

Constitutional Theory of Federalism and the European Union

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Signe Rehling LARSEN, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021)

Stephen TIERNEY, *The Federal Contract. A Constitutional Theory of Federalism* (Oxford University Press 2022)

Hèctor LÓPEZ BOFILL, *Nostalgic Empires. The Crisis of the European Union Related to Its Original Sins* (Lexington Books 2023)

INTRODUCTION

Three eminent constitutional law scholars have recently made significant contributions to the topics of constitutional theory of federalism and the European Union. My intention is to offer a combined review by contrasting *The Constitutional Theory of the Federation and the European Union* by Signe Larsen, which discusses both of these topics, with *The Federal Contract* by Stephen Tierney and *Nostalgic Empires* by Hèctor López Bofill. While Tierney's book provides a useful treatment of constitutional theory of federalism, the book by López Bofill will be more helpful in considering the case of the EU.

For Larsen, the EU is a federation, which she understands as being a discrete form of political association that needs to be distinguished from both the empire and the state. According to López Bofill, the joint venture of defeated and ever weaker European empires not only explains the origins of the EU but also some of its present ills and wrongs. While Larsen and López Bofill share a favourable view of the notion of federation in contrast to that of empire, I will point out that

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empires can take, and indeed took, different forms, some of which have points of concordance with liberal, democratic and federal tenets. It may come as a surprise that Larsen and López Bofill find inspiration in the works of Carl Schmitt, but they both offer a liberal-democratic reinterpretation of his theoretical insights. In the case of Larsen, she is able to make this rereading through ideas inspired by Hannah Arendt, as we will see with regard to the topics of sovereignty and political unstableness.

When the present essay addresses Larsen's constitutional theory of the federation, *The Federal Contract* of Tierney will vigorously come into play since it is a tour de force in constitutional theory of federalism. Although the volumes of Larsen and Tierney have some common features, such as their rejection of the traditional distinction between federation and confederation, they also have important differences, some of which will be explored here. In particular, given that Larsen defines a federation as being a political union of states, her approach goes beyond statehood and her conception of federation opposes sovereignty. By contrast, Tierney develops a constitutional idea of federalism within states that reconciles federalism, federation, sovereignty, and statehood.

The different perspectives we are exposed to in comparing these books compel us to participate in a lively and enriching conversation on federal theory and the EU. The structure of this combined review will be as follows: after presenting some thoughts on the nature and purposes of the EU, a debate on empires and the EU will be addressed. Then, deepening into theory on federalism and federation, I will engage in a more specific discussion on the issues of federation and confederation, and federation and secession. As federalism is characterised by the confronted aims of union and diversity, this will bring us to the final and much disputed issue of sovereignty.

The present essay focuses especially on several topics that in each case are addressed by at least two of the books reviewed here and which are particularly controversial, well beyond the confines of academia, and are closely connected with one another, dealing with issues that are of great significance in current debate both in Europe and further afield. After confronting the different ideas of the authors, I will sometimes attempt to suggest a harmonious interpretation or a middle ground between them. While this approach surely does not do full justice to the broad scope of subjects that are variously covered by the authors, it is my hope that it will be sufficient to prick the curiosity of the reader so that they will go further in their study of these rich and challenging works.

THE NATURE AND PURPOSES OF THE EU

The question of what type of polity the EU is has puzzled scholars from the beginning of European integration in the 1950s. The answer remains open to

much debate. While many scholars have been less than insightful by simply stating that the EU is '*sui generis*', Larsen contends that, rather than a unique form of political association, it is a *federation* understood as 'a political union of states founded on an interstate agreement of a constitutional nature, a federal compact, that does not absorb the Member State into a new state'.¹

Larsen claims that the EU is arguably the only genuine federation that remains in the present day. Therefore, she goes back to the nineteenth century to find further examples that feed her theoretical and practical insights, namely the antebellum United States of America, the German Confederation, and the Swiss Confederation before developing into a federal state through the Constitution of 1848.² In all three cases, these paradigmatic federations became federal states as a result of armed conflict.³ We might point out that if the EU were to follow a bloody pathway to become a federal state, this would run contrary to its lasting-peace project.⁴

The lasting-peace project has been a founding narrative and purpose of the EU.⁵ Other essential, underpinning purposes of this union are, in my view, a state-rescue project, a shared-sovereignty project, a larger-market project, and a liberal-democracy project. As these projects may at times be in tension with one another and require harmonisation, the books of Larsen and López Bofill make a valuable contribution to the exploration of possible current imbalances and how equilibrium might be achieved.

In contrast to Larsen, López Bofill offers a more pessimistic reading of the EU, contending that rather than muting the voracity of state nationalism this 'supranational artifact . . . deeply contributed to consolidate it and, with such a movement, the failure of the emergence of a European demos was ensured'.⁶

¹S.R. Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) p. vii, 1, 191.

²Larsen, *supra* n. 1, p. 1.

³*Ibid.*, p. 200.

⁴For Rousseau, since no Federation of Europe could ever be established except by a revolution, pursuing lasting peace through this federation 'would perhaps do more harm in a moment than it would guard against for ages.' See his *Lasting Peace through the Federation of Europe* (1782).

⁵Inspired in the Kantian idea of a gradually expanding federation to prevent war and achieve perpetual peace, the Schuman Declaration proclaimed that 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.' Accordingly, 'the pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe'. 'The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.' The proposal for a European Coal and Steel Community 'will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace'.

⁶H. López Bofill, *Nostalgic Empires. The Crisis of the European Union Related to Its Original Sins* (Lexington Books 2023) p. 20.

For him, the original sin that cast a long shadow over Europe was a tacit agreement between nostalgic empires to renounce direct domination over overseas possessions in order to concentrate more fully on the defence of the national cohesion of their metropolitan territories, often hindering sub-state self-determination as well as supra-state integration.

Larsen and López Bofill follow Alan Milward in considering the EU to be a project to rescue its member states.⁷ In fact, we could further argue that this project is not only to rescue but also to build and reinvigorate their members as nation-states. While European economic and political integration could make state disintegration more feasible as a matter of fact (since having a supra-state union could reduce the costs and uncertainties of small nations' separation from their larger states),⁸ there seems to be an unspoken agreement or cloaked complicity to avoid and deter state division, even when substate secession and self-determination is claimed through liberal-democratic mechanisms.⁹

EMPIRES AND THE EU

Larsen attempts to distinguish states and empires from federations and argues that the EU is as an important instantiation of the latter type of polity. In contrast to empires, she contends that in federations, as it is the case of the EU, states come together of their own initiative, by way of free contract, and with the promise of becoming equal partners.

Although territorial domination has typically characterised empires, there have been many forms of empires and their systems of territorial rule have tended to change over time and space.¹⁰ Imperial domination or rule can be direct, imposed and coercive (traits that are deeply opposed to federalism and federation) or more indirect, consented or tolerated. Such consent or toleration can be based on economic and other material interests, as well as on more spiritual, cultural or

⁷See A. Milward, *The European Rescue of the Nation State* (Routledge 1999).

⁸See A. Alesina et al., 'Economic Integration and Political Disintegration', 90 *AER* (2000) p. 1276.

⁹See P. Bossacoma, 'Secession from and Secession within the European Union', 22 *I-CON* (2024) p. 111.

¹⁰J. Zielonka, in *Europe as Empire* (Oxford University Press 2006), contends that the enlarged EU is likely to become something more similar to a 'neo-medieval empire' than a 'neo-Westphalian empire' in which public authority is shared and spread, fragmented and overlapped, diversified and asymmetric, functional and dynamic, soft and porous. Other eminent authors, such as Josep M. Colomer, also treat the European Union as an empire. In *Great Empires, Small Nations* (Routledge 2007), Colomer refers to 'vast democratic empires' such as the USA and the EU. Hamilton, in No. 22 of *The Federalist Papers*, already foresaw the possibility of a democratic empire: 'The fabric of American empire ought to rest on the solid basis of the consent of the people'.

political elements, including identity and ideology. In particular, the Holy Roman, the Habsburg, the Austro-Hungarian, and the German empires bore some resemblance to federal unions, and have influenced the development of federalism in Europe, including European integration.¹¹ By encouraging, supporting and putting in place federal arrangements across its overseas territories and dominions, other empires such as the British one also helped the spread of federal ideas and practices.¹² A general explanation could be that the more territorially extensive, separated and plural the polity, the more federal its governance may reasonably tend to be.¹³

A federation is achieved through free and equal contract, whereas an empire is achieved by and through domination, according to Larsen. Nevertheless, she historically connects these different types of polities, given that European integration is a response to the decline of empire and state failure. 'The Union emerges as the heir of European imperialism once the direct rule upon the vastness of transoceanic extensions disappeared', claims López Bofill in a similar fashion.¹⁴

A central idea of López Bofill's book and his ongoing investigation into constitutional theory through history is that the EU, as well as federations and other similar unions, are the result of the weakness experienced by its founding members and those that subsequently join. 'Only this weakness can explain the willingness of powerful nations (that took part in the process of European

¹¹See H.H.F. Eulau, 'Theories of Federalism under the Holy Roman Empire', 35 *American Political Science Review* (1941) p. 643; and J.J. Rousseau, *A Lasting Peace through the Federation of Europe* (Constable and Co. 1917). Austromarxists such as Karl Renner endeavoured to turn the empire into a federation, and he actually commissioned Hans Kelsen to draft the Austrian Federal Constitutional Law of 1920. Later on, Austroliberals such as Friedrich Hayek, in *The Road to Serfdom* (Routledge 1944) p. 243, advocated for a federal union of Western Europe.

¹²See D.J. Elazar, *Exploring Federalism* (The University of Alabama Press 1987) p. 142, 148-149, and W.I. Jennings, *The Approach to Self-Government* (Cambridge University Press 2011) p. 120. According to Hayek, *supra* n. 11, p. 239, Jennings's book on *A Federation for Western Europe* (Cambridge University Press 1940) 'ought to be carefully consulted when the time comes for the framing of a new political structure of Europe'.

¹³In this vein, Jennings, *supra* n. 12, p. 111, claims that 'the larger plural societies must have a federal Constitution in order to maintain unity in diversity, or more properly diversity in unity'. According to A.E. Dick Howard, 'The Uses of Federalism: The American Experience', 8 *American University International Law Review* (1993) p. 392, 'From the beginning, American federalism has been more the product of circumstances than of any philosophical design. Until 1763 the British empire was essentially federated. The larger questions of foreign affairs, war and peace, and overseas trade were decided in Westminster, but colonial legislatures had considerable de facto control over matters of local concern.'

¹⁴López Bofill, *supra* n. 6, p. 13.

integration) to relinquish their imperial aspirations in favor of a discourse centered on transnational liberties and welfare'.¹⁵

While for López Bofill weakness is key to explaining integration and federation, Larsen elegantly writes that 'the federal union is meant to create equals out of unequals'.¹⁶ Although weakness may explain the desire to unite in equal partnership, contracting parties do not need to be or feel equally weak. Beyond federalism and European integration, feeling weak may generally incline humans towards sociability, driving them to create and preserve encompassing groups, robust communities and political societies.

In a possibly reductionist approach, and perhaps conflating imperialism with state-nationalism, López Bofill claims that Brexit represents an extreme instantiation of imperial 'nostalgia'. Nostalgic imperial dreams have still further consequences within and outside the EU, such as 'coercive measures adopted to erode national minorities existing within the European borders of a particular member state or the capitalist occupation exercised by a group of central and northern European states to entrench their dominant position toward the southern and eastern peripheries of Europe'.¹⁷

Imperial ambitions have evolved into a neo-imperialism that the EU has developed to maintain a privileged position for Europe worldwide. European integration was, for López Bofill, 'the last bet to maintain the global influence of the western European states in spite of their respective empires' dismantling'.¹⁸ In a nutshell, he claims that 'the change in the means of domination has not jeopardized the intention of continuing to exercise such a domination'.¹⁹ If this were true, the EU as a federation could be seen as almost meeting the idea of domination that characterises Larsen's definition of empire.

¹⁵López Bofill, *supra* n. 6, p. 1.

¹⁶Larsen, *supra* n. 1, p. 27. With regard to equality and equal partnership, I missed in Larsen's book a debate on asymmetry of status and powers of the federated units. In particular, on differentiated integration in the EU, *see*, among many others, R. Bellamy, *A Republican Europe of States* (Oxford University Press 2009) ch. 6. According to Tierney, since the federal polity is designed to accommodate territorial pluralism in all its shapes and sizes, asymmetry rather than equality understood as sameness may be a defining characteristic of federal subjecthood, a radical departure from unitary constitutional formation (p. 129). My views on the topic of territorial asymmetry, more in line with Tierney's, can be found in P. Bossacoma, 'An Egalitarian Defence of Territorial Autonomy', 62 *Revista Catalana de Dret Públic* (2021) p. 90.

¹⁷López Bofill, *supra* n. 6, p. 20-21.

¹⁸*Ibid.*, p. 11.

¹⁹*Ibid.*, p. 24.

THEORY ON FEDERALISM AND FEDERATION

Despite its practical importance in both Europe and elsewhere, federalism has been a relatively neglected subject by mainstream normative thought in both philosophy and law, while empirical studies have appropriated this field of study.²⁰ The concepts of federalism and federation have remained rather obscured and under-theorised within political and constitutional studies, but Larsen and Tierney shine light into this darkness.

Larsen started to fill this theoretical vacuum by proposing a constitutional theory of the federation that focuses on the EU, and Tierney goes much further in proposing a constitutional theory of federalism (a much broader idea than the notion of federation) that focuses on federalism within states rather than among and beyond states (allowing him to take into consideration many more federal constitutional orders and experiences than Larsen). Federal constitutionalism is a distinct form of government, but this does not imply, according to Tierney, a distinct form of statehood. Federalism is, under his approach, a discrete and generic order of constitutional rule for the modern state.

In contrast to Tierney, Larsen aims to supersede the theory and practice of states when she builds her constitutional theory of the federation. A federation, which Larsen conceives of as a federal union of states, is a type of political association made through an interstate agreement that creates a new source of authority and an emerging people. Despite the predominance of the idea and theory of the state in modern times, she argues that federations should not be understood under the statist paradigm.

Providing a middle ground between Larsen and Tierney, my contention is that federalism can be applied within and beyond the state, and, accordingly, that it may foster peace, stability and prosperity within and beyond state borders. Since federal constitutionalism is, following Tierney, a discrete form of government rather than statehood, this generic order of constitutional rule may also apply beyond the state. Federalism could, in essence, be an interesting idea blessed with many theoretical and practical devices to recognise and accommodate territorial diversity.

FEDERATION AND CONFEDERATION

In the mid-19th century, the German categories of *Bundesstaat*, as a form of 'federal state', which was also translated as 'federation', and *Staatenbund*, as a form of 'state federation' more commonly translated as confederation, confederacy or

²⁰Worthy exceptions can be found also in the discipline of philosophy, such as W. Norman, *Negotiating Nationalism* (Oxford University Press 2006).

league of independent states, have dominated the debates on federalism. Larsen argues that this typology is to be rejected for attempting to connect the concept of federation to that of state: 'the federation is not a subspecies of the state, but rather a discrete political form'.²¹ Following Schmitt's *Constitutional Theory*, Larsen insists²² that this 'simple' distinction between federal state and state federation 'is no longer possible'. However, perhaps we should understand these categories as ideal types, which in the real world are not to be found in a pure form but combined in different ways and measures. In particular, while most would think of the EU as a confederation, it has certainly developed federal traits.²³

Tierney criticises this binary distinction between *Bundesstaat* and *Staatenbund* since it focuses on the form of state rather than the form of constitutional government and it thus fails to distinguish constitutionalism from statehood.²⁴ He claims that federal constitutionalism is a distinct form of government but this does not imply a distinct form of statehood,²⁵ and 'the elision of state and constitution is a category mistake'.²⁶ Despite being theoretically interesting, Tierney's approach might appear to some to be slightly artificial given that the type of territorial constitution is conventionally understood as playing a significant role in shaping and influencing the type of state. In other words, the form of statehood and the form of (territorial constitutional) government seem to be closely connected.

In the 1970s, federal scholarship introduced the felicitous distinction between 'federalism' as a normative idea and 'federation' as one of its institutional manifestations. Rather than being descriptive, federalism is basically a normative term that refers to the advocacy of multi-tiered government combining elements of shared rule and regional self-rule.²⁷ The idea of federalism consists of uniting peoples under a contractual power-sharing relationship combining self-rule and shared rule.²⁸ Many federal scholars have insisted on this combination of self-rule, which Tierney calls 'autonomous government',²⁹ and shared rule, which he refers

²¹Larsen, *supra* n. 1, p. 18-19.

²²*Ibid.*, p. 384.

²³*Staatenverbund* is a new term used by the German Federal Constitutional Court (see judgments on the Maastricht and Lisbon Treaties) to describe a form of multi-level government such as the EU in which states work more closely together than in a confederation (*Bundesstaat*) but retain their own sovereignty and competence to decide on conferring competences to supra-state institutions, unlike in federal states (*Staatenbund*).

²⁴S. Tierney, *The Federal Contract. A Constitutional Theory of Federalism* (Oxford University Press 2022) p. 30.

²⁵*Ibid.*, p. 108.

²⁶*Ibid.*, p. 114.

²⁷R.L. Watts, *Comparing Federal Systems*, 3rd edn. (McGill-Queen's University Press 2008) p. 8.

²⁸Elazar, *supra* n. 12, p. 5, 12.

²⁹Tierney, *supra* n. 24, ch. 8.

to as 'associational government',³⁰ in order to ensure that the central order of government gives voice to the federated units, so protecting their autonomous interests while at the same time encouraging identification and alignment with the union.³¹

Among the institutional manifestations of federalism as an idea, we may first introduce the notion of the *federal political system*, which is, according to Ronald Watts:

a broad category of political systems in which, by contrast to the single central source of authority in unitary systems, there are two (or more) levels of government thus combining elements of *shared-rule* (collaborative partnership) through common institutions and *regional self-rule* (constituent unit autonomy) for the governments of constituent units.

This broad genus thus encompasses different types of unions, such as federations, quasi-federations, confederations and (con)federacies. 'As in a spectrum, the categories are not sharply delineated but shade into one another at the margins', he argues.³²

Watts reserved the term *federation* for a specific category within the genus of federal political systems, given that:

federations represent a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens.³³

With respect to the EU, Watts considers that its origins were fundamentally confederal but that during the course of its development it has become a unique hybrid of features found in both confederations and federations. Unlike Watts, for Larsen the EU is not essentially confederal, but rather the only genuine federation that remains in the world today. By contrast, Watts refers to 25 functioning federations, while mentioning five contemporary confederations and hybrids such as the EU.³⁴

³⁰Ibid., ch. 9.

³¹Tierney, *supra* n. 24, p. 172-173.

³²Watts, *supra* n. 27, p. 8.

³³Ibid., p. 9.

³⁴Ibid., Introduction and p. 56 ff.

According to Dimitrios Karmis and Wayne Norman, we typically think of confederations as much ‘looser’ unions than federations, and this ‘looseness’ has been characterised in various ways: in particular, paying attention to whether or not the units have a right to veto constitutional changes or to unilaterally exit the union.³⁵ Among typical features that distinguish confederations from federations, Andreas Follesdal first lists that ‘member units may legally exit’ from confederations.³⁶ Since confederations are generally looser unions than federations, the former ‘are more likely to have decision-making rules based on unanimity, and to permit opt-outs, and indeed secession’.³⁷

FEDERATION AND SECESSION

While making an effort to encompass confederal constitutions within his capacious idea of federalism, Tierney apparently accepts that confederal – in contrast to federal – constitutions might require territorial unanimity for a range of constitutional decisions and may offer a constitutional right of secession.³⁸ In this regard, a long-standing doctrine holds that federal states are different to, or can be distinguished from, confederal polities and international organisations since the former do not recognise a right to secede whereas the latter normally do.³⁹ My

³⁵D. Karmis and W. Norman, ‘The Revival of Federalism in Normative Political Theory’, in D. Karmis and W. Norman (eds.), *Theories of Federalism*, (Palgrave Macmillan 2005) p. 3 at p. 5.

³⁶A. Follesdal, ‘Federalism’, in *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/archives/sum2018/entries/federalism>, visited 7 January 2025.

³⁷B. O’Leary, ‘Federalism and Federation’, in *The Princeton Encyclopedia of Self-Determination*, <https://pesd.princeton.edu/node/431>, visited 7 January 2025. He argues that ‘a federation may be defined as a political system in which at least two territorial levels of government share sovereign constitutional authority over their respective division and joint share of law-making powers; differently put, neither the federal government nor the relevant federative entities may unilaterally alter one another’s powers without a process of constitutional amendment in which both levels of government participate. A confederation in which the member-states can strip confederal institutions of their delegated powers without their consent is therefore not a federation. Likewise, a unitary state in which the central government may lawfully destroy the delegated rights or reconstitute the forms of local or regional governments without their express consent is not a federation. Joint participation in sovereign authority by both the federal government and the federative entities is the hallmark of a federation’.

³⁸Tierney, *supra* n. 24, p. 120.

³⁹This traditional doctrine, as for instance put forward by Jellinek (in *Die Lehre von den Staatenverbindungen* 1882), is still in the minds of many politicians, judges and academics. The German Constitutional Court, in BVerfGE 89, 155, 12 October 1993, *Re Maastricht Treaty*, considered the EU a community of sovereign states (*Staatenverbund*) that are entitled to terminate their membership.

normative contention, which opposes practice and is likely to meet resistance from power politics, would be that the more voice member states have in a confederation or loose union, the more legitimate or justified it could be to qualify or limit a right to exit.⁴⁰ In other words, larger degrees of self-rule and shared rule can be normative arguments for qualifying or limiting secession.⁴¹

Federal constitutions can, according to Tierney, be founded upon the basis of indissolubility, as Lincoln claimed and the US Supreme Court in *Texas v White*⁴² confirmed. Nonetheless, following his broad idea of federalism and the contrasting approach of the Supreme Court of Canada in the *Quebec Secession Reference*,⁴³ Tierney argues that ‘the federal idea leaves the question of secession to each constitution to manage, depending upon how it envisages the nature of constituent constitutional authority within its own polity’.⁴⁴ However, without a proper normative reflection on secession, the regulation in each constitution may depend on ‘the arbitrament of arms’, as the US Supreme Court admitted in *Daniels v Tarnay*.⁴⁵

According to Larsen, ‘that the federation is contracted in “perpetuity” does not necessarily mean that it lasts forever. The “permanence” is part of the intention of the federal compact’.⁴⁶ Common confusions may arise from this. She treats perpetuity as a synonym of permanence but I would question this: while the former makes us think of an unbreakable or indissoluble contract, the other merely refers to a compact of unlimited duration or with no specific limit of time. Therefore, a perpetual union is something normatively thicker and more ambitious than a permanent union.

In the 1964 *Costa* case,⁴⁷ the ECJ held that ‘the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail’. Although the Court described this limitation of member states’ sovereign rights as *definitive* (in the French, Italian, and Spanish versions) or *permanent* (in the English version), this does not

⁴⁰As put by Albert Hirschman, voice, exit and loyalty are intimately related and are to be balanced: see A.O. Hirschman, *Exit, Voice, and Loyalty* (Harvard University Press 1970).

⁴¹P. Bossacoma, ‘Federalism and Secession’, in F. Mathieu et al. (eds.), *Comparative Federalism. A Pluralist Exploration* (Palgrave Macmillan forthcoming 2024).

⁴²74 U.S. 700 (1868).

⁴³[1998] 2 SCR 217.

⁴⁴Tierney, *supra* n. 24, p. 149.

⁴⁵102 U.S. 415 (1880). See P. Bossacoma, *Morality and Legality of Secession* (Palgrave Macmillan 2020).

⁴⁶Larsen, *supra* n. 1, p. 20.

⁴⁷ECJ 15 July 1964, Case C-6/64, *Flaminio Costa v E.N.E.L.*

necessarily mean perpetual or indissoluble.⁴⁸ ‘Definitive’ in the sense of ‘permanent’ seems to refer to the lack of any predetermined temporal limits, but not to the impossibility of terminating or withdrawing from the Union. Despite recognising a right to exit in Article 50, the Treaty on European Union was ‘concluded for an unlimited period’ (former Article 51 and current Article 53).

For López Bofill, the regulation of secession from and within the EU is an important element that supports his understanding of this association as a tool to rebuild the European nation-states. Two relevant provisions were recognised in the drafting of the Constitutional Treaty (2004) and later included in the Treaty on European Union (2007): together with an ultimately unilateral right to withdraw of each Member State,⁴⁹ a principle of territorial integrity was enshrined to armour the national identity and unity of member states against ‘internal defiance launched by minority nations’.⁵⁰

I wonder whether Larsen would support certain reasons for secession or a qualified right to secede in spite of her appeals to perpetuity and permanence. She argues that ‘a federation is a permanent union of two or more states that rests on a free agreement of all Member States with the common goal of self-preservation’,⁵¹ that ‘federations are constitutional projects and as such they are often created in order to realize or perpetuate specific political identity or “way of life” for their Member States’,⁵² that the federation is ‘committed to preserving the diversity of its Member States’.⁵³ Could a state’s self-preservation, including the preservation of its autonomy and diversity, be a reasonable argument to secede from a federation? In times of crisis, federal institutions tend to appeal to a unitary authority that may shift the federal balance in both the short and the long term.

⁴⁸By contrast, in *Texas v White*, *supra* n. 40, the US Supreme Court Opinion held: ‘The union between Texas and the other States was as complete, as *perpetual*, and as *indissoluble* as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States’. On the other side of the Atlantic, Art. 1 of the Draft Treaty embodying the Statute of the European Community (adopted on 10 March 1953) read: ‘The present Treaty sets up a EUROPEAN COMMUNITY of a supra-national character. The Community is founded upon a union of peoples and States, upon respect for their personality and upon equal rights and duties for all. It shall be *indissoluble*’.

⁴⁹According to the ECJ 10 December 2018, Case C-621/18, *Wightman and Others*, Art. 50 TEU enshrines ‘the sovereign right of a Member State to withdraw from the European Union’.

⁵⁰López Bofill, *supra* n. 6, p. 72. See Art. 4.2 TEU, and previous Art. I-5 of the Draft Constitutional Treaty.

⁵¹Larsen, *supra* n. 1, p. 19.

⁵²*Ibid.*, p. 49.

⁵³*Ibid.*, p. 107.

AN UNSTABLE BALANCE: DUAL AND CONFRONTED TELOS

According to Carl Schmitt's constitutional theory, a federation is an unstable and thus transitional form of government that tends to lead to statehood as a more stable and perfect political association.⁵⁴ For Hannah Arendt, the state is unstable for liberal-democratic reasons, given that it has a tendency to favour the concentration of power internally (authoritarianism) and the expansion of powers externally (imperialism). Under Arendt's perspective, the federation is a more reasonable and promising form of government since 'in the realm of human affairs sovereignty and tyranny are the same'. The 'abolition of sovereignty' is, according to her, a great invention of a federal republic.⁵⁵

Despite their many disagreements, both Arendt and Schmitt are main sources of inspiration for Larsen, who tries to harmonise their differences by pointing out that both states and federations can be unstable. When states are weak or unstable, federating is a common way to secure themselves militarily, politically and economically. In periods of crisis, federations often have the temptation to adopt some form of emergency rule that entails centralisation, which may lead to unification into a federal state or disintegration into different states.

In fact, after World War II, the weak states of a devastated Europe, experiencing the decay of their former empires, started as both an economic and military federative process. European integration thus shows that both states and empires can be or become unstable due to war and conflict. Larsen notes that the process of European integration had been surprisingly smooth until the debt crisis around 2010.⁵⁶ To counter this crisis and the later calamities of Covid-19, the Ukraine war and the backsliding with regard to the rule of law in certain member states, non-explicit emergency rule has been implemented in the EU.

As emergency rule tends to involve more centralisation and unification while restricting autonomy and diversity, this may put into tension the double government structure and the double political existence of the federation, perhaps leading to federal imbalances and even statehood through either integration or disintegration. Federations often create a federal people and a federal legitimate authority, which in times of crisis may eventually override member state peoples and their authorities.

United in diversity is a well-known EU motto that expresses an ideal federal balance. A more realist approach, however, especially in times of adversity, would be to acknowledge that tensions and imbalances may arise between unity and

⁵⁴See C. Schmitt, *Constitutional Theory* (Duke University Press 2008) p. 388-407.

⁵⁵H. Arendt, *On Revolution* (Penguin Books 2006) p. 144.

⁵⁶Compared to other young federations, Larsen considers that 'the history of the EU, until the outbreak of the Eurozone crisis, has been characterized by relative internal stability and surprisingly little contestation of Union authority': Larsen, *supra* n. 1, p. 171.

diversity. *Federal balance*, as Larsen puts it, depends on striking an equilibrium between contradictory forces: 'the federation is simultaneously directed towards unity and diversity, transformation and conservation, the past and the future'.⁵⁷ Chapter 4 of Larsen's book is dedicated to the '*precariousness* of this balance'. When addressing the complexity and fragility of the federal balance, we should not see the inherent tension between union and pluralism as a pathology which leads federalism to its inevitable demise.⁵⁸ This tension should, to some extent, be normalised.

Such a tension is encapsulated in the *united in diversity* maxim. However, if a reasonable balance is to be struck and maintained between union (perhaps preferable to the potentially homogenising notion of unity)⁵⁹ and pluralism, why should the EU aim to achieve an 'ever closer union'? Is there no point at which closer union would run counter to the constitutional singularity, identity, autonomy, or even existence of its units? In any case, the 'ever closer union' motif seems inspired by the Kantian advice on how perpetual peace might be achieved: since 'the positive idea of a world republic cannot be realized', Kant recommends that we should pursue 'an enduring and gradually expanding federation likely to prevent war'.⁶⁰ But an ever closer union may be at odds with one that is gradually enlarging.

SOVEREIGNTY AND FEDERALISM

Federations, and the EU in particular, cannot be understood on the basis of the general theory of the state or its concept of sovereignty, Larsen maintains. Rather than being organised around the sovereignty idea, federal unions are characterised by a double government structure and political existence, with a lack of internal hierarchy and the internal absence, contestation or repression of sovereignty.⁶¹ For her, while the notion of sovereignty is primordial or preeminent to understanding the political form of the state, it is 'useless' and should be set aside when conceiving and analysing a federation.⁶² But if federal unions are characterised by internal absence, contestation or repression of sovereignty, should we then set aside the idea of sovereignty in federations or rethink the very notion of it?

My question therefore is whether sovereignty is compatible with the idea of federalism and with federal polities. While for Larsen the concept of sovereignty is

⁵⁷Larsen, *supra* n. 1, p. 196.

⁵⁸Tierney, *supra* n. 24, p. 22.

⁵⁹To reach and preserve a federal balance both citizens and authorities 'must desire union, and must not desire unity', if we phrase it in Diceyan terms: see Tierney, *supra* n. 24, p. 163.

⁶⁰I. Kant, 'Perpetual Peace: A Philosophical Sketch' (1795) in *Kant: Political Writings* (Cambridge University Press 1991) p. 105.

⁶¹Larsen, *supra* n. 1, p. 47, 149.

⁶²*Ibid.*, p. 46.

‘incompatible’ and ‘impossible to reconcile’ with the federation,⁶³ I am inclined to believe that sovereignty can adapt to federal theory and reality. Such an adaptation can be done in two main ways that may well complement each other. One way that sidesteps the thorny task of redefining the concept is by coining new conceptions. Although I cannot comment on all the many different conceptions, I might just mention some terms or labels that have been put forward, such as post-sovereignty, post-Westphalian sovereignty, post-modern sovereignty and post-national sovereignty. Beyond the *post* prefix, adjectives such as *soft* and *liquid* have also been used to coin terms such as soft sovereignty and liquid sovereignty.

Another way is by broadening the concept of sovereignty, with the possible cost of losing a measure of clarity of an already ambiguous and contested concept. In fact, all these new terms and the conceptions behind them require or imply a broadening of the concept of sovereignty. In general, conceptions are meant to fit within a concept.⁶⁴ When we typically refer to or reflect on conceptions such as ‘representative democracy’, ‘justice as fairness’ or ‘formal equality’, we are implicitly maintaining that the concepts of democracy, justice and equality are broad enough to include or encompass these different conceptions.

A broad concept of sovereignty takes in political and legal powers and the authority to regulate, decide and adjudicate on high constitutional matters as well as to have a recognised status and role in key international affairs. This internationally recognised status grants competences by default to adopt high constitutional laws, decisions and rulings. Sovereignty typically refers to territorial or territorialised forms of power and has long been related to statehood. Sovereignty is not only concerned with ultimate authority, which is a controversial idea best avoided especially in federal systems, but also with political and legal powers that presume a certain priority, strength and depth.

This tentative definition requires immediate notes of caution. When dealing with the idea of sovereignty, we must not forget that time and place are crucial. Sovereignty is both *contextual*, since it responds and adapts to circumstances, and *protean*, for it can take many forms. The open texture of the concept of sovereignty and its resulting indeterminate inclusiveness indeed permits a protean diversity in the realisation of sovereignty as a claim that articulates and sustains a certain vision of the power of the polity and the structure of interpolity relations.⁶⁵ It is this very vagueness, not to say ambiguity, that makes the sovereignty idea more tenacious and adaptive.⁶⁶

⁶³Ibid., p. 7, 43.

⁶⁴For the distinction between *concept* and *conception*, see J. Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press 1999) p. 5; R. Dworkin, *Law's Empire* (Hart Publishing 1998) p. 90-96; N. MacCormick, *Questioning Sovereignty* (Oxford University Press 1999) p. 32.

⁶⁵N. Walker, ‘The Sovereignty Surplus’, 18 *J-CON* (2020) p. 370 at p. 381.

⁶⁶See P. Bossacoma, *Sovereignty in Europe* (University of Girona 2018).

Tierney signals that constitutional theory often elides external, state sovereignty with internal, constitutional sovereignty.⁶⁷ Internal sovereignty, or sovereignty under internal law, is identified with the supreme power towards the population in its territory. This sovereignty faces inwards and tends to be recognised from within. Conversely, external sovereignty, or sovereignty under international law, is identified with a supreme power in a negative sense, namely independence. This sovereignty faces outwards and tends to be recognised from outside.

While external sovereignty seems more related to the notion of statehood under international law (i.e. state sovereignty), internal sovereignty seems more concerned with the constitution as the main source of internal law (i.e. constitutional sovereignty). According to Tierney, this distinction is of crucial importance for harmonising federalism and sovereignty, since it allows external (state) sovereignty to be conceived in the traditional monist way and internal (constitutional) sovereignty in a pluralist manner. It also allows federalism and federation to be harmonised with statehood. Federalism is, under his approach, a form of constitutional design and practice for a modern, sovereign state. Unlike Larsen, Tierney finds that sovereignty and federalism can be compatible.

The last chapter of Larsen's book is titled 'Emergency Rule without a Sovereign', and it holds that 'the federation as a discrete political form relies on the suspension of sovereignty and therefore on the question of who decides remaining unanswered'.⁶⁸ However, Larsen notes that emergency government has the potential to answer this question, since the sovereign is the one who decides on the exception, as claimed by 'the most intelligent of the Nazis'.⁶⁹ Schmitt indeed argued that it is precisely the exception that makes the whole question of sovereignty relevant.⁷⁰

Paying attention to the *subject* of sovereignty (the *who* question) rather than the *object* of sovereignty (the *what* question) may well lead the debate to presuppose the existence of an unlimited, final, independent, perpetual, indivisible, underived political power, which seems incompatible with genuine federal thought and practice. By contrast, if the debate is more concerned with what sovereignty is, the answers, including Larsen's, could be more inclined to question the mentioned attributes and inquire about the existence and nature of such power, perhaps qualifying, relativising and nuancing it.⁷¹ However, at the

⁶⁷Tierney, *supra* n. 24, p. 106-107.

⁶⁸Larsen, *supra* n. 1, p. 162.

⁶⁹López Bofill, *supra* n. 6, p. 22.

⁷⁰C. Schmitt, *Political Theology* (University of Chicago Press 2005) p. 1 and 6, respectively.

⁷¹When the debate focused on the idea of sovereignty (i.e. the object), the possibility of discussing who the holder of that power should be (i.e. the subject) opened up: X. Arbós, 'Orígens i evolució del concepte de sobirania', in E. Fossas (ed.) *Les transformacions de la sobirania i el futur polític de Catalunya* (Proa 2000) p. 33.

end of the day, and as Tierney contends, the 'who' of sovereignty may well be an essential dimension of the 'what' of sovereignty.⁷²

FINAL REMARKS

Anyone interested in theories of federalism and European integration will find much to chew over in the books of Larsen, Tierney and López Bofill. They defend different theses from different prisms but taken together they may help us to have a more complex and nuanced picture of the issues that we have discussed. Tierney develops the broad idea of federalism as a constitutional rule within sovereign states that offers a territorially-pluralist alternative to traditional unitary constitutionalism. Larsen is interested in the European federation as a genuine association of states that transcends the sovereign state, whereas López Bofill focuses on the EU as a political instrument for building and securing the sovereignty of its nation-states.

Three books that help us to answer three distinct but closely connected questions: What is federalism? What is a federation? And what is the EU? Despite their different approaches and answers, these works will provide theoretical and practical insights for the readers to build their own arguments and conclusions. My own postulate would be that, in order to overcome some of this century's crucial challenges, the EU should become more like its member states, while these states should adopt a more multinational federal culture (and so less unitarian and nationalist) for both their internal pluralism and European integration to thrive.

However, this is a mere hypothesis that may deserve to be labelled as naïve since a significant federalisation of the EU is likely to be difficult without the aid of accidental and impactful events such as wars, as happened in the USA, Switzerland and Germany. Closer integration by creating, for instance, a powerful European Army and Defence Union would probably be resisted by member states on grounds emerging from issues explored in the present essay, such as sovereignty, imperialism, state-nationalism, confederation, secession, and unstableness. The balance between union and diversity, which we may call the scale of federalism, could then become uneven and unsteady.

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⁷²Tierney, *supra* n. 24, p. 113.