is at $x_2$, and
the federal government centralizes, shifting the distribution to $x_3$. Not only will the federal government incur the punishment triggered by the move beyond $T_u$, but after the punishment, the distribution may be “corrected” to a point even more decentralized than the original position, such as $x_1$.

The benefit of a large—or thick—boundary is that there is room for discussion, for deliberation over the appropriate distribution of authority. It tolerates experimentation, perhaps leading to higher levels of governmental efficacy, as well as innocent mistakes. It may also encourage us to think about the leeway that the safeguarding institutions have from the public. Any one of these safeguards may have space between the upper and lower bounds; the size of this space determines the amount of tolerance for authority migration. The downside of a thick boundary is that the efficacy of the federation, in both the productive and allocative senses, is not certain. That is, the larger the area, the greater the range of efficiency—allocative and productive—tolerated by the union. Therefore, the union may slip to lower efficiency, performing suboptimally, without any corrective institutional reaction. Its productive capacity, all else equal, is less certain.

The band of tolerance will be tighter the more the electorate agrees about the distribution of authority, and the more closely it controls the various safeguards. Agreement may come from a common culture, a set of common expectations. Therefore we return to Madison and the others: a federal culture, the making of a nation, may direct attention

\footnote{This thick boundary—that is, the distance between the thresholds—may capture formally Sunstein’s (2001) argument about what constitutions do: their ambiguity ensures space for discussion and compromise, when possible, between opposing parties.}
away from the zero-sum games of allocative efficiency and toward the positive-sum gains in productive efficiency. In so doing, it reduces the range of uncertainty in what the federation does and causes to happen. Absent significant external threats that put pressure on the federation’s immediate performance, in nascent federations, a wide band of tolerance is likely to be beneficial; it allows the experimentation necessary to discover the most effective distribution of authority. Over time, however, we may prefer the certainty of a more constricted federation as we gain more experience with what distribution of authority is most productive.

Conclusion

This essay has presented in brief a framework for analyzing federal success and failure. It has argued that opportunistic authority migration is endemic to federations, and weakens them by reducing their productive capacity. Institutional safeguards exist and work best as complementary remedies. However, public debate about the ideal distribution of authority, as well as a lack of direct control over the self-interested actors within the safeguards, means that there will be a range of distributions possible, and the state and national governments may be able to manipulate authority within this range. The importance of a federal culture remains ambiguous, but it might help coordinate the safeguards by reducing the size of the range, thereby generating a more reliable level of productive efficiency.
References


