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Good breakups: a brief recap of the case for institutional competition, from a public law and economics perspective

Riccardo DE CARIA*

The centrifugal drive currently being experienced in many jurisdictions and at different levels of government is typically perceived as a problem. In my paper, I would like to make a different case, if rather not the opposite, based on law and economics considerations: state fragmentation and dis-unity is, on the other way round a great opportunity for freedom and fundamental rights to thrive, and for Europe to live up to its glorious past.

Overcoming the Westphalian model of state, and even the fictional notion of sovereignty as we have come to know it, is the only path that can offer a safe anchoring to democracy. Not embracing this view and continuing to argue in favour of “more of the same”, bears instead a huge risk that democracy twists up, and ingloriously loses the ongoing, epic battle to wall builders and closed-borders advocates.

La spinta centrifuga che al giorno d'oggi si sta manifestando in diverse giurisdizioni, nonché a diversi livelli di governo viene normalmente percepita come un problema. Nel mio contributo mi soffermerò su un caso differente, se non opposto, sulla base di considerazioni di law and economics: la frammentazione e la disunione dello Stato può essere considerata, al contrario, una grande opportunità per lo sviluppo della libertà e per dei diritti fondamentali, nonché un'occasione per l'Europa per rimanere all'altezza del suo glorioso passato. Il superamento del modello di stato westfaliano, ma anche la nozione fittizia di sovranità che abbiamo imparato a conoscere è l'unica via che può offrire un sicuro ancoraggio alla democrazia. Non adottare questo punto di vista e continuare a discutere a favore del “più o meno lo stesso”, porta con sé, invece, l'enorme rischio che la democrazia si frantumi e perda ingloriosamente l'epica battaglia contro i costruttori di muri e i fautori della chiusura dei confini.

“Any people anywhere, being inclined and having the power, have the right to rise up, and shake off the existing government, and for a new one that suits them better. This is a most valuable, – a most sacred right – a right, which we hope and believe, is to liberate the world. Nor is this right confined to cases in which the whole people of an existing government, may choose to exercise it. Any portion of such people that can, may revolutionize, and make their own, of so much of the territory as they inhabit. More than this, a majority of any portion of such people may revolutionize, putting down a minority, intermingled with, or near about them, who may oppose their movement”.

Abraham Lincoln, Speech in United States House of Representatives: The War with Mexico, 12 January 1848

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1. INTRODUCTION: A CENTRIFUGAL THRUST IN SEARCH OF A THEORETICAL FRAMEWORK

Three competing drives seem at work in today's Europe. On the one hand, the Eu is continuously advocating for an increase of its competence, and effectively pursuing this agenda, at the expense of national jurisdictions. On the other hand, several nationalist movements have emerged at the Member States level, that have tried to resist this centralising push and reaffirm the reasons of traditional nation-states. Finally, other groups have actively begun operating to promote territorial disaggregation, secession, or state fragmentation.

The prevailing view, among legal scholars and public opinion leaders¹, seems to be that this latter wave is a potentially fatal threat for Europe (first drive). To a certain extent paradoxically, this phenomenon is linked to the spread of nationalist-populist-sovereignist movements (second drive): despite some apparent differences between the second and third trend (one challenges national sovereignty, while the other reaffirms it), they both obstruct the political design of an "ever closer union"².

Therefore, supporters of such political goal believe that these somewhat opposite, but connected, trends need to be tackled jointly. This effort should be pursued by reaffirming the push toward centralisation, beyond both national and sub-national identities. Some civil passion should be ignited among European peoples, so that they finally subscribe to the ultimate goal of political unification.

In other words, European elites seem to believe that the people of Europe have been fooled by irresponsible political leaders, who have fomented and exploited an anti-establishment attitude – either in the sense of reaffirming national sovereignties, or of promoting their fracturing into smaller states – for the sake of their short-term electoral benefit, disregarding the actual interests of the continent.

In this brief article, I would like to make the opposite case: first of all, populist politicians are arguably not the *cause* of the anti-Eu wave, but rather the *effect*. They appear to be shrewd political animals who have smelled an opportunity in an already existing trend, and have capitalised on it, but they have not originated it in the first place. In fact, the anti-Eu sentiment was arguably grown out of widespread discontent for a too "intellectual" project, that was perceived as a threat to local (national, or sub-national) identities. As it turned out, people were more attached to such identities than the European ruling class was prepared to appreciate.

Contrary to the mainstream view, I submit that the centrifugal trend is not to be feared or rejected, but instead embraced. My argument here is in favour of state fragmentation, therefore I will express support for the subnational arrangements advocated by several political movements in their respective contexts; from this perspective, I take the view that the Westphalian model of national sovereignty should actually be challenged. From my perspective, though, this should not lead toward a European federation, but rather to the opposite perspective. To be sure, the belief expressed here is that nation-states are far from ideal and indeed need to be questioned; however, for both ide-

¹ See, among many, G. HERNÁNDEZ, C. CLOSA, *The Challenge of Catalan Secessionism to the European Model of the Rule of Law*, 14 *Hague J Rule Law* 257, 2022.

² This is the very famous expression included in the Treaties since the very beginning (Preamble to the 1957 Rome Treaty), in pursuance of the underlying political goals of the EEC's founding fathers.

ological and economically-driven reasons, as will be explained in the course of the article, they are still preferable to a politically united federation at the European level³. Also, most of the claims made by nationalist movements are admittedly incompatible with the perspective of territorial fragmentation advocated for here, but nonetheless their resistance to European political unification can still be shared by those supporting this latter vision.

In the following sections, I will first present a summary of the theoretical arguments that make state fragmentation and dis-unity a great opportunity for freedom and fundamental rights to thrive, drawing on what I believe are some illuminating pieces of scholarship on the subject (§ 2); I will then apply these premises to the current situation in Europe, explaining why in my view a connection should be drawn between the different existing pushes towards fragmentation, and how to handle them coherently (§ 3). Finally, I will conclude by envisioning the possible scenarios that will materialise as far as fundamental rights protection in Europe is concerned, according to how the current centrifugal trends are addressed (§ 4).

2. THE THEORY SUPPORTING THE CASE FOR STATE FRAGMENTATION AND DIS-UNITY: AN OPPORTUNITY, NOT A THREAT, FOR FUNDAMENTAL RIGHTS PROTECTION

The mistrust in the ability of centralised polities to guarantee, in the long run, a high level of protection of fundamental rights derives from a double strand of considerations: in part, from a disenchanted observation of the limits of the policymakers' cognitive abilities; in part, from a straightforward acknowledgment of the incentives that govern their behaviour.

As far as the first point is concerned, Hayek's arguments remain in my opinion irrefutable, even though they have come to be too easily dismissed in the mainstream debate. In several writings⁴, Hayek has shown very convincingly how the cognitive ability of individuals is inherently limited. Clearly, this structural limitation does not disappear because of the mere fact that they start holding public office.

Therefore, broadening their power is a long shot that has the features of a gamble: in some cases, it can turn out to generate a profit, but there is also a chance that things will go wrong. In fact, rationality tells us that this latter hypothesis is much more likely and realistic.

Such an increase in the powers of elected official is therefore to be avoided. This appears to be true both on the quantitative level, *i.e.* with regard to the number of decisions taken by public decision-makers and to the amount of wealth that undergoes their intermediation, and on the geographical level, *i.e.* with regard to the territorial scope within which the decisions considered are effective: the greater the boundaries of such territory, the more disruptive the consequences in case they prove to be misguided.

³ See Y. HAZONY, *The Virtue of Nationalism*, New York, 2018. For different perspectives on the subject, L. ORGAD, *The Cultural Defense of Nations. A Liberal Theory of Majority Rights*, Oxford, 2015.

⁴ The most relevant of which is his article on *The Use of Knowledge in Society*, 35(4) *The American Economic Review* 519, 1945. On the subject, see also R. A. POSNER, *Hayek, Law, and Cognition*, 1 *NYUJ. Law and Lib.* 147, 2005; A. AMBROSINO, 48(1) *Journal of Economic Issues* 19, 2014.

The second consideration is closely linked and derives from the law and economics scholarship on the subject of incentives, with particular regard to the teachings of the public choice school⁵: given the cost that moving still has in terms of both time and monetary disbursement, the variable of how far one has to travel, before reaching the border and finding a new jurisdiction with a different set of rules, can have a significant impact: the further away the borders, the higher will the costs be to leave a jurisdiction, exercising the so-called foot voting⁶. As a result, the less will policy-makers of a given jurisdiction be deterred from adopting policies harmful to individual freedom, because the risk of alienating their constituency, and thus losing taxpayers to other competing jurisdictions, will be lower⁷.

In other words, the fundamental economic assumption that monopoly supply tends to harm consumers, who normally benefit from competitive markets, holds true also on the institutional terrain, with regard to the supply of public services, or conversely the “consumption” of rules. From this point of view, Lord Acton’s golden dictum “power tends to corrupt; absolute power corrupts absolutely” applies not only in terms of the number of such powers but also in terms of their geographical extent.

Admittedly, this statement derives from an implicit premise, that is almost taboo for most public law scholarship, but which has instead solid grounds in the studies of constitutional law and economics. Such underlying premise is that laws too can be seen as the object of a market, where the presence of multiple suppliers will trigger a virtuous process of “race to the top”. In this competitive “market for laws”⁸, bad laws will arguably tend to be eliminated, because bad laws (starting from the ones limiting fundamental rights, or levying high taxes) tend to push citizens, or better taxpayers, to relocate elsewhere, while good rules will be extended by imitation.

On the other way round, when such market has an oligopolistic structure, this will most likely lead to a “race to the bottom”: in such a scenario, the virtuous mechanisms just described do not have the necessary conditions to operate, and what takes place is a phenomenon not too different from what in the monetary sphere is known as the Gresham’s law, under which – in the presence of an artificial rule of legal tender that equates its value – the bad currency drives out the good currency⁹. In the analogy, bad laws drive out good laws.

⁵ Starting from the seminal masterpiece by J.M. BUCHANAN, G. TULLOCK, *The Calculus of Consent: Foundations of Constitutional Democracy*, Ann Arbor, 1962.

⁶ One of leading experts on the subject is certainly I. SOMIN: see in particular his book *Free to Move: Foot Voting, Migration, and Political Freedom*, Oxford, 2020, and revised edn 2021. Some obstacles to foot voting have been identified in rent control by G. GALLES, [Rent Control Makes It Harder to Vote with Your Feet, Market Urbanism](#), 16 November 2018.

⁷ There appears to be significant evidence to confirm this assumption: see C. EDWARDS, [New Census Data Show Americans Are Migrating from Tax-Punishing States](#), Fee Stories, 21 December 2018; M.J. PERRY, [Top 10 Inbound Vs. Top 10 Outbound US States: How Do They Compare on a Variety of Tax Burden, Business Climate, Fiscal Health, Energy/housing Costs and Economic Measures?](#), AEIdeas, 5 November 2019; Id., [Markets in Everything: Investors Will Pay Moving Costs for Companies Leaving High-cost, Business-hostile States like CA, NY, NJ, and IL](#), AEIdeas, 17 July 2020; D. SANCHEZ, [How Elon Musk Beat a California Dictate by Flexing the “Power of Exit”](#), FEE Stories, 15 May 2020.

⁸ Among the first ones to use this expression, see B.L. BENSON, E.M. ENGEN, *The Market for Laws: An Economic Analysis of Legislation*, 54(3) *Southern Economic Journal* 732, 1988.

⁹ See G. SELGIN, *Salvaging Gresham’s Law: the Good, the Bad, and the Illegal*, 28 *Journal Of Money, Credit, And Banking* 637, 1996; G. SELGIN, *Gresham’s Law*, EH.Net Encyclopedia, 2003, eh.net/encyclopedia/greshams-law/.

For such a mechanism to work, citizens need to be guaranteed the possibility of freely exiting the system¹⁰. Otherwise, the incentives and disincentive outlined just above cannot operate properly: it is not by chance that the least free political systems are typically the ones building barriers, physical and/or legal, to prevent their citizens from defecting to other countries, from the Berlin Wall to the experiences of several other authoritarian regimes.

If this applies to individuals, the same reasoning holds true if applied to the territories themselves: for the virtuous incentives mentioned above to apply, it is necessary that a territory can also move, in this case not in a physical way, but as a jurisdiction, either by choosing to belong to a different jurisdiction or by establishing one of its own.

This argumentative line leads to the conclusion that small and confined jurisdictions are the preferred institutional solution for the protection of fundamental rights. This certainly applies to economic rights, and therefore to the creation of institutional premises that encourage the flourishing of entrepreneurial activities. But arguably it is also valid for the promotion of social rights. Firstly, an economically prosperous system will also be in a better position to provide social benefits¹¹. But in any case, a genuinely competitive system will be able to attract workers also based on the better legal conditions offered to them, including a higher degree of protection of their labour-related rights. Therefore, it can be argued that the principle that workers' rights are best guaranteed by a system in which they can effectively implement the "hire your best employer"¹² mechanism, can also be applied to the institutional context: in this case, the principle could become "choose your best jurisdiction", or "choose your best welfare state".

But as mentioned, institutional competition appears to benefit businesses at the same time. From this point of view, a final consideration is warranted. Very often, businesses demand the standardisation of rules, because of the costs involved in compliance with the rules of many different jurisdictions. This explains the favour of many employers' organizations for projects of legislative unification, at the Eu or even worldwide level¹³.

However, the flaw in such claims is that they focus on the short term: immediately, there may be a reduction in costs, but in the medium-to-long term, less competition in the supply of rules implies less incentives for policy-makers to keep the quality of their offer high. The severe risk is that, in the absence of "institutional" deterrents, such quality declines irreparably, eventually damaging those same companies that had been lured by the perspective of an apparent near-term advantage¹⁴.

¹⁰ See A.O. HIRSCHMAN, *Exit, Voice, and Loyalty. Responses to Decline in Firms, Organizations, and States*, Cambridge, Mass., USA and London, 1972.

¹¹ Cf T. WORSTALL, *Astonishing Numbers: America's Poor Still Live Better Than Most of The Rest Of Humanity*, Forbes, 1 June 2013.

¹² The expression was popularised by the Italian labour law scholar P. ICHINO, *Inchiesta sullavoro. Perché non dobbiamo avere paura di una grande riforma*, Milano, 2011.

¹³ For some interesting reflections on the subject, see, among many: L. ENRIQUES, M. GATTI, *The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union*, 27(4) *U. Pa. J. Int'l Econ. L.*, 2006; M.G. FAURE, *Legal Harmonisation from the Perspective of the Economic Analysis of Law*, in Id., H. Koziol, S. Puntischer-Riekmann (Eds.), *Vereintes Europa ~Vereintheilichtes Recht?*, Maastricht, 2008, 11; E. BAFFI, P. SANTELLA, *The Economics of Legal Harmonization*, *Encyclopedia of Law and Economics*, 2nd edn, vol. 7, 2011. Cf. also M. ZUCKERBERG, *The Internet needs new rules. Let's start in these four areas*, *The Washington Post*, 30 March 2019.

¹⁴ See broadly, with different perspectives: C.G. CHUKWUDUMOGU, *The Regulation of Tax Competition. Rethinking "Harmful" Tax Competition in a Global Context*, Cheltenham, 2021; J.F. MÜLLER, *Political Pluralism, Disagreement and Justice. The Case for Polycentric Democracy*, London, 2020; P.D. ALIGICA, V. TARKO, *Polycentricity: From Polanyi to Ostrom, and Beyond*, 25(2) *Governance: An International Journal of Policy, Administration, and Institutions* 237, 2012; A. BERGH, R.HÖJER (Eds.), *Institutional Competition*,

After all, the extraordinary flourishing of trade that, between the Low Middle Ages and the Renaissance, made the territories today included in Italy so great, took place in an era of extreme territorial fragmentation: the *Communes* and the *Seignories* were for some centuries the lighthouse of the world at both economic and cultural level, and this was not been prevented – in fact, I maintain, it was fostered – by the remarkable amount of different jurisdictions existing on the territory of the Italian peninsula.

Similarly, at the European level, the *lex mercatoria* or Law Merchant, which has done so much for the economic development of Europe, was developed precisely in a context of multiple jurisdictions, none of which was so extensive that it could impose its laws on others¹⁵. Such form of spontaneous law¹⁶ emerged overcoming the boundaries of the coercive law, which preceded the nationalised law of the post-Westphalian era¹⁷.

Ultimately, there appear to be three levels from which to look at experiences of secession, territorial fragmentation, and state dis-unity: that of efficiency, that of legitimacy, and that of legality. Firstly, from the law and economics literature, we obtain various arguments that lead us to believe that the possibility that local communities freely decide on their own borders, evaluating from time to time the preferable extension of the territory in which they wish to live, is beneficial for the economy, so even a very high fragmentation of the institutional landscape can be deemed as highly efficient.

But territorial fragmentation appears above all to be legitimate, that is to say corresponding to a universal sense of justice (which disregards any economic considerations and would also apply if the reasoning in terms of efficiency led to different or even opposite conclusions). In other words, it corresponds to justice that communities can self-determine, as is recognised to a certain extent by international law, although the latter appears to restrict this right only to circumstances in which the fundamental rights of a people living in a given territory are violently infringed upon by a jurisdiction that people perceive to a very large extent as foreign¹⁸.

Cheltenham, 2008. A wonderful collection of quotes on the subject was proposed by D.J. MITCHELL on his very famous blog, *International Liberty*, [Jurisdictional Competition Is Why the West Became Rich While Asia languished](#), 10 September 2012. A notable stance against tax competition was taken by former Eu Commissioner Mario Monti in his Report to the President of the European Commission José Manuel Barroso, of 9 May 2010, *A New Strategy or the Single Market. At the Service of Europe's Economy and Society*, 79 ff.; cf. also OSSERVATORIO CPI, [L'Unione Europea e le eccessive differenze nella tassazione dei profitti tra paesi](#), 16 maggio 2020.

¹⁵ Cf. this reflection by J. STUART MILL, *On Liberty*, 1859: “What has made the European family of nations an improving, instead of a stationary portion of mankind? Not any superior excellence in them, which, when it exists, exists as the effect, not as the cause; but their remarkable diversity of character and culture. Individuals, classes, nations, have been extremely unlike one another: they have struck out a great variety of paths, each leading to something valuable; and although at every period those who travelled in different paths have been intolerant of one another, and each would have thought it an excellent thing if all the rest could have been compelled to travel his road, their attempts to thwart each other's development have rarely had any permanent success, and each has in time endured to receive the good which the others have offered. Europe is, in my judgment, wholly indebted to this plurality of paths for its progressive and many-sided development”.

¹⁶ See B.L. BENSON, *The Spontaneous Evolution of Commercial Law*, 55(3) *Southern Economic Journal*, 644, 1989; Id., *Law Merchant*, in R. HAMOWY (Ed.), *The Encyclopedia of Libertarianism*, Thousand Oaks, 2008, available at <https://www.libertarianism.org/topics/law-merchant>.

¹⁷ See M. BELOV, *The Challenges to Westphalian Constitutional Geometry in the Age of Supranational Constitutionalism, Global Governance and Information Revolution*, in Id. (Ed.), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law*, Oxford, 2018, 13 ff.

¹⁸ Cf. M. STERIO, *Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia*, 22(1) *ASIL Insights*; A. TANCREDI, *Secessione e diritto internazionale: un'analisi del dibattito*, 17(2) *Diritto Pubblico Comparato ed Europeo* 449, 2015; A. TANCREDI, *La secessione nel diritto internazionale*, Padova, 2001; A. CASSESE, *Self-Determination of Peoples. A Legal Reappraisal*, Cambridge,

From a theoretical perspective, it seems justified to go beyond what is currently sanctioned by international law, acknowledging a generalised and very broad natural right of all peoples to self-determination. Such right should not only entail the granting of a certain degree of “autonomy”, however extensive, within an existing legal system¹⁹, as enshrined for instance in the European Charter of Local Self-Government, but it should go as far as to include the possibility of founding a new one. The decision on its own borders is the first and fundamental decision that any political community should arguably be allowed to take.

At this point, the focus eventually shifts to the level of legality: aside from international law, what is the currently applicable legal framework of secession, particularly in the European context, where disruptive pressures have appeared more significant, at least in recent years? This aspect is subject to consideration in the following paragraph.

3. FROM THEORY TO PRACTICE: HOW TO ADDRESS THE CURRENT CENTRIFUGAL FORCES IN EUROPE

It is far beyond the scope of the present work to reconstruct the constitutional framework of secession in European countries, a task that has been performed thoroughly by very authoritative scholars²⁰. Rather, what I would like to do is to draw a connection between the various disintegrating pressures that have existed in the European continent in the past few years and evaluate how they have been dealt with by the different legal systems concerned.

From this point of view, the United Kingdom has proved to be the most open system towards these pressures, allowing first the referendum for the independence of Scotland, and then the historical one to leave the European Union. On the other hand, Spain (with regard to Catalonia) and Italy (with regard to Veneto) represent the opposite pole: in these latter cases, voting on boundaries was either prohibited in advance, by declaring unconstitutional (in 2015) the regional law of Veneto establishing a consultative independence referendum²¹, or severely repressed during and after the fact in the case of Catalonia, where the referendum was held in 2017 but only led to the imprisonment of the organisers, with no other practical effect in spite of the more than 90% rate of approval for independence²².

1995.

¹⁹ After all, as Italian legal philosopher Bruno Leoni acknowledged, “[local] self-government is not necessarily compatible with individual freedom” (1961 conference in Stresa, the translation is mine: such quote was pointed out to me by my colleague Giovanni Boggero).

²⁰ Among the most recent works, see D. HALJAN, *Constitutionalising Secession*, London, 2014; E. NOVIC, P. URS, *Secession* (entry), in R. GROTE, F. LACHENMANN, R. WOLFRUM (Eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, 2016; C. CLOSA, C. MARGIOTTA, G. MARTINICO, *Between Democracy and Law: The Amoralty of Secession*, Routledge, New York, 2019.

²¹ This is a well-established trend: see G. TARLI BARBIERI, *Regione Veneto o “Repubblica di San Marco”?* *Riflessioni sparse a partire dalla sent. 183/2018 della Corte costituzionale*, in *Forum di Quaderni Costituzionali*, 4 aprile 2019, disponibile su https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2019/05/nota_183_2018_tarlibarbarieri.pdf;

²² On the subject, see R. DE CARIA, *I referendum indipendentisti*, 16(4) *Diritto Pubblico Comparato ed Europeo* 1611. See also H. LÓPEZ BOFILL, *Hubris, constitutionalism, and “the indissoluble unity of the Spanish nation”*: *The repression of Catalan secessionist referenda in Spanish constitutional law*, 17(3) *I. J. Const. L.* 943, 2019, with a *reply* by A. BAR, p. 970, and a *rejoinder* by LÓPEZ BOFILL, p. 984; A. ABATININET, *Self-Determination as an Expression of Collective Human Dignity: The Case of Catalonia*, 5 *The Italian Law Journal*, 2019; G. MARTINICO, *Preserving Constitutional Democracy from Populism. The Case of Secession*

In this context, the European Union has never affirmed the right to independence of the people involved, dismissing the Catalan referendum as “not legal”²³, and resisting as much as possible the decision to leave the Union by the United Kingdom, in connection to which some European officials voiced some desire for retaliation²⁴. Consistently with its unifying vocation, the Eu sided with the greatest possible limitation of the vote on the borders, not taking a position on the violence in Catalonia, effectively ignoring the initiative in Veneto, and trying to give the Uk the hardest possible time on Brexit²⁵.

Arguably, it would have been preferable for the Eu institutions to show greater openness towards the centripetal pressures underway, welcoming them instead of fighting them. Such openness to the right of self-determination would be the best antidote to nationalist movements, that gained significant consensus in recent years (second drive of those identified at the beginning): the attitude of closure by the Eu institutions seems instead to have even reinforced such tendencies.

Instead, the best way to protect Europe from the return of nationalism appears to be open to rediscussing the sovereignty model developed after the Treaties of Westphalia, and comfortably accepting the possibility that Europe breaks up into many small homelands²⁶. Such new polities would eventually differ from simply small nation-states, since the institutional competition in a landscape of strong territorial pluralism like the one advocated here would lead them to evolve into different subjects, more respectful of individual liberties²⁷. In fact, this is arguably the best way to protect Europe and safeguard its peaceful existence, rather than the “imperial” approach championed by the Eu’s most heated supporters²⁸.

Referendums, 39(2) *National Journal of Constitutional Law* 139; more broadly, C. CLOSA (Ed.), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*, Cambridge, 2017

²³ European Commission, *Statement on the events in Catalonia*, 2 October 2017, available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_3626. Before the Spanish constitutional crisis of 2017-2018, see already C.K. CONNOLLY, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 *Duke J. Comp. & Int’l L.* 51, 2013.

²⁴ Cf. REUTERS, *German officials warn against EU “revenge” for UK Brexit vote*, 24 June 2016, available at [reuters.com/article/us-britain-eu-germany-future-idUSKCN0ZA319](https://www.reuters.com/article/us-britain-eu-germany-future-idUSKCN0ZA319). On Brexit in connection to secession movements, see the very interesting reflections by E. FRANTZIOU, *Was Brexit a Form of Secession?*, 13 *Global Policy* 69, 2022.

²⁵ It is though necessary to recall that the CJEU has on two occasions established the right to immunity for Catalan independentists elected to the European Parliament: C-502/19, *Criminal proceedings against Oriol Junqueras Vies*, Grand Chamber, 19 December 2019; C-629/21 P(R), *Puigdemont i Casamajó and Others v Parliament and Spain*, Order of the Vice-President of the Court of 24 May 2022. However, see also the case *Forcadell I Lluís and Others v. Spain* (75147/17, 7 May 2019), the main (but not only) instance in which the European Court of Human Rights has dealt a significant blow to Catalan independentists, here by finding that the Spanish Constitutional Court lawfully suspended a session of the Catalan parliament where independence was expected to be declared.

²⁶ Even Luigi Einaudi wrote that “we need to dispel from people’s hearts the obscene idol of sovereign state”.

²⁷ Some good examples can come from countries like Switzerland (on which see, among many, C. LOTTIERI, *Un’idea elvetica di libertà. Nella crisi della modernità europea*, Brescia, 2017, or J. STEINBERG, *Why Switzerland?*, Cambridge, 2015 or, even more, Liechtenstein. On Liechtenstein, see for instance: the articles published in the IACL-AIDC symposium on the one hundredth birthday of its constitution, available at <https://blog-iacl-aide.org/centenary-constitution-liechtenstein>; as well as L. PIRRI, *Lo Stato come impresa: il caso del Liechtenstein*, available at <https://www.polyarchy.org/papers/liechtenstein.html>. More broadly on micro-states see H. HOBBS, G. WILLIAMS, *Micronations and Statehood: Why Pretend to be a State?*, 16 December 2021, IACL-AIDC blog; E. BERTOLINI, *I micro Stati. La sfida della micro dimensione e le sue ricadute costituzionali*, Bologna, 2019.

²⁸ See the 9 November 2018 tweet by French Minister of Finance Bruno Le Maire: “L’Europe doit s’affirmer comme un empire paisible dans les 25 années qui viennent. Cette empire doit être celui des droits de l’homme et de la croissance durable”, further developed in an interview three days later to the German newspaper

As an intermediate way, or in any case, as a second best, the European ruling class should arguably promote at the European level a federalism like the one envisioned by an author like Cattaneo²⁹, or in more recent years by Miglio³⁰. Such approach vigorously refuses any centripetal movement, and instead promotes a strong political and institutional decentralisation. Unfortunately, in Europe, but also beyond Europe, there appears to be considerable confusion about the term ‘federalism’: paradoxically enough, both in the US and in Europe, the term ‘federalists’ has been employed to designate the advocates of greater territorial integration. But a genuinely federal Europe, one that never overcomes states’ rights (as advocated in the US for example by John C. Calhoun³¹) would be a perspective worthy of the greatest consideration.

The preference for a federal Europe, or even for an ultra-fragmented one, is not just a prerogative of the anti-statist tradition, brought forward until today by scholars and representatives of the libertarian and anarcho-capitalist thinking, such as Bassani³², Lottieri³³, or Hoppe³⁴, but which has some predecessors already in the 19th century, such as von Haller³⁵ and de Molinari³⁶, and Mises at the beginning of the 20th³⁷. This line of thought prefigures a society without a state, governed by a market order, in which public services are also provided by private corporations³⁸, urban planning is not a public

Handelsblatt, where he reiterated that Europe needs to become a “form of empire, like China and the U.S.”. Just to make one further example, longtime MEP Guy Verhofstadt echoed this line of thought a year later: cf. B. JOHNSON, *Only an EU ‘empire’ can secure liberty: EU leader*, Transatlantic Blog, 16 September 2019, available at <https://www.acton.org/publications/transatlantic/2019/09/16/only-eu-empire-can-secure-liberty-eu-leader>.

²⁹ See the recent collection of his writings on *Federalismo* (Milano, 2019).

³⁰ In English, see for instance his essay *The Cultural Roots of the Federalist Revolution*, *Telos* no. 97(1993), 33.

³¹ Among his writings, see in particular the two gathered in R.K. CRALLE (Ed.), *The Papers of John C. Calhoun: A Disquisition on Government and a Discourse on the Constitution and Government of the United States*, Columbia, 2003. An opposite perspective was recently voiced by D. FRENCH, *Divided We Fall: America's Secession Threat and How to Restore Our Nation*, New York, 2020. One of the most recent cases shaping American federalism was *Franchise Tax Board of California v. Hyatt* (or *Hyatt III*), 587 U.S. ____ (2019).

³² See for instance his co-authored book (with A. VITALE AND W. STEWART) on *I concetti del federalismo*, Milano, 1995 or his work on Jefferson *Contro lo Statonazionale. Federalismo e democrazia in Thomas Jefferson*, Bologna, 1995; or, in English, his essay on *Jefferson, Calhoun and States' Rights: The Uneasy Europeanization of American Politics*, *Telos* no. 114 (1999) 132.

³³ See for instance his edited studies *Dalle vicinie al federalismo. Autogoverno e responsabilità*, Pordenone, 2010 and (with N. IANNELLO), *Secessione. Una prospettiva liberale*, Brescia, 2015.

³⁴ See for instance his essays *Small is Beautiful and Efficient: The Case for Secession*, *Telos* no. 107 (1996), 95, and *Of Private, Common, and Public Property and the Rationale for Total Privatization*, 3 *Libertarian Papers* 1, 2011.

³⁵ See broadly his six-volume masterpiece *Restauration der Staats-Wissenschaft oder Theorie des natürlich-geselligen Zustandes, der Chimäre des künstlich-bürgerlichen entgegengesetzt*.

³⁶ See in particular his essay *The Production of Security*, published in 1849 with two essays of Frédéric Bastiat.

³⁷ See in particular his *Nation, State, and Economy*, of 1919. On his thought, see R.M. EBELING, *Ludwig von Mises on Liberalism, Nationalism, and Self-Determination*, 21 November 2018, available at <https://www.a-ier.org/article/ludwig-von-mises-on-liberalism-nationalism-and-self-determination/>.

³⁸ On the subject see, from different perspectives: J. TROUNSTINE, *The Privatization of Public Services in American Cities*, 39(3) *Social Science History* 371, 2015; R.J. DILGER, R.R. MOFFETT, L. STRUYK, *Privatization of Municipal Services in America's Largest Cities*, 57(1) *Public Administration Review* 21, 1997; C.P. GILLETTE, *Opting out of Public Provision*, 73 *Denv. U. L. Rev.* 1185, 1996. Some notable examples of privatized public services include utilities like water in Atlanta and Detroit, prison management in several American states as well as in the UK, and even certain police powers, also in the UK and in several U.S. cities (the best-known experiment, however controversial, has been Sharpstown, Texas). In general, the most signifi-

monopoly³⁹, and new forms of political aggregation can be tested, such as gated communities⁴⁰, or private cities⁴¹, or the experiences of newly established institutions like the platforms created as a result of sea steading⁴², not to mention the challenges to traditional national sovereignty brought about by new technologies, with particular regard to decentralised-ledger ones⁴³.

The return to the Middle Ages on the legal and institutional level was in fact famously invoked also by a highly original author of a completely different tradition, Paolo Grossi⁴⁴. The unified Europe of law appears, in his writings, one of the “legal mythologies” to overcome, the result of a “legal Jacobinism” living “many lives”, that he believed was expressed even in the “constitutional” documents such as the Nice Charter or the aborted Treaty Establishing a Constitution for Europe.

It seems therefore useful to read together all the various disruptive instances in action, looking at them as reactions to the ruling classes’ project of “making the Europeans”⁴⁵, a unitary people created in the laboratory a bit like Esperanto, the language that is proposed for adoption by the politically unified Europe. Such reactions should be welcomed as a beneficial jolt of history, a moment of pride for peoples with centuries-old identities that cannot be erased out of political wishful thinking. In the concluding

cant experiment, now scaled back, was Sandy Springs, Georgia: cf. M. STRACHAN, *Sandy Springs, Georgia: The City That Privatized Nearly Everything*, [HuffPost](https://www.huffpost.com), 22 April 2011.

³⁹ See for instance A. BERTAUD, *Order without Design. How Markets Shape Cities*, Cambridge, 2018; D.E. ANDERSSON, S. MORONI, *Cities and Private Planning. Property Rights, Entrepreneurship and Transaction Costs*, Cheltenham, 2014. See also the classic work by J. JACOBS, *The Death and Life of Great American Cities*, New York, 1961, as well as several interviews or writings to the architect Patrik Schumacher, available on his website <https://www.patrikschumacher.com/>: see in particular *Plea: privatization of cities; Private creativity instead of political planning. Conversation with a libertarian German star architect; For a Market-led Revolution in Urban Housing; Free Market Urbanism - Urbanism beyond Planning*. Houston, Texas is one of the most important examples of cities with no zoning laws.

⁴⁰ For an overview, already more than fifteen years ago, see R. ATKINSON, S. BLANDY (Eds.), *Gated Communities*, New York, 2006.

⁴¹ Here the reference is to the studies and actual experiments by T. GEBEL, *Free Private Cities: Making Governments Compete for You*, CreateSpace Independent Publishing Platform, 2018. Another interesting experiment is the one of Liberland, see <https://liberland.org/en/about>. Recent reflections on the subject of cities are the ones by F. PIZZOLATO, G. RIVOSECCI, A. SCALONE (Eds.), *La città oltre lo Stato*, Torino, 2022; R. HIRSCHL, *City, State. Constitutionalism and the Megacity*, Oxford, 2020. Finally, see also D.T. BEITO, P. GORDON, A.T. TABARROK (Eds.), *The Voluntary City. Choice, Community, and Civil Society*, Oakland, 2002.

⁴² See J. QUIRK, P. FRIEDMAN, *Seasteading. How Floating Nations Will Restore the Environment, Enrich the Poor, Cure the Sick, and Liberate Humanity from Politicians*, New York, 2017; V. TIBERIUS (Ed.), *Seasteads. Opportunities and Challenges for Small New Societies*, Zurich, 2017.

⁴³ Cf. B. MAÇÃES, *The Crypto State? How Bitcoin, Ethereum, and other technologies could point the way to new systems of governance*, in *City Journal*, Autumn 2020, available at <https://www.city-journal.org/technological-developments-new-systems-of-governance>.

⁴⁴ See in particular *L'ordine giuridico medievale* (Roma-Bari, 1995), *Mitologie giuridiche della modernità* (Milano, 2001), *Società, diritto, stato. Un recupero per il diritto* (Milano, 2006); but see also W. CESARINI SFORZA, *Il diritto dei privati*, 1929. Finally, cf. this quote from Czech author Milan Kundera: “Alas, wretched large nation! The gateway to humanity is narrow and so difficult for you to pass through... I believe in the great historical calling of small nations in a world that is at the mercy of great powers yearning to smooth its edges and readjust its dimensions. Because they are constantly searching for and creating their own visage, because they must struggle for their independence, small nations are the agents of resistance against the frightful influences of global uniformity, protectors of the variegation of traditions and ways of life, and guarantors that the original, the extraordinary and the idiosyncratic are at home in the world” (from *Czech Destiny*, 1968, translated by T. West).

⁴⁵ To paraphrase a famous quote attributed to the Italian patriot Massimo D’Azeglio, after the unification of Italy.

paragraph, I will reflect briefly on the different paths that open up in front of us, depending on whether the Eu institutions decide or not to welcome at least in part the perspective advocated for in these pages.

4. THE POSSIBLE SCENARIOS FOR EUROPE

Centrifugal forces and nationalist movements have been partially defused by a massive new wave of public spending by the Eu with its Next Generation EU instrument. But sooner or later those trends will resurface, likely exacerbated. At that point Europe will arguably face an Ackermanian “constitutional moment”⁴⁶. The disruptive process (currently more silently) in progress in Europe might end up in two opposite ways: either the centralisation process eventually succeeds, or new strong institutional fragmentation like the one imagined above might materialise. It appears more difficult that the current middle way can last indefinitely, and that the traditional instruments and categories elaborated by constitutional law⁴⁷ will be able to accommodate such trends forever⁴⁸.

To be sure, we seem to have already started to enter a “post-Westphalian situation”⁴⁹, one where the fictional notion of sovereignty has come under substantial criticism⁵⁰, even though it is at the same time reaffirmed by the raising political movements to which I referred in the beginning. In other words, as stated at the beginning of this paper, nation-states are currently subject to three different drives: in the first place, they face substantial centrifugal forces, that press for fragmentation into smaller political units; secondly, they are at the centre of a revival by nationalist forces; finally, they are subject to tension from Eu institutions, which push for the transfer of more and more powers from Member States.

Any of these drives could eventually prevail. If the push towards state fragmentation succeeds at least somewhere, it could generate a partial domino effect, encouraging similar movements in different areas to take action to go down the same road. If nationalist forces prevail, instead, there will be little to no room for other levels of government, and this will be even more so if the Eu succeeds in its design of political unity. The solution advocated here is the former, which is the one that arguably guarantees fundamental rights to the greatest extent, for the reasons stated above.

⁴⁶ B. ACKERMAN, *We the People: Foundations*, Cambridge, 1991.

⁴⁷ Broadly on the subject, see: I. LAGO (Ed.), *Handbook on Decentralization, Devolution and the State*, Cheltenham, 2021; M. MONTI, *Federalismodisintegrativo? Secessione e asimmetria in Italia e Spagna*, Torino, 2021; G. ANDERSON, S. CHOUDHRY (Eds.), *Territory and Power in Constitutional Transitions*, Oxford, 2019; the symposium on *Crisis and Constitutional Pluralism in the EU* in Volume 21 of the *Cambridge Yearbook of European Legal Studies* 2019; the symposium on *Constitutional Amendment and Dismemberment* of the *Yale Journal of International Law* 2018; C. PAVEL, *Divided Sovereignty. International Institutions and the Limits of State Authority*, Oxford, 2014; F. PALERMO, *Beyond Second Chambers: Alternative Representation of Territorial Interests and Their Reasons*, 10(2) *Perspectives on Federalism* 49, 2018.

⁴⁸ Cf. J. Ratzinger: “the [European] project, which is unilaterally oriented toward the construction of an economic power, in fact automatically produces a sort of new system of values that must be tested in order to find out its ability to last and to create a future”, *Europe Today and Tomorrow. Addressing the Fundamental Issues*, San Francisco, 2007 [2004].

⁴⁹ M. BELOV, *The Challenges to Westphalian Constitutional Geometry*, cit., 13. See also S. Cassese, *A World Government?*, Sevilla, 2018.

⁵⁰ See several passages in L.M. BASSANI, A. MINGARDI, *Dalla Polis allo Stato. Introduzione alla storia del pensiero politico*, Torino, 2022.

In the present time, there is growing discussion of the possible overcoming of nation-states: the literature on the subject has started to be abundant, and there are many authors engaged in envisioning a world that goes beyond them⁵¹. However, this movement goes predominantly upwards, in the sense of further centralisation. Instead, I maintain that the opposite perspective should be carefully considered and appreciated: responding to the shortcomings of modern democracies and nation-states with “more of the same” does not seem to be geared toward success. Europe should not be afraid to retrieve from its own past what made it great, forgo intellectualist projects, and let the traditional institutional differences thrive. It would thus create the conditions for a pluralist, competitive market for legal institutions and thus for a virtuous process of imitation and mutual learning, that a unitary institutional setting unforgivably prevents.

⁵¹ On top of the authors mentioned above, in footnotes 32 and following, we could also mention modern classics like D.D. FRIEDMAN, *The Machinery of Freedom. Guide to a Radical Capitalism*, available at <http://www.daviddfriedman.com/Machinery%203rd%20Edn.pdf>, 2014, or E.P. STRINGHAM, *Private Governance: Creating Order in Economic and Social Life*, Oxford, 2015. See also the study by P. HANKUS, *The Secessionist Processes from Libertarian Perspective*, 19(2) *Res Publica. Revista de Historia de las Ideas Políticas* 419, 2016, as well as the essay by M. MCCONKEY, *Anarchy, Sovereignty, and the State of Exception: Schmitt's Challenge*, 17(3) *The Independent Review* 415, 2013.