

**The Impact of the European Charter of Fundamental Rights
And the Proposed EU Constitution
On the Domestic Policies of EU Member States**

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I. INTRODUCTION

Since its beginning, the Charter of Fundamental Rights of the European Union (“the Charter”) has drawn both strong praise and harsh criticism. Proponents of the Charter (and thus of a European Constitution)¹ have argued that the Charter “can be seen as a vital part of the reorientation of the Union . . . which embraces the fundamental values and rights that have been the guiding principles of post-war Europe.”² They assert that the Charter renders the rights guaranteed by the European Union (the “EU”) more transparent and increases the legitimacy of EU human rights law.³ Conversely, critics have warned that “[i]f incorporated in an EU treaty, [the Charter] could in practice have the effect of reducing citizens’ rights at the national level.”⁴ These critics fear that the Charter will reduce levels of national control over domestic policies. The Charter has thus sparked a debate in Europe between those who wish to emphasize (and perhaps expand) the protection of human rights within

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¹ The Charter's purpose has been explained by various sources in different ways. One of the most common themes is that it represents a “Bill of Rights” for a European constitution. Indeed, the Final Draft of the Constitution for the European Union, issued by the European Convention on June 12, 2003, incorporates the Charter as Part II of the EU Constitution. Constitution, Part Two, The European Convention, CONV 797/1/03 REV 1 (English) (hereafter, “EU Constitution”).

² Graham Watson, “The Europe We Need,” June 19, 2002, *at* http://www.theepc.be/europe/print_europe.asp?

³ *Id.*

⁴ See Anthony Coughlan, “Why the EU Charter of Fundamental Rights should be opposed?”, *at* <http://www.eurocritic.demon.co.uk/rights.htm>.

the EU and those who fear the growing dominance of EU law over the national sovereignty of member states.⁵

Whether the Charter should (or will) be incorporated into a treaty binding all EU member nations may be known shortly. A “Final Draft” of a Constitution for the EU, incorporating the Charter as Part Two of the document, was released by the European Convention on June 12, 2003.⁶ Additional “Final Drafts” may be forthcoming⁷ and debates regarding the adoption of the EU Constitution are proceeding briskly.⁸

The possibility that the Charter will be incorporated into an EU Constitution raises important questions regarding whether (and/or how) the Charter will have an impact on national domestic policies.⁹ That impact could be dramatic, because

⁵ This debate has been brewing within the EU for some time and is often quite complex. As John Richardson, Head of the Delegation of the European Commission to the United Nations, stated in 2002: On the one hand, many of our citizens . . . are dissatisfied with Europe’s performance on the world stage and are concerned about the maintenance of peace and security within the Union. . . In these areas they would like to see a strengthened, more effective entity—“more Europe.” On the other hand, their disenchantment with the long reach of European Union . . . regulation in the first pillar area of economic policy is growing. The feeling of loss of local control over their destiny and a vague feeling of potential loss of identity within an ever more centralized polity is palpable. Here, they want “less Europe.”

John Richardson, *The European Union in the World—A Community of Values*, 26 FORDHAM INT’L L.J. 12 (2002).

⁶ Part Two, EU Constitution.

⁷ Additional meetings of the European Convention (ostensibly to deal with technical drafting issues) are scheduled for July 2003 and may continue thereafter. Accordingly, future revisions to the June 12 “Final Draft” may be made. However, the European Council, meeting in Thessaloniki, Greece, shortly after the draft was issued declared that the “presentation of the draft constitutional treaty marks the completion of the Convention’s task . . . and, accordingly, the end of its work.” Stanley Crossnick, “Convention’s draft treaty must be respected,” *European Voice* at 7 (26 June-2 July 2003).

⁸ Hearings, meetings and discussions regarding the adoption of the Constitution began immediately after the Final Draft was issued on June 12, 2004. For example, a meeting bringing together members of the EPP-ED Group in the European Parliament met in Copenhagen on June 25 and 26 to discuss the results of the European Convention and strategy for adoption of the Constitution. (Notes of the meeting on file with the authors.)

⁹ At the meeting described in the above note, several Members of the European Convention asserted that inclusion of the Charter in the EU Constitution would prevent further expansion of EU powers and preserve the governing roles of member states. E.g., statements by Elmar Brok (Member of the European Parliament and Chairman of the EPP Group in the European Convention) and Inigo Mendez de Vigo (Member of the European Parliament and Member of the Praesidium of the Convention). By contrast, Timothy Kirkhope (Member of the European Parliament and Member of the Convention) asserted that incorporation of the Charter into the Constitution could narrow national discretion and might even reduce the level of national human rights protections enjoyed in some countries. (Notes of the meeting on file with the authors.)

Article I-10(1) of the EU Constitution proclaims that the “Constitution, and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.” The actual extent of this “primacy” is vitally important to the future of Europe, for the Charter covers – often in quite expansive terms – everything from human dignity¹⁰ to education,¹¹ collective bargaining,¹² social security,¹³ health care,¹⁴ paid vacations¹⁵ and environmental protection.¹⁶ Thus, incorporation of the Charter into an EU Constitution might significantly expand the regulatory reach of the EU and substantially constrain domestic decision making by EU member nations.¹⁷

By its express terms, the Charter states that it does not enlarge EU authority or erode the governing power of member states. Article 51 of the Charter limits the Charter’s application to the activities of the EU,¹⁸ states that the Charter does not “establish any new power or task” for the EU,¹⁹ and reasserts the European notion of “subsidiarity” – a legal concept designed to preserve local and national decision making competences within the European legal system.²⁰ Article 53, in turn, preserves human rights and fundamental freedoms contained in the constitutions of member states.²¹ These provisions, taken at face value, prevent EU “mission creep”

¹⁰ Article 1, Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, C 364/1 (2000) (hereafter, “Charter”).

¹¹ Article 14, Charter.

¹² Article 28, Charter.

¹³ Article 34, Charter.

¹⁴ Article 35, Charter.

¹⁵ Article 31(2), Charter.

¹⁶ Article 37, Charter.

¹⁷ *See, e.g.*, the debate between Members of the European Convention above at note 9.

¹⁸ The Charter also applies to the actions of member states when they are applying EU law. Article 51(1), Charter.

¹⁹ Article 51(2), Charter.

²⁰ Article 51(1), Charter.

²¹ Article 53, Charter.

and fortify national sovereign powers.²² The question remains whether these provisions can achieve their stated objectives.

Comparative constitutional history suggests that, despite its own proclamations to the contrary, the Charter may well alter substantially the respective powers of the EU and its member nations. Like the Charter, the Bill of Rights appended to the United States Constitution was initially intended to apply only to the federal government, not to member states.²³ Over time, however, and precisely because the requirements of the Bill of Rights were deemed to be “fundamental to the American scheme of justice,” constitutional provisions that were initially drafted to apply only to the federal government became generally applicable to all government entities, federal *or* state.²⁴ The Charter could similarly – and quickly – become fundamental to (and therefore widely applicable throughout) a European scheme of justice.

Accordingly, there is a real possibility that the Charter’s incorporation in the EU Constitution will (1) expand EU power and (2) alter (perhaps in unforeseen ways) the sovereign status of member nations. A full review of these two issues, of course, would require hundreds of pages. We offer, therefore, only an initial inquiry.

Our analysis (as is already evident) rests in part upon a comparison of the Charter and proposed EU Constitution with American constitutional experience. We

²² In 2002, British Minister for Europe, Peter Hain, complained that “creeping federalism” was moving sovereign power “towards Brussels and away from nation states.” Andrew Grice, *Hain Warns of “Creeping Federalism” in E.U.*, *Indep.*, July 22, 2002, 1.

²³ See, e.g., *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833)(U.S. Constitution’s requirement that private property cannot be taken without just compensation applies only to federal government, not state governments).

²⁴ *Duncan v. Louisiana*, 391 U.S. 145 (1968). As a technical matter, the Bill of Rights has been made applicable to the states through the 14th Amendment to the U.S. constitution. *Id.* Nevertheless, the drafters of the 14th Amendment did not intend (nor has the U.S. Supreme Court ever held that they intended) to make the states subject to the Bill of Rights by adopting the 14th amendment. See, e.g., *The Slaughterhouse Cases*, 83 U.S. 36 (1873) (the 14th Amendment does not subject the states to the constraints of the Bill of Rights). Rather, the Bill of Rights has been imposed on the states – not because the drafters of the 14th Amendment intended that result – but because the human rights set out in the first ten amendments to the U.S. constitution are so “fundamental to the American scheme of justice” that it is unjust to allow the states to ignore them. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

do not pretend that American constitutional history provides anything near full answers for the questions now facing Europe. Nevertheless, America's attempt to preserve separate spheres of action for state and central governments does have some relevance to the issues now facing the EU.²⁵ And (to the best of our obviously less-than-perfect abilities), we have based our analysis upon a comparative review of European constitutional and human rights documents.

To gauge whether the Charter represents an expansion in the scope and content of European human rights concerns, we compare the Charter with the language of the 1952 Convention for the Protection of Human Rights and Fundamental Freedoms.²⁶ To ascertain whether the Charter reflects (or is in tension with) constitutional norms within member states, we have compared the Charter with the language of nine selected European constitutions (Belgium, France, Germany, Ireland, Italy, the Netherlands, Portugal, Spain and the United Kingdom).²⁷

This comparison suggests that the Charter will almost certainly broaden EU control over a significant range of social policies. As a result, and over time, member states may be required to submit to a more expansive EU will in human rights, social

²⁵ As Professor Ernest Young has stated:

The usefulness of the American experience for Europe does not depend on any illusion that American federalism has "all the answers." . . . American federalism may well have failed to protect state autonomy in the ways that may be most important to Europeans. But failures are often even more interesting than successes from the perspective of lessons learned.

Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, New York University Law Review, December 2002, 1612.

²⁶ The text of the Convention was amended according to the provision of Protocol No. 3 (entered in force in 21 September 1970), Protocol No. 5 (20 December 1971), Protocol No. 8 (1 January 1990), and comprised also the text of Protocol No. 2. All provisions amended or added by these Protocols are replaced by Protocol No. 11, as from 1 November 1998. As from that date, Protocol No. 9 which entered into force on 1 October 1994 is released and Protocol No. 10 has lost its purpose. See Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol no. 11. at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

²⁷ The United Kingdom, of course, does not have a written constitution. It does have a long-standing constitutional tradition based upon the "rights of Englishmen." Although we cannot pretend to know the precise content of an unwritten constitution derived from court decisions and various acts of parliament and other governmental entities, we have based our analysis upon widely recognized texts discussing the British constitution.

services and other areas.²⁸ Whether this is deplorable or laudable, of course, depends largely upon whether one favors national or supra-national control of the principles declared in the Charter. We begin with a brief review of the origin of the Charter.

II. THE ORIGINS OF THE CHARTER

The first comprehensive listing of human rights within Europe was the 1952 Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the European Convention on Human Rights (ECHR). The ECHR was conceived during the creation of the Council of Europe in 1949,²⁹ and entered into force in 1953. As of February 2003, 44 states are signatories to the ECHR.³⁰ The ECHR contains 59 articles, divided into three sections.³¹

While the Convention sprang from the Council of Europe, the Charter was born within the EU. The idea of the Charter was initially discussed by representatives from the EU Heads of States at the Cologne European Council on the 3rd and 4th of June 1999.³² From the beginning, the precise purpose and legal status of the Charter

²⁸A comparison of the Charter with the terms of the ECHR makes this point quite readily: the Charter deals with numerous new human rights not mentioned in the ECHR. Section III D, below. The interaction of the Charter with the ECHR, furthermore, will become a point of some debate, inasmuch as Article I-7(2) of the proposed EU Constitution states that the EU “shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” Article I-7(3) then states that the ECHR forms part of the “general principles of the Union’s law.”

²⁹ See P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1 (Kluwer Law International ed., 1998)

³⁰ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia (Former Yugoslav Republic of), Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. See <http://conventions.co.int/treaty/en/searchsig.asp?NT=005&CM=&DF=>

³¹Section 1 sets out basic rights and freedoms, such as right to life (Art. 1), freedom from torture or slavery (Art. 3-4), right to liberty and security (Art. 5), right to a fair trial (Art. 6), right to respect for private and family life (Art. 8), freedom of thought, conscience, religion, expression, assembly (Art. 9-11), and the right to marry (Art. 9). Section II establishes the European Court of Human rights, as well as its functions and prerogatives (Art. 19-52). Finally, Section III contains miscellaneous provisions, such as the territorial application of the Convention (Art. 56) and individual states reservations (Art. 57).

³² See Europarl, *The Charter of Fundamental Rights of the European Union*, at http://www.europarl.eu.int/charter/default_en.htm. See also, generally, Rainer Arnold, *A Fundamental Rights Charter for the European Union* 15 TUL. EUR. & CIV. L.F. 43 (2000) (discusses the purposes and

were hotly debated. The Charter's proponents certainly viewed it (at the very least) as a restatement of existing European human rights principles.³³ Compared with the terms of the ECHR, the Charter unquestionably represents an expansion of existing principles.³⁴ The Charter, furthermore, was created in the early period of discussions surrounding the idea of a European Constitution. Thus, from the beginning, it was not clear whether the drafters of the Charter were creating a non-binding compilation of EU human rights norms or a mandatory "Bill of Rights" for a European Constitution that would reign supreme over all national constitutions.³⁵

The Cologne European Council commissioned an ad-hoc body (Drafting Convention) to draw up a draft charter.³⁶ The Drafting Convention held its constituent meeting in December 1999 and adopted a draft on 2 October 2000.³⁷ A few weeks later, the European Council in Biarritz unanimously approved the draft and forwarded it to the European Parliament and the European Commission for review.³⁸ The Parliament gave its agreement on 14 November 2000, followed by the Commission on 6 December 2000.³⁹ After agreement by the Drafting Convention on a final text for the Charter, the presidents of the European Parliament, the Council of the European Union and the European Commission proclaimed the Charter on 7 December 2000 during the Nice European Council.⁴⁰

But, despite the approval of the foregoing EU organs, no agreement could be reached in Nice regarding the precise legal status of the Charter. Instead, the legal

origins of the Charter, as well as a description of its attributes and importance to the European "Constitutional Order").

³³ See, e.g., note 2, above.

³⁴ See Section III C, below.

³⁵ See J. Liisbert, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?* (Jean Monnet Working Paper, 2001).

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ Christopher McCrudden, *The Future of the EU Charter of Fundamental Rights*, Harvard Jean Monnet Working Paper No.10/01, <http://www.jeanmonnetprogram.org/papers/01/013001.html>

status of the Charter was set for determination at the 2004 Intergovernmental Conference. At that meeting, the status of the Charter was to be considered along with such questions as the delineation of the respective powers of the EU and its member states, the role of “subsidiarity” as a legal concept within the EU, the simplification of the governing EU treaties, and the role of national parliaments within the EU structure.⁴¹ The discussion of these questions, however, has taken an important new turn. When the Intergovernmental Conference meets in 2004, it will consider – not just the Charter – but the Charter as Part II of a multi-part EU Constitution.

With the proposal to incorporate the Charter into the EU Constitution, one major question regarding the legal status of the Charter appears to have been answered. The document, with six major headlines (dignity, freedoms, equality, solidarity, citizen’s rights and justice), is to serve as a grand statement of the fundamental rights of Europeans. The Charter is not the “only” such statement, as the Constitution provides that the EU also will seek accession to the ECHR.⁴² But, if the Constitution is adopted in the form proposed by the European Convention, the Charter undoubtedly will become the centerpiece of European human rights discourse.

The decision to move the Charter to the center of the EU Constitution makes the answers to the questions stated but not resolved at the Nice Council all the more pressing. What is the role of “subsidiarity” in the emerging constitutionalized EU? What are the respective powers of the EU and its member states? And what issues are left to national parliaments? We now turn to an analysis of these questions.

II. The Principle of Subsidiarity and the Charter

⁴¹ See O.J. 2001/C 80/01, Declaration No. 23 to the Final Act of the Treaty of Nice, para. 5.

⁴² Article I-7(2), EU Constitution.

Any discussion of the respective powers of the EU and its member nations must begin with an examination of the European notion of “subsidiarity.” Beginning with the Maastricht Treaty, “Community Institutions are obliged to abide by the Principle of Subsidiarity in the application of the European Community Treaties”.⁴³ The Treaty on European Community offers a concise, if still debated, definition:

In areas which do not fall within the exclusive competence, the Community shall take action, in accordance with the Principle of Subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the community.⁴⁴

The Draft Constitution states that EU powers are governed by the “principle of subsidiarity,” and uses essentially the same terms as the Treaty on European Community to define the principle.⁴⁵

The subsidiarity principle asks a question mixing competence with need in deciding whether a policy is set at a national or supra-national level.⁴⁶ One observer has accurately called subsidiarity “a work in progress.”⁴⁷ This commentator goes on to assert that, with regard to subsidiarity, “American experience offers no direct analogs.”⁴⁸ But, while subsidiarity is unquestionably a work in progress, we are less certain that the American experience in federalism is irrelevant. A few pages from

⁴³ Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 BERKELY J. INT. L. 359, 361 (2002).

⁴⁴ See *id.* and accompanying footnote (citing EC Treaty art. 5(2) (ex art. 3b (2))).

⁴⁵ Article I-9, EU Constitution:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

⁴⁶ According to another American scholar, subsidiarity “requires that action to accomplish a legitimate government objective should in principle be taken at the lowest level of government which is capable of effectively addressing the problem.” W. Gary Vause, *The Subsidiarity Principle in European Union Law—American Federalism Compared*, 27 CASE W. RES. J. INT’L L. 61,62 (1995).

⁴⁷ Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV 1612, 1678 (2002).

⁴⁸ *Id.*

American history suggest how the future course of subsidiarity may well play out. That history, moreover, demonstrates that subsidiarity will provide weak protection for the unique constitutional traditions of EU member states.

The American Constitution was drafted precisely to define and confine the powers conferred on the national legislature and, conversely, to protect and safeguard the powers and prerogatives of the constituent state governments. Indeed, the American people were so concerned with the creation of a powerful central government that they insisted the Constitution of 1789 incorporate a Bill of Rights to do two things: protect individual liberty and safeguard state governments from federal encroachment.⁴⁹ The first mission of the Bill of rights, set out in Articles One through Eight, is well known; those articles, among other things, acknowledge such fundamental rights as free speech, freedom of religion and due process of law. It is the second mission of the Bill of Rights – the protection of the competencies of state governments from federal encroachment – that has most relevance to the European question of subsidiarity.⁵⁰

The Ninth and Tenth Amendments were designed to further many (if not most) of the same goals as the current European doctrine of “subsidiarity.” The Ninth

⁴⁹ *Compare National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that the Tenth Amendment to the United States Constitution prevented federal regulation of the essential functions of state government) with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (reversing *Usery* and concluding that only the “national political process” places limits upon the expansion of federal power).

⁵⁰ Professor Young explains the difference between American federalism and European subsidiarity this way: the “goal of subsidiarity is the definition of *different* levels of authority in state and society as well as the appropriate distribution of powers” whereas the goal of federalism is “the *necessary connection* of state and society.” Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV 1612, 1678 (2002) (emphasis in original). We are not convinced by this distinction, however. The most recurrent theme in American federalism, in our view, has not been the “necessary connection” of the state and federal governments but, rather (and as in the European model), the jealously guarded division of power between the competencies of the two governments. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress does not have the constitutional authority to regulate the possession of guns within public schools because such regulatory power is reserved to state governments). *Compare id.* (dissenting opinion of Justice Breyer) (strenuously arguing that Congress was not invading an area where states possessed peculiar competence precluding uniform national regulation).

Amendment to the Constitution states that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵¹ The Tenth Amendment, in turn, provides that all powers not delegated to the national government “are reserved to the States respectively, or to the people.”⁵² In a very real sense, these two constitutional provisions were drafted to perform the same set of functions as those set out in Articles 51⁵³ and 53⁵⁴ of the Charter, both of which address slightly different (but related) notions of subsidiarity.

Like the Ninth Amendment, which reserves rights not expressly set out in the United States Constitution to the states or to the people, Article 53 provides that “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized . . . by the Member State’s constitutions.” Similarly, just as the Tenth Amendment preserves the right of the states to act where regulatory power has not been expressly conferred on the federal Congress, Article 51 of the Charter states that it “does not establish any new power or task for the . . . Union” and is applied “with due regard for the principle of subsidiarity.”⁵⁵ But, while unquestionably adopted to preserve the same range of

⁵¹ U.S. CONST. AMEND. IX.

⁵² U.S. CONST. AMEND. X.

⁵³ Article 51 of the Charter provides: “(1) The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiary and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. (2) This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”

⁵⁴ Article 53 of the Charter provides: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

⁵⁵ Article 51, Charter. Part I of the EU Constitution also emphasizes the themes set out in Articles 51 and 53 of the Charter (contained in Part II of the Constitution). Like Articles 51 and 53 of the Charter, these provisions from Part I of the EU Constitution mirror the concerns set out in the 9th and 10th Amendments to the United States Constitution. Just as those amendments sought to ensure that the U.S. federal government would remain within the scope of its delegated powers while leaving state sovereignty otherwise unaltered, Article I-9(2) of the European Constitution provides that “[c]ompetences not conferred upon the Union in the Constitution remain with the Member States,” while Article I-9(3) provides that EU power can only be exercised under the “principle of subsidiarity.”

interests safeguarded by Articles 51 and 53 of the Charter, the Ninth and Tenth Amendments have not preserved state governments (and their constitutions) from the wholesale expansion of centralized power.

Most American legal scholars now concede that the Ninth Amendment is a virtual dead letter – an “inkblot.”⁵⁶ The fact that powers not given to the national Congress by express terms were specifically reserved by the Ninth Amendment to state legislatures or the people has not prevented the United States legislature, and United States courts, from expanding their power.⁵⁷ The sovereign protection purportedly conferred by the Tenth amendment has fared no better.

Within the United States, the “retained powers” of the states – protected by the Tenth Amendment – have (at times) essentially disappeared. This became so widely accepted that, in 1985, several Justices of the Supreme Court wrote that state governments existed at the sufferance of the national legislature and federal courts.⁵⁸ Although the U.S. Supreme Court has recently attempted to resurrect a more robust notion of “subsidiarity” in order to protect local democratic majorities within the various states,⁵⁹ these efforts have often succeeded by slim five-to-four votes on the Court⁶⁰ and have done little (considered as a whole) to erode federal dominance.⁶¹

Thus, in actual practice, a cluster of concepts quite similar to the “principle of subsidiarity” has not protected state powers from federal encroachment under the American constitution. At least one European commentator has suggested that any

⁵⁶ L. Tribe, *AMERICAN CONSTITUTIONAL LAW* (1988 2d ed.) at 774-777.

⁵⁷ See generally Gerald Gunther and Kathleen M. Sullivan, *CONSTITUTIONAL LAW* 87-258 (1997) (13th Ed.).

⁵⁸ See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (O’Connor, J., dissenting).

⁵⁹ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997).

⁶⁰ See, e.g., cases in the preceding note.

⁶¹ See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (concluding that the delineation of respective state and federal power within the United States is a question largely committed to the political discretion of the national legislature).

protection for national governments under the EU scheme may be no more robust. This commentator notes that Article 53 of the Charter is essentially identical to Article 53 of the ECHR. Nevertheless, and despite the clear pronouncement that “nothing” in the ECHR shall be invoked to “adversely affect” a “Member State’s Constitution,” Article 53 of the ECHR has not placed “any constraints on [the European Court of Human Rights’] dynamic and teleological style of interpretation.”⁶² Rather, the court “has on several occasions discovered or stipulated inherent rights” even when they seemingly conflict with national constitutions.⁶³

The European Court of Human Rights, of course, is not an EU organ and the ECHR is not (at least for now) a binding EU document.⁶⁴ Nevertheless, many of the substantive provisions of the ECHR are similar to those of the Charter, including the principle of subsidiarity. Therefore, it seems fair to assume that the European Court of Justice – operating (like the European Court of Human Rights) under a system of subsidiarity and adjudicating legal issues similar to those that have been decided under the ECHR – will expand Charter provisions in derogation of national prerogatives.

We do not mean by these remarks to suggest that the European experience with “subsidiarity” will be identical to America’s experience with the Ninth and Tenth Amendments. Nor do we mean to suggest that the tasks now facing Europe are not worth undertaking. America has learned to function fairly well with an exceptionally high level of centralized constitutional control. Accordingly, our point is quite simple: comparative constitutional history suggests that, once broad central powers

⁶² *J. Liisbert, Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law*”, Jean Monnet Working Paper (2001) at 28.

⁶³ *Id. See, e.g., Open Door Counseling v. Ireland*, 1992, A-246, paras. 78-79. In that case, the European Court of Human Rights concluded that, despite Ireland’s strong and unequivocal protection of unborn life, Ireland could not restrain dissemination of certain information about the availability of abortion services.

⁶⁴ The Draft Constitution proposes that the EU accede to the ECHR. Article I-7, EU Constitution.

are created, it is difficult to retain the vibrancy of the unique legal voices and constitutional experiences of the constituent states within a shared-power system.

The European Convention, in drafting the proposed EU Constitution, was well aware of this reality. Article I-9(3) emphasizes that the EU must exercise its competences (including enforcement of the Charter) “[u]nder the principle of subsidiarity,”⁶⁵ and incorporates a Protocol that establishes procedures to reinforce respect for the principle.⁶⁶ The Protocol requires wide consultation on all proposed legislative acts,⁶⁷ allows national parliaments to question whether proposed legislation complies with the principle of subsidiarity,⁶⁸ requires reconsideration of legislative proposals if sufficient numbers of national parliaments object,⁶⁹ and even opens the subsidiarity question to judicial review by the European Court of Justice.⁷⁰

These procedures unquestionably are designed to maintain political pressure to counter any undue expansion of EU competence. Whether Article I-9 and its accompanying Protocol will indeed prevent EU regulatory power from aggressively expanding will only be known with time. The constitutional experience of the United States, however, provides some evidence that political enforcement of subsidiarity – even when coupled with judicial review – may not provide significant protection for the diverse constitutional and legislative agendas of member states.

⁶⁵ Article I-9(3), EU Constitution.

⁶⁶ Protocol on the Application of the Principles of Subsidiarity and Proportionality, Annex II, EU Constitution.

⁶⁷ *Id.* at par. 2.

⁶⁸ *Id.* at pars. 4-6. Under paragraph 4 of the Protocol, legislative proposals must be forwarded to national parliaments with an explanation as to how the proposal complies with the requirement of subsidiarity. Under paragraph 5, national parliaments can then issue a “reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity.” Under paragraph 6, each national parliament is given two votes on the question whether a proposal exceeds EU power.

⁶⁹ *Id.* at par. 6 (requiring reconsideration of legislative proposals if “at least one third of all the votes allocated to the Member States’ national parliaments and their chambers” question a “proposal’s non-compliance with the principle of subsidiarity”).

⁷⁰ *Id.* at par. 7.

The United States Supreme Court began reviewing the legality of federal assertions of legislative power at a very early stage in U.S. history.⁷¹ For a time, federal courts policed the line between state and federal power with some rigor – “national” issues were held to be within the competence of the federal government while “local” questions were not.⁷² This distinction between “national” and “local” matters, of course, is the core idea behind the principle of subsidiarity. But maintaining this distinction over time became exceptionally difficult for federal courts.⁷³ As a result, U.S. federal courts eventually abandoned their attempt to safeguard “American subsidiarity,”⁷⁴ concluding that state governments were to be protected from federal overreaching – if at all – by the political interaction of the state and federal legislatures.⁷⁵ This political protection of state sovereign power has proven to be quite weak.⁷⁶

Thus, America’s attempt to safeguard state sovereignty from intrusion by centralized power ends essentially where the European experiment with subsidiarity now begins: political interaction between national parliaments and EU organs. To the extent that American constitutional history has any relevance, it is doubtful that political dialogue between national parliaments and EU organs will keep EU power

⁷¹ See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824) (broadly describing congressional power to regulate interstate traffic under the “commerce clause” of the U.S. constitution).

⁷² See, e.g., *Cooley v. Board of Wardens*, 53 U.S. 299 (1851) (state governments have power to regulate matters of “local” concern, while federal government has authority regarding matters of “national” concern); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (dismissing federal action challenging E.C. Knight’s acquisition of several sugar manufacturing plants on the ground that the manufacturing of sugar involves a “local” activity within state regulatory control rather than a “national” matter under federal control).

⁷³ See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (concluding that any distinction between matters of “national” and “local” concern is artificial; federal regulatory power extends even to local matters if there is a legitimate federal regulatory interest).

⁷⁴ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (federal government can regulate a farmer’s personal consumption of his own, home-grown wheat).

⁷⁵ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (holding that the “principal and basic limit” on federal power is “state [political] participation in federal government action”).

⁷⁶ See, e.g., *id.* (O’Connor, J., dissenting).

within defined competencies.⁷⁷ Indeed, experience in the United States suggests that only a fairly precise categorical delineation of decisional authority within a shared-power system can safeguard the constitutional and legislative independence of otherwise subordinate states.

Despite the failure of the Ninth and Tenth Amendments and political dialogue to protect American states from federal encroachment, there are two fairly well established categorical exceptions to the broad power of the federal government: education and family law.⁷⁸ Federal authority to regulate these two areas of local interest was not expressly granted by the U.S. Constitution and Congress has been hesitant to assert an implied federal power.⁷⁹ Exactly why these two categories of governmental competence have been left to the states is not precisely clear; perhaps they are a relic of the period when the Supreme Court rigorously protected “local” concerns from “national” intrusion.⁸⁰ But, for whatever reason, education policy and family law have been insulated (at least to a degree) from extensive federal control. They are the only major governmental arenas where the American federal government

⁷⁷ This point has been echoed by a European scholar as well. See Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 BERKELEY J. INT. L. 359, 361 (2002) (noting that the principle of subsidiarity “simply suggests that a comparative assessment of national and Community measures be taken before the Community can take action;” such an analysis, he notes, “leaves ample room for argument”).

⁷⁸ See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (Congress does not have the constitutional authority to regulate the possession of guns within public schools because such regulatory power is reserved to state governments); *Labine v. Vincent*, 401 U.S. 532 (1971), rehearing denied, 402 U.S. 990 (1971) (under the federal constitution, state legislatures – not the federal congress – have the power to make rules to establish, protect, and strengthen family life); see also Donald T. Kramer, 16A Am. Jur. 2d Constitutional Law, Section 230 (“incidents of state sovereignty”).

⁷⁹ Unlike the U.S. Constitution, the proposed EU Constitution posits a strong role for the EU in education and family law. Article 14 of the Charter obligates the EU to insure that “[e]veryone has the right to education,” including the “possibility to receive free compulsory education.” Article 14(1), (2), Charter. Article III-177, in turn, grants the EU power to “establish incentive actions” in order to “contribute to the development of quality education.” Article III-177(1), (4)(a). An EU power to provide educational “incentives” can become very broad indeed. See discussion in note 81, below. On matters of family law, the Charter obligates the EU to ensure that the “family shall enjoy legal, economic and social protection.” Article 33(1), Charter. In addition, Article III-165(3) of the EU Constitution provides that the EU may “adopt a European decision determining those aspects of family law with cross-border implications which may be adopted by the ordinary legislative procedure.”

⁸⁰ See note 72, above.

treads with some caution.⁸¹ In education and family law, the various state legislatures have retained substantial control over aspects of life that matter deeply to the American people.⁸²

If there are aspects of European life where deeply felt convictions suggest that local rather than national control is appropriate, the respective decisional competences of the Union and its member states in those areas should be set out in rather precise terms. This is hardly a novel suggestion. Indeed, certain provisions of the Charter attempt this task by insulating some rights (or at least certain aspects of those rights) from the potential for absolute centralized control. Article 14, which involves the “right to education,” is a good example.

The first two sentences of Article 14 provide a “right to education” and “the possibility to receive free compulsory education.”⁸³ These two sentences seem to assert a fairly broad role for the EU in education because, according to Article 51, these sentences “are addressed to the institutions, bodies and agencies of the Union.”⁸⁴ The last clause of Article 14, by contrast, provides that the “freedom to found educational establishments” and the “right of parents” to supervise “the education and

⁸¹ It is hard to imagine *any* area of American life that the U.S. Congress could not regulate in some manner – even if only by holding out monetary “incentives” for state compliance. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (although the 21st Amendment to the United States Constitution cedes to the states purportedly absolute power to regulate the sale and use of alcoholic drinks, Congress could require states to adopt a minimum drinking age as a prerequisite to the receipt of federal highway funds). Notably, the Draft Constitution issued by the European Convention specifically allows the EU to “establish incentive actions” to encourage achievement of EU aims in the area of education (Article III-177(4) (a)), an area of “social policy” where the Constitution declares that the EU “shall share competence with the Member States.” Article I-13(1), -(2), EU Constitution. U.S. experience demonstrates that monetary incentives from a central government usually render irrelevant all debate regarding the respective power of state and federal authorities.

⁸² A clear example is the question of same-sex marriage that is now playing out within the various states. Because state legislatures – not the federal Congress – control the contours and content of marital and family law, advocates for same-sex marriage have had to take their case to the 50 states rather than to the national Congress or federal courts.

⁸³ Article 14(1), -(2), Charter.

⁸⁴ Article 51(1), Charter.

teaching of their children” are to be exercised “in accordance with the national laws governing the exercise of such freedom and right.”⁸⁵

The language of this final clause embodies a categorical conclusion that (however broad EU power may become under the first two clauses of Article 14) some issues related to education – in particular, the establishment of schools and parental involvement in the education process – are issues particularly suited for national rather than supra-national control. Read alone, therefore, Article 14 sets out clear categories where local rather than EU control of education is appropriate. Unfortunately, other provisions from Parts I and III of the Constitution muddy the waters substantially.

Despite Article 14(3)’s assurance that national policies will govern the establishment of educational institutions, national decisions in such matters could conceivably be overtaken by EU education “incentive actions” adopted pursuant to Articles III-177(1) and (4) of the Constitution.⁸⁶ Furthermore, the right of parents to ensure that “their religious, philosophical and pedagogical convictions shall be respected” in the education of their children⁸⁷ may be inconsistent with the commitment of the EU in Article I-3(3) of the Constitution to “promote . . . protection of children’s rights.”⁸⁸ Thus, even the apparently clear reservation of national

⁸⁵ Article 51(3), Charter.

⁸⁶ See notes 79 and 81, above.

⁸⁷ Article 14(3), Charter.

⁸⁸ Article I-3(3), EU Constitution. Under the International Convention on the Rights of the Child, parents may not have the authority to ensure that their religious, philosophical and pedagogical convictions are respected in their children’s education. According to the most vigorous proponents of the Convention on the Rights of the Child (“CRC”), parents lose such authority once the state determines that a child is mature enough to make such decisions alone. See, e.g., Bruce C. Hafen and Jonathan O. Hafen, “Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child,” 37 HARV. INT’L L.J. 449 (1996) (noting that article 5 of the CRC “significantly limits its view of parental rights to those that are ‘consistent with the evolving capacities of the child,’” therefore, under article 5, the parental rights recognized by the CRC apparently extend only to giving parents a role in enforcing the rights the CRC grants to the child, without recognizing an independent parental right”). See also Article 24(1), Charter (children “may express their views freely,” and “such views shall be taken into consideration on matters which concern them in accordance with their age and maturity”).

prerogatives in Article 14 may not suffice to safeguard local control when Article 14 is read in the broader context of the entire EU Constitution.

Other Articles of the Charter likewise suggest that various levels of decision making authority have been left with the member states.⁸⁹ But, as with Article 14, the extent to which these categorical reservations of national power will actually *preserve* national discretion is debatable. In these areas as well, the implementation provisions in Parts I and III of the EU Constitution establish potentially broad EU decisional authority that may derogate from the national competences purportedly reserved by the language of the Charter.⁹⁰

⁸⁹ Various Articles in the Charter seem to recognize a level of local, rather than EU, decisional authority. The “right to marry and right to found a family” guaranteed by Article 9 is given “in accordance with the national laws governing the exercise of these rights.” But see note 79, above (setting out the broad power of the EU under other Charter and constitutional provisions to regulate aspects of family law). See also Article 10(2) (right of conscientious objection); Article 16 (freedom to conduct a business); Article 27 (workers’ right to information); Article 28 (collective bargaining); Article 30 (protection in the event of dismissal); Article 34 (social security and social assistance); Article 35 (health care); Article 36 (access to services of general economic interest).

⁹⁰ Although the “right to marry and found a family” is only guaranteed “in accordance with national laws governing the exercise of those rights” (Article 9, Charter), Article III-165(3) of the EU Constitution provides that the EU may “adopt a European decision determining those aspects of family law with cross-border implications which may be adopted by the ordinary legislative procedure.” Since virtually all aspects of family law may have cross-border implications (from what constitutes a “marriage” to what constitutes a “divorce” and everything else in between), these provisions may confer upon the EU relatively broad competence in the areas reserved for state control under Article 9 of the Charter. Article 16’s preservation of national power regarding the “freedom to conduct a business,” as well as Article 27’s proviso that “national laws and practices” shape a worker’s “right to information and consultation,” may be circumscribed similarly by numerous provisions of Part III. See, e.g., Article III-26 (EU Constitution prohibits “restrictions on freedom to provide services” by member states with regard to nationals from other member states); Article III-92 (the EU and member states may develop “a coordinated strategy for employment”); Article III-93(1) (member states, “through their employment policies, shall contribute to the achievement of the objectives . . . of the Union”); Article III-94 (the EU “shall contribute to a high level of employment by encouraging cooperation between Member States”); Article III-96 (the EU may “establish incentive measures designed to encourage cooperation between Member States . . . in the field of employment”). National discretion in the area of collective bargaining (Article 28, Charter) may be diminished by EU power to “encourage cooperation” with respect to “the right to association and collective bargaining between employers and workers.” Article III-102(g). National decisions related to a worker’s dismissal (Article 30, Charter) are subject to EU power to “complement the activities of the Member States” in “protections of workers where their employment contract is terminated.” Article III-99(1)(d). National health care measures (Article 35, Charter) may be subject to EU oversight because the Constitution cedes to the EU power to enact “a European law” that ensures “a high level of human health protection.” Article III-174(1), -(4). Even national social security decisions are not insulated from EU oversight. Although the Constitution provides that the EU may not “define the fundamental principles of [the member states] social security systems,” the EU nevertheless has the authority to “support and complement” national approaches to social security. Article III-99(1)(a), 5(a). In actual practice, it may become quite difficult to maintain a distinction between EU actions that “complement” rather than

The Charter has the potential to expand EU power significantly and at the expense of national competence. To prevent this result, the Charter was drafted (as was the EU Constitution) with subsidiarity as an overriding principle. Subsidiarity, however, has not prevented the European Court of Human Rights – in enforcing the ECHR within the Council of Europe – from intruding into areas once thought to be governed solely by national constitutions.⁹¹ In addition, American experience with concepts quite similar to subsidiarity suggests that judicial and legislative enforcement of the Charter within the EU will enlarge EU and diminish national competences.

Only clear demarcation of decisional authority, not malleable tools such as subsidiarity, is likely to preserve local authority in areas where national, rather than supra-national, control is desirable. The drafters of the Charter attempted this difficult task. But, read in the context of the EU Constitution as a whole, whether they have succeeded is questionable.

III. IMPACT OF THE CHARTER ON NATIONAL CONSTITUTIONS

As noted earlier, the Nice Council adopted the Charter, but left open questions regarding its status, the role of subsidiarity, the respective powers of the EU and member states, and the role of national parliaments. The proposed status of the Charter is now clear; it is to become Part Two of the European Constitution. We have set out our views on the possible future vigor of subsidiarity. We now turn to the other questions posed in Nice: what impact will the Charter have on national parliaments and the domestic law of member states?

We note two important points at the outset.

“regulate” national social security decisions. See also Article III-18 (authorizing the EU to enact “a European law” that assures all rights of migrating workers related to “the field of social security”).

⁹¹ See notes 62-63, above.

First, the 54 Articles of the Charter unequivocally raise vital issues relating to the distribution of government power. The “fundamental rights” set out in those Articles sometimes restrict government power, as in Article 12’s protection of freedom of expression and information. Many of the Articles, however, do not *limit* government power: instead, they impose affirmative obligations upon the government to *act*. Social and economic questions abound in the Charter. These include, among others, the right to education (Article 14), the right to social security and social assistance (Article 34), the right to health care (Article 35) and the right of access to services of general economic interest (Article 36). Because of the pervasive importance of these issues to modern life, the Charter necessarily raises the question whether national or EU government organs ultimately will decide outcomes in these areas. The level of government that has “final say” on education, social security, health care and access to services will be the level of government that becomes most important in the day-to-day lives of European citizens in whatever member state they live.⁹²

Second, although Article 51 asserts that “the provisions of the Charter are addressed to the institutions and bodies of the Union” and *not* the member states, the plain language of the Charter reveals that this is simply not accurate. At least one provision of the Charter – Article 40 – directly constrains national election policies. Article 40 provides (emphasis added):

⁹² In a very real sense, the Charter raises fundamental questions regarding the ordering of representative democracy within Europe. Should the citizens of each member state retain decisional authority on health care, education and social security questions or are such questions better resolved at a supra-national level? National decision making may allow citizens more political control over matters vitally important to their lives, but it may produce inefficiencies and inconsistencies between protections afforded in one nation and another. Supra-national decision making may be more efficient and reduce inconsistent results, but it also dramatically reduces the decisional authority of individual citizens. The answers to these questions are hidden within the intricacies of the 54 Articles of the Charter.

Every citizen of the Union has the *right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.*

Although the above alteration of national electoral policy has been a feature of EU governance for some time, this language nevertheless demonstrates that the Charter simply is *not* “addressed” *only* to EU organs. Unless the italicized portion of Article 40 is addressed to – and constrains the electoral policies of – EU member states, the article is nonsensical.

Moreover, other provisions of the Charter also seem somewhat out of place unless they are directed at something *other* than “the institutions, bodies and agencies of the Union.”⁹³ Has the EU ever married anyone? If (as we presume) it hasn’t, why does Article 9 commit the EU to “protect the right to marry and found a family”?⁹⁴ Similar questions can be raised with regard to Article 14’s right to education, Article 34’s right to social security and Article 35’s right to health care. To our knowledge, the EU does not provide educational services, social security benefits or health care. Is the Charter’s commitment to protect and preserve such “rights,” then, even comprehensible if it is directed *only* to a level of government that does not provide such benefits?

Thus, any discussion whether the Charter will expand EU power and erode national discretion must begin with the realizations that (1) the distribution of government power lies at the core of the Charter and (2) although the Charter purports to address only the EU, its provisions make very little sense unless they are directed to both national and EU levels of government. On the face of things, the Charter does *something* to the respective powers of the EU and its member states. The real question is, how *much* does it do?

⁹³ Article 51(1), Charter.

⁹⁴ Article 9, Charter.

We divide our discussion into several parts. First, we examine further how the Charter – despite language which expressly limits it to the actions of the EU⁹⁵ – may be construed to govern directly the activities of member states. Next, we explore how the Charter will dramatically expand the power of the European Court of Justice. We then examine the Charter’s new – and expansive – listing of “fundamental rights.” Finally, we analyze potential tensions between the Charter and selected European constitutions in such areas as expression, association, equality, discrimination, social security and health.

A. Possible Impact of the Charter on Member States

The Preamble of the Charter asserts a significant role for the document. The Preamble proclaims that the Charter:

[r]eaffirms . . . rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

As one commentator has aptly noted, “If [this] does not qualify as a common law of Europe, what then would?”⁹⁶ The Charter, as a “common law of Europe,” could significantly impact the domestic law of EU member states.

When it was drafted, the Bill of Rights appended to the American constitution did not apply to the actions of state governments. The First Amendment, for example, provided that “Congress” (meaning, the federal congress) “shall make no law”

⁹⁵ Article 51(1), Charter.

⁹⁶ J. Wouters, “The EU Charter of Fundamental Rights: Some Reflections on its External Dimension,” Institute for International Law, Working Paper No. 3, May 2001 at 3.

restricting freedom of speech.⁹⁷ In the early 1900's, however, the U.S. Supreme Court began applying various provisions of the Bill of Rights to the actions of state governments despite such language. The theory for expanding the reach of the Bill of Rights was straightforward: certain provisions were so "fundamental" that refusal to enforce them against the states would violate "principles of justice" that were "rooted in the traditions and conscience of [the American] people."⁹⁸

The Charter, like the Bill of Rights in the United States, does not apply expressly to the activities of its constituent member states.⁹⁹ Nevertheless, according to its preamble, the terms of the Charter are purportedly drawn from traditions common to member states. To the extent that this view is widely and deeply shared by scholars, legislators, lawyers and jurists within the EU, the provisions of the Charter quickly may come to be seen as "fundamental" to a "European scheme of justice."¹⁰⁰ Once such an opinion is established, any refusal to apply the Charter to member state action could be considered retrogressive and anachronistic.

The possibility that the Charter might be invoked against member states, therefore, cannot be dismissed.¹⁰¹ The Charter stands at the center of the EU Constitution. The themes of the Charter, moreover, recur continually throughout the draft Constitution.

⁹⁷ U.S. CONST., AMEND. I.

⁹⁸ See, e.g., *Twining v. New Jersey*, 211 U.S. 78 (1908) (provisions of the Bill of Rights that involve "fundamental fairness" may be applicable to state governments); *Palko v. Connecticut*, 302 U.S. 319 (1937) (a provisions of the Bill of Rights that constitutes "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" is applicable to state governments) (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

⁹⁹ Article 51(1), Charter.

¹⁰⁰ Cf. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (U.S. Supreme Court declares that all provisions of the Bill of Rights that are "fundamental to the American scheme of justice" are binding on state governments).

¹⁰¹ Some may protest that the express limitation of the Charter to EU action ends any debate regarding the Charter's possible impact on member states. Such a view, we believe, not only ignores the overlapping and integrated nature of Parts I, II and III of the proposed EU Constitution, it also underestimates the vigor with which human rights advocacy groups will press the outer boundaries of the Charter – both as to its substantive provisions and the governmental entities it superintends.

Indeed, a great many of the Charter’s principles are repeated (sometimes almost verbatim) in numerous places throughout the implementation provisions of the proposed Constitution. These include a provision that authorizes “a European law” dealing with the subject matter of Article 21 of the Charter, *e.g.*, “discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹⁰² There are similar reassertions of Charter principles (and shared EU constitutional competence) regarding such important matters as human dignity,¹⁰³ liberty,¹⁰⁴ protection of personal data,¹⁰⁵ education,¹⁰⁶ employment,¹⁰⁷ rights of establishment and provision of services,¹⁰⁸ asylum,¹⁰⁹ equality,¹¹⁰ workers’ rights,¹¹¹

¹⁰² Article III-5, EU Constitution. *Compare* Article 21, Charter (dealing with non-discrimination on multiple grounds) *with* Article I-3, EU Constitution (EU “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children’s rights”) *and* Article I-4 (“In any field of application of this Constitution, . . . any discrimination on grounds of nationality shall be prohibited”) *and* Article III-1a (“In defining and implementing the policies and activities referred to in this Part of the Constitution, the Union shall aim to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation”) *and* Article III-5 (the EU Council “may establish the measures needed to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation”).

¹⁰³ *Compare* Article 1, Charter (human dignity) *with* Article I-2, EU Constitution (the EU is “founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights”).

¹⁰⁴ *Compare* Article 6, Charter (right to liberty and security) *with* Article I-2, EU Constitution (the EU is “founded on the values of respect for . . . liberty”) *and* Article I-3, EU Constitution (the EU “shall offer its citizens an area of freedom, security and justice”).

¹⁰⁵ *Compare* Article 8, Charter (protection of personal data) *with* Article I-50, EU Constitution (“everyone has the right to the protection of personal data” under a “European law”).

¹⁰⁶ *Compare* Article 14 (declaring the right to an education) *with* Articles III-177(1), III-177(4) (a), EU Constitution (the EU “shall contribute to the development of quality education” by encouraging member state efforts and, “if necessary, by supporting and supplementing their action;” such EU action can include “a European law” to “establish incentive actions”).

¹⁰⁷ *Compare* Article 15, Charter (freedom to choose an occupation and right to engage in work) *with* Article III-15, EU Constitution (workers “shall have the right,” subject to public policy exceptions, “to accept offers of employment actually made”).

¹⁰⁸ *Compare* Article 15(2), Charter (EU citizens have the freedom “to exercise the right of establishment and to provide services in any Member State”) *with* Article III-19, EU Constitution (“restriction on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited”) *and* Article III-26, EU Constitution (“restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended”).

¹⁰⁹ *Compare* Article 18, Charter (right of asylum) *with* Article III-162, EU Constitution (the EU “shall develop a common policy of asylum”).

¹¹⁰ *Compare* Article 20 (“everyone is equal before the law”) *and* Article 23, Charter (equality between men and women) *with* Article I-2, EU Constitution (the EU is founded on “respect for . . . equality”) *and* Article III-1, EU constitution (“the Union shall aim to eliminate inequalities, and to promote equality, between men and women”).

social policy,¹¹² health,¹¹³ the environment,¹¹⁴ consumer protection,¹¹⁵ voting,¹¹⁶ movement¹¹⁷ and justice.¹¹⁸

In addition, Articles I-3(2)¹¹⁹ and I-8(2)¹²⁰ of the EU Constitution, when combined with broad implementation competences from Part III, such as Articles III-

¹¹¹ Compare Articles 27 through 31, Charter (dealing with such issues as workers' rights to information, collective bargaining, access to placement services and protection from unjustified dismissal) with Articles III-15 through III-18, EU Constitution (establishing rights of workers to free movement), Article III-96, EU Constitution (authorizing "a European law" to "establish incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment") and Article III-99(1)(d), EU Constitution (providing that the EU "shall support and complement the activities of the Member States" in "protection of workers where their employment contract is terminated").

¹¹² Compare Article 34, Charter (providing for national decision of social security and social services issues) with Article III-99(1)(c) (providing that the EU "shall support and complement the activities of the Member States" in the area of "social security") and Article III-18, EU Constitution (authorizing the EU to "establish such measures as are necessary to bring about freedom of movement for workers by introducing a system to secure for migrant workers and their dependents" aggregation of benefits for services provided in several countries and "payment of benefits to persons resident in the territories of Member States").

¹¹³ Compare Article 35, Charter (declaring the right to a "high level of human health protection") with Article III-174(1), (4), EU Constitution (authorizing "a European law" to ensure "a high level of human health protection").

¹¹⁴ Compare Article 37, Charter (declaring the right to a "high level" of environmental protection) with Article III-2, EU Constitution ("Environmental protection requirements must be integrated into the definition and implementation of the Union policies") and Article III-124(1) (providing that EU policy "shall contribute" to "preserving, protecting and improving the quality of the environment").

¹¹⁵ Compare Article 38, Charter (EU policies "shall ensure a high level of consumer protection") with Article III-2a, EU Constitution ("Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities") and Article III-127(1) (committing the EU to "ensure a high level of consumer protection").

¹¹⁶ Compare Article 40, Charter (right to vote and stand as candidates in municipal elections) with Article I-8(2), EU Constitution (citizens of the EU "shall have the right to vote and to stand as candidates . . . in municipal elections in their Member State of residence, under the same conditions as nationals of that State") and Article III-7, EU Constitution (a European law "shall determine the detailed arrangements" for exercising the right to vote in Article I-8).

¹¹⁷ Compare Article 45, Charter (freedom of movement and residence) with Article I-8(2), EU Constitution (citizens of the EU "shall have the right to move and reside freely within the territory of the Member States") and Article III-6, EU Constitution ("If action by the Union should prove necessary to attain the objective, referred to in Article I-8, of the right of every Union citizen to move and reside freely and the Constitution has not provided the necessary powers, the European law . . . may facilitate the exercise of that right") and Article III-15(1) ("workers shall have the right to move freely within the Union").

¹¹⁸ Compare Articles 47-50 (dealing with the rights to a fair trial, presumption of innocence, proportionality of legal punishments, and right not to be punished twice for the same criminal offense) with Article III-153, EU Constitution (providing that the EU "shall constitute an area of freedom, security and justice with respect for fundamental rights") and Articles III-165, III-166, EU Constitution (authorizing EU to establish the necessary standards to promote EU-wide recognition of civil and criminal judgments, including such issues as "the rights of individuals in criminal procedure").

¹¹⁹ Article I-1(3), EU Constitution ("the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted").

¹²⁰ Article I-8(2), EU Constitution (that "citizens of the Union shall enjoy the rights . . . provided for in this Constitution," including "the right to move and reside freely within the territory of the Member States").

153¹²¹ and Article III-6¹²² of the EU Constitution, provide an arguable basis for Union competence to enforce *any* rights provision of the Charter not already mentioned. It certainly does not take a terribly clever attorney, or an overly zealous judge, to conclude that any principle taken from “The Charter of Fundamental Rights of the Union” not already set out in notes 102-118 is enforceable against both EU and national governments under constitutional provisions in Part I that guarantee EU citizens “an area of freedom, security and justice without internal borders”¹²³ and “the right to move freely within the territory of the Member States”¹²⁴ that are fully implemented by the provisions of Part III (which, among other things, confer upon the EU the power to promote “respect for fundamental rights” and “the right of every Union citizen to move and reside freely”).¹²⁵

With such wide-ranging repetition of the Charter’s themes throughout the implementation provisions of Parts I and III of the EU Constitution, the Charter is likely to have a significant impact on the prerogatives of member states for at least two reasons:

First, courts, administrative agencies and other decision makers (both within the EU and member states) will find the “pull” of the Charter almost irresistible. To the extent that its preamble is correct, the Charter asserts principles common (and purportedly fundamental) to a European scheme of justice.¹²⁶ This conclusion is

¹²¹ Article III-153(1), EU Constitution (“Union shall constitute an area of freedom security and justice with respect for fundamental rights, taking into the account the different legal traditions and systems of the Member States”). This implementation competence, of course, incorporates a subsidiarity provision. While subsidiarity could limit the implementation competence of the EU under this provision, Section II above explains how subsidiarity may moderate EU power only nominally.

¹²² Article III-6(1), EU Constitution (“if action by the Union should prove necessary to attain the objective, referred to in Article I-8, of the right of every Union citizen to move and reside freely and the Constitution has not provided the necessary powers, the European law or framework law may facilitate the exercise of that right”)

¹²³ Article I-3(2), EU Constitution.

¹²⁴ Article I-8(2), EU Constitution.

¹²⁵ Articles III-6(1), III-153(1), EU Constitution.

¹²⁶ Preamble, Charter (Charter is “based on common values”).

strongly reinforced by the repeated restatements, reaffirmations and emphasis upon Charter principles throughout the implementation provisions of Parts I and III of the EU Constitution. The American constitutional system ultimately concluded that its principles of fundamental justice applied equally to the local and central governments. To the extent that the Charter is indeed a distillation of the “common values” of Europe,¹²⁷ we seriously question whether EU organs can resist applying it to the activities of EU member states.

Second, and even if any analogy to American constitutional experience is inapt, the “shared competence” system established by the proposed EU Constitution will inevitably extend the principles of the Charter to the activities of member states as a result of ordinary EU political processes. Under the proposed Constitution, the EU has “exclusive competence” (to the exclusion of the member states) in a limited number of economic and environmental areas.¹²⁸ The EU, however, has “shared competence” plus the ability to “cooperatively coordinate” policies across an exceptionally broad range -- including (among other things) the internal markets of member states; freedom, security and justice; energy; social policy; economic, social and territorial cohesion; and employment policies.¹²⁹

Indeed, the EU Constitution maps out a large universe of “shared competence.” Unless an area of government concern lies within the EU’s “exclusive” or “cooperative” competences (under Articles I-12 and I-16), that area (to the extent it is discussed within the 118 pages of Part III of the Constitution) is *deemed* to be a

¹²⁷ *Id.*

¹²⁸ Under Article I-12, the EU has exclusive competence in monetary policy (for those states that have adopted the Euro), common commercial policy, customs union, conservation of marine biological resources, and negotiation of certain international agreements.

¹²⁹ Article I-13, EU Constitution (establishing shared competence in all of the noted areas except for employment policies), Article I-14, EU Constitution (providing for the “coordination of economic and employment policies”).

shared competence.¹³⁰ And, once the EU has asserted a “shared competence,” national governments decidedly take second place.

Under Article I-11(2), when competences are “shared,” member states can act only if the EU has not acted or has decided to abandon its actions. Furthermore, other clauses of the EU Constitution grant the central government the power to use whatever means it deems appropriate to further EU policies in areas of “shared competence.”¹³¹ These clauses look very much like the “necessary and proper clause” of the U.S. Constitution,¹³² which has been interpreted so broadly that federal power is essentially unfettered if it can be deemed (under any conceivable rationale) to be reasonably related to the achievement of a government purpose.¹³³ The broad universe of shared competence, coupled with clauses that allow the EU choice of the means to further its objectives in those areas, will assure (at least over time) extensive central government enforcement of the principles set out in the Charter.¹³⁴

The net effect of this constitutional network could be extensive enforcement of Charter principles in the operation of the political systems of member states. A comparison with U.S. history may again be appropriate. Under the express terms of

¹³⁰ Article I-13(1) (“The Union shall share competence with the Member States where the Constitution confers on it a competence which does not related to the areas referred to in Articles I-12 and I-16”).

¹³¹ See, e.g., Article I-3(5) (the EU’s “objectives shall be pursued by appropriate means”); Article I-9(4) (the scope and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution”). These efforts can include either “a European law,” a “framework statute,” incentive programs, or coordination efforts. See 102-118, above.

¹³² U.S. CONST., Article I, Section 8 (granting Congress authority to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”).

¹³³ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹³⁴ Article I-24(4) of the EU Constitution does impose one large hurdle in front of coordinated EU exercise of the competences conferred by the Constitution. That article mandates that European laws and framework laws may be adopted only by the unanimous action of the European Council. Since the European Council will consist of the Heads of State of the member nations (Article I-20, EU Constitution), the unanimity provision essentially gives each state a veto regarding any proposal to expand an EU regulatory scheme. A “veto” scheme could either result in inability of the Council to act (as happened under the veto scheme of the UN Security Council during the Cold War period), or produce such collective pressure for “action” that individual nations may become politically unable to disagree with majority outcomes. The actual operation of the provision is unknowable at the present time. However, for purposes of analyzing the EU Constitution’s allocation of power between the EU and its member states, one has to assume (as we do here) that Council action is at least possible with regard to any of the competences conferred by the EU Constitution.

the 21st Amendment to the United States Constitution, state governments purportedly have exclusive control over the importation, sale and use of alcoholic liquors.¹³⁵ But, despite this ostensibly exclusive power, the United States Congress nevertheless can set a uniform national drinking age by stipulating that – if a state wants federal highway funding – that state must comply with Congress’ alcohol policy.¹³⁶

The European Convention foresaw that incorporation of the Charter into the EU Constitution could be construed as re-ordering EU and member state authority. They accordingly re-emphasized the subsidiarity principle discussed in Section II, above, by adding new clauses and paragraphs to Articles 51 and 52 of the Charter.

Article 51 was amended to stress deference to national norms. In addition to asserting that the Charter does not “establish any new power or task” for the EU, Article 51 now adds that the Charter “does not extend the scope of application of Union law beyond the powers of the Union.”¹³⁷ New subparagraph 5 of Article 52 states that the “principles” set out in the Charter may be “judicially cognisable” in only limited circumstances.¹³⁸ Two other subparagraphs appended to Article 52, moreover, specify that the Charter “shall be interpreted in harmony” with the constitutional traditions of member states,¹³⁹ with “full account” taken of all “national laws and practices” noted in the Charter.¹⁴⁰

Given all possible emphasis, the provisions of new Articles 51-53 may reduce the future impact of the Charter. The Charter (if taken at its word) does not revise the

¹³⁵ The 21st Amendment provides, in pertinent part, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST., AMEND. XXI.

¹³⁶ *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹³⁷ Article II-51(2), Charter (as incorporated into Draft EU Constitution). The first clause of Article 51 was similarly revised to reflect that, in applying EU law, member states must recognize the powers of the EU “as conferred on it in the other Parts of the Constitution.” Article II-51(1), Charter (as incorporated into Draft EU Constitution).

¹³⁸ Article II-52(5), Charter (as incorporated into Draft EU Constitution).

¹³⁹ Article II-52(4), Charter (as incorporated into Draft EU Constitution)..

¹⁴⁰ Article II-52(6), Charter (as incorporated into Draft EU Constitution).

human rights stance of the EU because it does not extend EU law and creates no new powers or tasks.¹⁴¹ The Charter, in any event, is to be interpreted in harmony with the constitutional human rights laws of member states.¹⁴² Thus, the Charter arguably has little (if any) possible impact upon the domestic policies of member states.

Indeed, pushed to the limit, these Articles (at least as set out in the Final Draft of the Constitution) could reduce the Charter almost to the level of human rights “guidance.” Under one possible reading of the newly revised Article 52, the human rights stated in the Charter are not generally enforceable by the European Court of Justice. Rather, the principles of the Charter are to be “implemented by legislative and executive acts” of the EU and “Member States when they are implementing Union law,” but are “judicially cognisable” *only* when the European Court of Justice rules on the legality of EU and national legislative and executive actions.¹⁴³ If this is correct, the Charter stands as an admonition to EU and national legislators, who may be held accountable by the European Court of Justice if they depart from the Charter’s principles. The principles themselves, however, are not subject to wide-ranging judicial review in the first instance.¹⁴⁴

¹⁴¹ Article II-51(2), Charter (as incorporated into Draft EU Constitution).

¹⁴² Article II-52(4), Charter (as incorporated into Draft EU Constitution).

¹⁴³ Article II-52(5) Charter (as incorporated into Draft EU Constitution). This new addition to Article 52 of the Charter provides in full:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

¹⁴⁴ If, as we suspect, the new additions to Article 52 were prompted by the concerns of the European Convention over judicial enforcement of the broad terms of the Charter, revised Article 52 may not be equal to the task imposed upon it. Although paragraph 5 of Article 52 will delay judicial evaluation of Charter principles until after legislative or executive action, it will not avoid judicial tinkering with the economic and social policies of the EU. For example, whatever educational programs the EU and member states may establish under Article 14(1) of the Charter (“everyone has the right to education”) and Articles I-16(2) and III-177 of the EU Constitution (the EU may take “coordinating or complementary action” with regard to “education;” the EU “shall contribute to the development of quality education . . . if necessary, by supporting and supplementing” member state action), those programs may still be open for subsequent alteration by the European Court of Justice on the grounds that more, less or “something different” could have been done to serve better the “right to education.”

The above reading of the Charter is possible but we believe unlikely. For one thing, the additions to Articles 51 and 52 essentially amount to saying, “We really, really, **really** mean it when we say the Charter does not expand EU powers or intrude upon national constitutions, laws and practices.” Nothing new is added except exclamation points. And, while exclamation points are important, they may not deter EU organs (in particular, the European Court of Justice) from concluding that the “common values” of Europe set out in the Charter¹⁴⁵ are applicable throughout the EU legal system, including the legal systems of member states.

This is particularly true when, in light of the Charter considered as a whole, it is difficult to give Articles 51 and 53 their plain meaning. As noted above,¹⁴⁶ despite Article 51’s assertion that the Charter will not affect member states because it is “addressed to the institutions, bodies and agencies of the Union,” the sections of the Charter which announce rights in areas of primary state concern – including family law,¹⁴⁷ education,¹⁴⁸ social security¹⁴⁹ and health care¹⁵⁰ – make very little sense unless they are construed as having *some* impact on the legal norms of member states.

Furthermore, paragraph 2 of Article 52 of the Charter provides that “rights recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.”¹⁵¹ Notes 102-118 demonstrates that “provision” indeed has been made for wide enforcement of numerous Charter rights. And, there are good arguments to support full EU implementation of *any* right set out in the Charter under the EU Constitution’s expansive provisions establishing “an area of freedom, security

¹⁴⁵ Charter, preamble.

¹⁴⁶ See text immediately following note 92, above.

¹⁴⁷ Articles 7, 9, 24, 33, Charter.

¹⁴⁸ Article 14, Charter.

¹⁴⁹ Article 34, Charter.

¹⁵⁰ Article 35, Charter.

¹⁵¹ Article II-52(2), Charter (as incorporated into Draft EU Constitution).

and justice without internal borders”¹⁵² where a right to “move and reside freely” reigns supreme.¹⁵³

Finally, the exceptionally deferential reading of the Charter that is possible by emphasizing the subsidiarity language of Articles 51, 52 and 53 (particularly as revised by the European Convention) will not satisfy the Charter’s many proponents. After all, they viewed the Charter’s adoption as a milestone in the development and enforcement of European human rights.¹⁵⁴ A construction of the Charter that renders it subordinate to the law of member states is also unlikely to be supported by European scholars who question whether deference to domestic law in developing and enforcing European human rights is inappropriate.¹⁵⁵

Thus, the precise impact of the Charter upon the respective powers of the EU and its member states cannot be predicted from the language of Articles 51, 52 and 53. While the subsidiarity provisions of the Charter (as incorporated into the EU Constitution) stress that EU power is not enlarged and local power is not diminished, the concept of subsidiarity itself remains essentially unchanged. As set out in Section II, above, subsidiarity may not prevent enlargement of EU and contraction in member state power. Furthermore, there are substantial reasons to believe that the Charter’s principles will become widely applicable throughout all governmental instrumentalities of Europe, either because those principles will be seen as

¹⁵² Articles II-3, III-6(1), EU Constitution.

¹⁵³ Articles II-8, III-6(1), EU Constitution.

¹⁵⁴ See, e.g., note 2, above. In a communication published in October 2000, the European Commission opined that “it is unlikely that the expectations aroused in the public opinion by the decision to prepare the Charter could be satisfied by mere proclamation by the Community institutions without the incorporation of the Charter in the treaties.” Communication from the Commission on the Legal nature of the Charter of Fundamental Rights of the European Union, COM 644 final, 11.10.2000. Similarly, in 1999, the German Presidency of the EU declared that “European decisions must be meaningful to Europe’s citizens . . . Germany therefore strongly supports the idea of a Charter of Human Rights which would have pride of place among Europe’s treaties.” Europe’s Path into the 21st Century, Part 1, “Creating a people’s Europe – making it part of their daily lives”, at <http://www.bundesregierung.de/>

¹⁵⁵ See, e.g., J. Liisbert, “Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law”, Jean Monnet Working Paper (2001).

representing the “common values” of Europe¹⁵⁶ or because they will be legislatively and administratively enforced by means of the interconnecting web of law set out in Parts I, II and III of the EU Constitution. Therefore, there is a real possibility that the Charter will play a much broader role in the definition of EU powers – and in the evolution of the sovereign powers of EU member states – than a first reading of Articles 51, 52 and 53 of the Charter may suggest.

B. The Charter and Judicial Power

The influence of the Charter is likely to be most contentious in highly charged (and fairly debatable) ethical arenas. While there is widespread consensus regarding many core human rights, there remain substantial disputes regarding the meaning of such important Charter concepts as “human dignity.”¹⁵⁷ The unquestionably broad concept of “human dignity” suggests answers to a range of debatable questions. These include, but are not limited to: When does human life begin? When can it be ethically ended? What constitutes a “marriage”? Does advertising which exploits various aspects of human sexuality violate the human dignity of women (or men)? As a result, various conceptions of “human dignity” will provide answers to questions ranging from the propriety of research on embryonic cells to the permissible range of activities by electronic and print media and the fiscal impact of social security measures designed to support and maintain the family.

The Charter may take the power to answer such questions away from national constitutions and parliaments and place it in the hands of the European Court of Justice. This possible consolidation of power is one of the most serious issues raised by adoption of the Charter as part of the EU Constitution. The matter should not be

¹⁵⁶ Charter, preamble.

¹⁵⁷ Article 1, Charter.

dismissed (as some commentators have done) simply by asserting that the Charter does not address moral and ethical questions.¹⁵⁸

Take, for example, the question of marriage. Article III-1a commits the EU to “combat discrimination based on . . . sexual orientation.”¹⁵⁹ Article 9 of the Charter, in turn, commits the EU to “guarantee the right to marry and the right to found a family in accordance with the national laws governing the exercise of these rights.” Articles III-5(1) and 165(3), finally, authorize a European law “to combat discrimination based on . . . sexual orientation” and both a European law and/or a European decision addressing “those aspects of family law with cross-border implications.”¹⁶⁰

Suppose, then, that Nation A adopts legislation recognizing same-sex marriage and conferring all of Nation A’s spousal social security benefits upon the couple. If a same-sex couple married in Nation A subsequently moves to Nation B, which under its constitution neither recognizes same-sex marriage nor confers social security benefits on such spouses,¹⁶¹ doesn’t Article 9 of the Charter, as implemented by Articles III-5(1) and III-165(3), authorize the European Court of Justice to issue a decision commanding Nation B to recognize the marriage of (and perhaps provide social security benefits to) the couple? We think the answer is rather clearly “yes.”

¹⁵⁸ See, e.g., E. Regan, “The Charter of Fundamental Rights,” *The Institute of European Affairs* (2002) at 11-12 (arguing that the Charter is irrelevant to the abortion debate because Ireland is protected by the Maastricht Treaty and its protocols and, in any event, the “right to life” guarantee of Article 2 cannot “be interpreted as conferring a right to abortion”). Mr. Regan may or may not be right about the protections afforded by the Treaty of Maastricht, but the Charter is set to become part of the EU Constitution – which will supersede that Maastricht Treaty and its protocols. Furthermore, the right to abortion will be found (if it is found) in Articles 1 and 3 of the Charter, not Article 2.

¹⁵⁹ See also Article III-5 (authorizing the EU to adopt a “European law” to “combat discrimination based on . . . sexual orientation”).

¹⁶⁰ See also Article III-18, EU Constitution (authorizing the EU to “establish such measures as are necessary to bring about freedom of movement for workers by introducing a system to secure for migrant workers and their dependents” aggregation of benefits for services provided in several countries and “payment of benefits to persons resident in the territories of Member States”).

¹⁶¹ The Spanish Constitution provides that “[m]an and woman have the right to contract matrimony with full legal equality.” CONSTITUTION OF SPAIN, Article 32. The Spanish Constitution also provides constitutional assurances of “social, economic, and legal protection” for “the family” that might not extend to a same-sex couple. *Id.* at Article 39.

If we are right, Article 9 of the Charter – which according to Article 53 cannot “be interpreted as restricting or adversely affecting” the “human rights” recognized by “the Member States’ constitutions” – has played a significant role in altering the human rights regime in Nation B. Of course, whether this alteration of Nation B’s human rights scheme “adversely affects” or “vastly improves” the human rights regime of Nation B is fairly debatable. But, the very fact that Article 9 may play a role in revising a nation’s debatable policy position demonstrates that the Article *can* have a substantial impact upon the constitutional and legal policies of member states.¹⁶²

The role of the Charter in revising national legal and constitutional norms becomes even greater if – as we argue, above – its various provisions come to be recognized as fundamental to a European scheme of justice and, therefore, applicable not only to EU action but to the action of member states. Should this occur, the probable impact of the Charter upon the governmental competences of member states will be dramatic indeed. We give two rather obvious examples.

Article 1 of the Charter, states that “[h]uman dignity is inviolable. It must be respected and protected.” Article 3, in turn, provides protection for “physical and mental integrity.” Although not necessarily apparent upon the face of either Article, these provisions provide substantial support for litigants in the EU who may wish to establish judicially created rights to abortion on demand and assisted suicide throughout the EU. If the Charter becomes directly applicable to EU member states, the European Court of Justice rather than national parliaments will decide these (and many other) questions.

¹⁶² Some nations, moreover, might feel quite strongly about this (and other) issues. Article 41, para. 3.1 of the Constitution of Ireland provides:

The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

In the United States, debates regarding the beginning and ending of life have always turned upon arguments grounded in human dignity and physical and mental integrity. Litigants on both sides of the abortion question have debated the respective dignity rights of women and unborn children and have quarreled over whether denial of abortion impermissibly impairs a woman's right to physical and mental integrity. Similarly, proponents and opponents of euthanasia have argued the indignity of a life in severe pain versus the dignity of life as an absolute value.

The precise meaning of "human dignity" and "bodily integrity" in these (and other) contests is debated at length in the daily and academic press¹⁶³ and in judicial decisions.¹⁶⁴ Nevertheless, whatever one's views – whether in favor of or opposed to abortion, in favor of or opposed to euthanasia – any answers ultimately turn upon competing, non-provable and often irreconcilable views regarding the "concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁶⁵ Until now, each nation in Europe was free to decide the outcome of such divisive

¹⁶³ The June 26 edition of *European Voice*, for example, contained two news stories reporting on competing notions of "human dignity" within the EU. An editorial discussed a purportedly controversial EU directive designed to eradicate "sexist practices" in advertising or TV programs in order "to respect human dignity." Editorial, "Pres on with discrimination law . . . regardless of press," *European Voice* at 9 (26 June-2 July edition). TV programmers and advertisers, of course, assert that their work does not intrude upon human dignity and that, indeed, the proposed directive would intrude upon their human rights. *Id.* The same edition of the paper contained another story discussing EU member state disagreement regarding embryo research. Germany, Ireland, Austria and Poland ban production of embryonic stem cells because, under human dignity law in these countries, "an embryo is defined as a living organism that therefore cannot be used in research." "German 'no' to embryo plans," *European Voice* at 23 (26 June-2 July edition). The paper notes that the United Kingdom, by contrast, supports the research.

The viewpoints of academicians are equally divided on the reach of human dignity. Abortion advocates in the United States have long argued that abortion is essential to protect human dignity because, without abortion, a woman is essentially subjected to "forced pregnancy," which is purportedly a form of involuntary servitude. See, e.g., R. Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 *NEW YORK UNIVERSITY REVIEW OF LAW AND SOCIAL CHANGE* 15, 40 (1991); Andrew Koppelman, *Forced Labor; A Thirteenth Amendment Defense of Abortion*, 84 *NORTHWESTERN UNIVERSITY LAW REVIEW* 484 (1990). Needless to say, opposing academicians state precisely opposing views of human dignity. See, e.g., [insert citations].

¹⁶⁴ See, e.g., the various plurality, concurring and dissenting opinions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (affirming and reversing parts of the seminal U.S. abortion case, *Roe v. Wade*, in five separate opinions).

¹⁶⁵ *Id.* (plurality opinion of O'Connor, J.),

controversies in the way it deemed best, whether by judicial decree, administrative decision or legislative action. After the Charter, diverse social action groups, with their staffs of lawyers and plaintiffs, will spring to the fore to seek judicial resolution of these and many more social questions.¹⁶⁶

Accordingly, as the EU moves forward with inclusion of the Charter in the European Constitution, member states must determine the extent to which they are willing to hand difficult and contentious social issues over to the European Court of Justice for ultimate resolution. The broad language of the Charter is beautiful and edifying. But the Charter is not a poem praising human dignity. Rather, the Charter is set to become part of a binding Constitution establishing the uniform, fundamental rights of citizens throughout the EU. The Charter presents in stark terms whether any and all contests involving competing notions of “human dignity” are to be resolved by the EU judiciary or whether member states will have the continued right to determine the content of some “fundamental rights” on their own.

C. The Charter’s Expansive New List of Fundamental Rights

The Charter takes great pains to assert that it does not alter the status quo within the EU. The Preamble to the Charter asserts that the document does nothing more than enunciate rights “as they result from” existing treaties, conventions and European constitutions.¹⁶⁷ Articles 51 and 53, as discussed above, assert that no changes in EU or member state laws are contemplated by the Charter.¹⁶⁸ The accuracy of these statements is questionable.

¹⁶⁶ These questions could conceivably include questions regarding levels of social security entitlements. *See, e.g.*, E. Regan, “The Charter of Fundamental Rights,” *The Institute of European Affairs*, at 9 (2002) (noting that the Charter includes social and economic rights that generally have not been considered justiciable).

¹⁶⁷ Charter at Preamble.

¹⁶⁸ J. Bering Liisbert, “Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?,” *Jean Monnet Working Paper 4/01* (2001). This writer asserts that Article 53 was included as “a politically useful inkblot meant to serve as an assurance to Member States, and eventually the electorate, that the Charter does not replace national constitutions.” *Id.* at 53. The same

Expansion of in the areas of EU concern is evidenced in the Charter itself. Three Charts are attached to this study.¹⁶⁹ The third of those charts, “Expansion of European Human Rights Regulation Over Time,” sets out – on the left-hand column – most of the human rights domains regulated under the Charter and the ECHR and its various protocols (minus administrative and criminal procedure issues that are broader than the scope of this paper, but subject to many of the same effects). The Chart demonstrates, somewhat dramatically, the broad new areas of human rights concern assumed by the EU with the adoption of the Charter.¹⁷⁰

Prior to the Charter, the ECHR and its subsequent protocols dealt with such issues as right to life, torture, slavery, liberty and security, privacy, rights of conscience and religion, freedom of expression, freedom of association, discrimination, property, movement, extradition, education, the death penalty, and marriage and family life. Chart 3. With the drafting of the Charter, the regulatory concerns of Europeans have broadened considerably.

The Charter now mandates an EU standard for 13 new areas not directly covered by the ECHR or any of its ratified protocols. These include rights pertaining to human dignity (Art. 1), integrity of the person (Art. 3), personal data (Art. 8), freedom to choose an occupation (Art. 15), asylum (Art. 18), equality (Art. 20),

author, however, clearly believes that Article 53 is little more than an “inkblot,” because of repeated assertions (throughout his paper) that the Article “leave[s] the principle of supremacy of Community law intact.” *Id.* at 43.

¹⁶⁹ Chart 1: Comparison of Charter with Constitutions; Chart 2: Comparison of EU Convention with Constitutions; Chart 3: Expansion of European Human Rights Regulation Over Time.

¹⁷⁰ Concededly, the Chart is not an exact representation of the expansion of EU human rights law. The Chart compares the subject matters addressed by the Charter with the subject matters addressed by the ECHR and its subsequent protocols. The Charter was drafted by the EU, while the ECHR was drafted by the Council of Europe. Accordingly, the fact that the Charter has a significantly broader scope than the ECHR does not necessarily demonstrate an expansion in the areas of concern for the EU.

Nevertheless, the ECHR is a legal document drafted, superintended and enforced by an inter-governmental organization. The ECHR, moreover, has been periodically updated and revised. The European Convention, finally, has now declared that – with the adoption of the EU Constitution – the EU will seek accession to the ECHR. Article I-7(2), EU Constitution. Therefore, a comparison of the Charter with the ECHR does provide some evidence regarding the expansion of EU human rights norms.

children (Art. 24), the elderly (Art. 25), disability (Art. 26), work conditions (Art. 31), child labor (Art. 32), social security (Art. 34), and health (Art. 35). In light of these broad new areas of EU concern, the assertion of Article 51 that the Charter does not establish any new “power” or “task” for the Community is bold indeed. In fact, the explicit codification of these areas of concern could have several notable consequences for the EU.

As an initial matter, several of these new rights are exceptionally broad. Take, for example, Article 1. Precisely what does the right to “human dignity” entail? This query, which is essentially unanswerable (at least for now), is vital because “human dignity” is declared to be “inviolable.”¹⁷¹ This is an extraordinarily high level of protection for a right that is difficult to describe with any degree of precision. Such an open-ended declaration of a “fundamental right” may well invite judicial activism and experimentation.¹⁷²

Next, the list of rights announced by the Charter includes not just civil and political rights, but social and economic rights. If all of the “human rights” set out in the Charter are justiciable, important questions of social and economic policy could be established – not by democratic organs of the EU – but by the European Court of Justice.¹⁷³ The Charter announces rights to education,¹⁷⁴ “entitlement to social security benefits,”¹⁷⁵ health care,¹⁷⁶ and “services of general economic interest.”¹⁷⁷ At present, as far as we can ascertain, no member state of the EU has made such social

¹⁷¹ Article 1, Charter.

¹⁷² The Charter might be rendered non-justiciable. As such, it would stand as a hortatory, but not legally binding, statement regarding the philosophical and ethical importance of human dignity. *See* Article 52(5), Charter (as incorporated into Draft EU Constitution).

¹⁷³ *See, e.g.*, E. Regan, “The Charter of Fundamental Rights,” *The Institute of European Affairs* (2002) at 9 (noting the difficulties that could arise of the social and economic rights set out in the Charter are justiciable).

¹⁷⁴ Article 14, Charter.

¹⁷⁵ Article 34, Charter.

¹⁷⁶ Article 35, Charter.

¹⁷⁷ Article 36, Charter.

and economic issues justiciable. We presume that this will remain the case under the Charter.¹⁷⁸

Finally, precisely because many of the rights set out in the Charter may well be non-justiciable, one of the most important consequences flowing from the Charter's lengthy new list of fundamental rights will be rapid growth in the EU's legislative agenda. Since social security, education and "access to services of general economic interest"¹⁷⁹ will become fundamental rights of all Europeans, and assuming that these rights will not be implemented and protected by the European Court of Justice in the first instance, the European Commission, the Council of Ministers and the European Parliament can expect increasing legislative demands.¹⁸⁰ American history again may be instructive.

Until the late 1930s, the legislative power of the United States Congress (as construed by the United States Supreme Court) was quite limited.¹⁸¹ Beginning in 1937, however, the Court radically rethought its vision of American federalism and ceded great new regulatory powers to Congress.¹⁸² As a result, during the last 60 years, the power of state legislatures has waned considerably while the regulatory power – and reach – of the federal government has grown astronomically.¹⁸³

¹⁷⁸ Indeed, this may be the reason why the European Convention added several new paragraphs to Article 52 when it incorporated the Charter into the EU Constitution. New paragraph 5 of Article 52 provides that the "principles" of the Charter are to be implemented by legislation and executive action, and are only "judicially cognisable" in the context of reviewing those legislative and executive acts. Article II-52(5), Charter (as incorporated into Draft EU Constitution). This paragraph may embody the European Convention's conclusion that many provisions of the Charter are too expansive (at least absent some legislative or executive action) for judicial inquiry and enforcement.

¹⁷⁹ Article 36, Charter.

¹⁸⁰ Under the proposed EU Constitution, the European Commission initiates most proposals for legislative action (Article I-25, EU Constitution), and legislation is thereafter jointly enacted by actions of the Council of Ministers (Article I-22(1)) and the European Parliament. Article I-19(1), EU Constitution.

¹⁸¹ See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Congress lacks the power to set minimum wages).

¹⁸² *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 615 (1937) (Congress possesses the power to set minimum wages).

¹⁸³ See, e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Id.* (O'Connor, J., dissenting).

Therefore, the expansion of the arenas of explicit EU concern under the Charter may well expand the regulatory reach of EU executive and legislative organs.

D. Potential Tension between the Charter and Existing European Constitutions

The Charter does more than announce a number of new rights. It also restates rights already contained in the ECHR and the constitutions of member states. This paper, among other things, attempts to identify potential areas of tension between the Charter and existing European constitutions. To obtain that information, we have taken each Article of the Charter and compared it with corresponding language from the ECHR and nine European constitutions – Belgium, France, Germany, Ireland, Italy, the Netherlands, Portugal, Spain and the United Kingdom. The outcome of this analysis is presented graphically in two charts, “Comparison of Charter with ECHR and Constitutions” (Chart 1, which compares constitutional language and the ECHR with the Charter) and “Comparison of ECHR with Constitutions” (Chart 2, which compares constitutional language with the ECHR).

Where a state constitution does not contain language corresponding with the language of the Charter or the ECHR, it is indicated on the charts by a white circle. If state constitutional language generally accords with the language of the Charter or ECHR, the representation is a shaded star. If state constitutional language might be read to be in tension with the Charter or ECHR, the representation is a quadrilled diamond. Fairly apparent conflicts between the Charter and the ECHR are set out in a darkened triangle. On both charts, the shaded columns represent human rights issues covered by the Charter that are not mentioned in the ECHR or any of its ratified protocols. (The prevalence of these shaded columns demonstrates the significant expansion in the areas of human rights concern announced by the Charter.)

Two tables of explanatory notes (Table 1, Explanatory Notes for Possible Constitutional Conflicts with the Charter; Table 2, Explanatory Notes for Possible Constitutional Conflicts with the ECHR) are provided with the charts to set out our reasons for assigning either “diamond” or “triangle” designations to certain constitutional language. In addition, an extensive appendix containing the relevant language from the Charter, ECHR and the European constitutions involved in this study is provided in a “Constitutional Appendix.”

This study reveals several interesting observations. To begin with, the nine constitutions are quite consistent with the corresponding terms of the ECHR. There is less consistency between the constitutions and many provisions of the Charter. Accordingly, to the extent that we are correct in predicting that the Charter will eventually be applied to the activities of member states, the adoption of the Charter as a “European Bill of Rights” will require most European states to alter their human rights schemes.

Perhaps the least interesting data at first glance, but also the most potentially meaningful, are the white circles, denoting areas that the Charter covers but upon which member state constitutions are silent. The significant number of such circles suggests that the Charter, as a “constitutional” document, may control policy domains that EU member nations have generally reserved for decision by more flexible civil, criminal and administrative codes. The heavy concentration of white circles in the shaded columns (areas not addressed under the ECHR) suggests that the Charter will exert a relatively significant normative influence in areas previously outside the realm of established European concern.

The impact may be most significant on Great Britain. The United Kingdom is the only constitution we examined that did not exhibit any potential tension with the

mandates of the Charter. This may well result from the fact that Britain’s “unwritten constitution” demonstrates such flexibility that it can be read (including by us) to be consistent with the rights set out in the Charter.¹⁸⁴ But, because the Charter would force Britain to forego this flexible, unwritten approach to constitutional rights, a rather forceful argument can be made that Britain gives up more than any other EU member state by adopting the Charter.

Under its current, flexible common law approach, the human rights regime of the United Kingdom is able to adapt rather quickly to the felt needs of its people on issues such as “human dignity,” “education,” and even “paid leave” as these questions arise. Nor does there seem to be evidence of serious and systematic human rights abuses throughout Britain. The “unwritten approach” to constitutional governance, in short, seems to be working relatively well.

What, then, does Britain give up and what does it obtain by adopting the Charter? For one thing, it gives up a uniquely adaptable and functional system of human rights governance that has served it well for hundreds of years. What does it get in return? An unquestionably modern (and painstakingly drafted) statement of human rights law. But there can be absolutely no assurance that the Charter will serve the needs of the United Kingdom as well as its centuries-old common law traditions. In a very real sense, then, the people of Great Britain may lose flexibility – and thereby lose a unique form of human rights protection – that has served them since Magna Charta.¹⁸⁵ Thus, although the United Kingdom, in one sense, is the country

¹⁸⁴ For example, what does a “right to education” entail? How much education? Of what quality? On what subjects?

¹⁸⁵ At the EPP meeting described in notes 8 and 9, above, Timothy Kirkhope, Member of the European Parliament and a Member of the European Convention from Great Britain, asserted that adoption of the Charter could result in lessening the human rights protections of British citizens. The assertion was greeted with significant skepticism by Parliamentarians from other nations who attended the meeting. Nevertheless, when the respective merits and demerits of the Charter are examined in light of British history and tradition, it is hard to dismiss Mr. Kirkhope’s statement as pure rhetoric. (Notes of meeting on file with authors.)

that is most “compliant” with the terms of the Charter, it is also the nation that may have the most to lose by adopting the Charter. It is highly ironic that Britain’s flexibility – to be lost in the adoption process – may have produced the country’s unusually high level of consistency with the numerous standards set in the Charter.

1. “Comparison of ECHR with Constitutions”

The constitutions studied reflect very little divergence from the terms of the ECHR. There are no clear “triangle” conflicts between the constitutions and the terms of the ECHR. The most wide-spread divergence from the terms of the ECHR involves the question of discrimination, where the constitutions of France, Germany, Ireland and Portugal offer protection to a more limited list of protected classes than is set out in the ECHR.¹⁸⁶ Spain arguably departs the most on this point, providing constitutional equality only for “Spaniards.”

Other possible conflicts with the ECHR involve extradition (where the constitutions of Italy, Portugal and Spain provide fewer procedural safeguards than are set out in the ECHR), association (where, again, the constitutions of Italy, Portugal and Spain impose certain restrictions on association – such as Portugal’s prohibition of assembly by racist or fascist groups – that are not contained in the ECHR), education (where Italy’s and Portugal’s constitutions do not protect the right of parents to ensure the education of their children in conformity with the parents’ religious and philosophical beliefs) and expression (where both Germany and Spain restrict free speech more broadly than seems warranted under the terms of the ECHR). In addition, Germany guarantees freedom of movement only to German nationals.

¹⁸⁶ The ECHR provides anti-discrimination protection on the grounds of sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article I.14, ECHR. The conflicts noted above generally result from the omission of one of the foregoing classes from the national constitution. Perhaps with the exception of Spain’s reservation of constitutional equality to “Spaniards,” none of these departures from the ECHR appears significant.

Ireland, finally, while protecting and emphasizing the right to life of unborn children, does not specifically protect the life of other human beings.¹⁸⁷ These potential conflicts, considered as a whole, are not terribly significant.¹⁸⁸

The reasons for this wide-spread compliance with the ECHR seem obvious. First, the ECHR has been in effect since the early 1950s and nations have had substantial time to bring domestic law in line with its commands. Secondly, the ECHR – as discussed above – deals with significantly fewer substantive areas than the Charter.

2. “Comparison of Charter with Constitutions”

A comparison of constitutional language from Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom with the Charter demonstrates higher levels of inconsistency than with the terms of the ECHR. This inconsistency is rather widely spread, involving 18 of the 28 categories of rights set out under the Charter.¹⁸⁹ Furthermore, ten categories of rights stand in tension with constitutional language from two or more nations.¹⁹⁰

¹⁸⁷ Ireland’s emphasis on the right to life of unborn children probably does not reflect any diminution in the country’s respect for human life. Rather, the emphasis upon the unborn child is likely meant to counter the constitutional traditions of other countries – like the United States – where unborn life is given little (if any) legal protection.

¹⁸⁸ See generally “Explanatory Notes for Possible Conflicts with the ECHR” (setting out more detailed reasons for the noted tensions with the ECHR).

¹⁸⁹ The only Charter headings where all nine European constitutions analyzed here either say nothing or are consistent with the Charter are human dignity, torture, slavery, liberty and security, privacy, marriage and family, conscience and religion, property, asylum and extradition. If potential conflicts with the ECHR are considered, 20 of the Charter’s rights categories may have potential conflicts. The ECHR’s provisions regarding marriage reserves the right of marriage to “men and women,” while the Charter does not specify any gender for marital couples. The ECHR’s extradition protections, furthermore, may extend only to nationals, unlike the broader death penalty protections for aliens accorded by the Charter.

¹⁹⁰ At least two constitutions may conflict with the Charter’s restatement of the rights of physical and mental integrity (Belgium and France), expression (Belgium, France and Ireland), association (Belgium, Germany, and Ireland), education (Germany, Italy and the Netherlands), equality (Belgium and France), discrimination (Belgium, France, Germany, Ireland, and Spain), children’s rights (Germany, Ireland, Italy, Portugal and Spain), and social security (Belgium, Germany, Ireland, Portugal, and Spain).

The “Comparison of Charter with Constitutions” chart demonstrates four areas of rather clear disagreement between constitutional and Charter language. One such conflict involves Germany’s reservation of power to regulate freedom of expression by means of legislation to eliminate abuse. A second rather plain departure from the dictates of the Charter involves Ireland: unlike the Charter, that country does not absolutely abolish child labor but rather endeavors to ensure that young people are not abused in their working conditions. The third conflict arises from Portugal’s restriction of freedom of association. Portugal’s constitution reserves the right to forbid organizations that are racist or that adopt fascist ideology. Finally, although the Charter abolishes the death penalty completely, Spain’s constitution reserves the ultimate sanction in time of war.¹⁹¹

Once beyond relatively clear disagreements, there are an additional 40 possible deviations from Charter language in eight of the nine constitutions analyzed.¹⁹² Only the unwritten constitution of the United Kingdom appears to be either consistent with or silent on every Article of the Charter. Italy and the Netherlands come in “second place,” with three possible deviations in constitutional language as compared to the Charter.¹⁹³ France and Portugal come in next, with four potential departures,¹⁹⁴ followed by Belgium and Spain with seven each.¹⁹⁵ Germany

¹⁹¹ Charter, Article 2(2).

¹⁹² The ECHR’s deviations from the Charter are not included in this analysis.

¹⁹³ Italy’s constitution possibly diverges from the Charter in the areas of education, children’s rights and disability rights. The Netherlands’ constitution differs from precise Charter requirements on questions of personal data, association and education. Portugal potentially differs from the Charter with respect to association, children’s rights, working conditions and social security.

¹⁹⁴ France’s constitution arguably differs from the Charter in certain particulars involving expression, discrimination, physical and mental integrity and equality. Portugal’s constitution potentially differs from the Charter with respect to association, children’s rights, working conditions and social security.

¹⁹⁵ Belgium’s constitution may depart from Charter requirements regarding physical and mental integrity, expression, association, equality, discrimination, social security and health. Spain’s constitution states requirements that may be inconsistent with the Charter in the areas of expression, association, discrimination, children’s rights, the elderly, social security and the death penalty.

and Ireland – whose constitutions each contain eight potential departures – raise the most questions regarding consistency with the Charter.¹⁹⁶

National constitutions differed from the terms of the Charter most frequently on questions of expression, association, discrimination, children’s rights and social security. The five national deviations from Charter language in each of these five areas produce the great bulk of the possible inconsistencies revealed by this study.

As to issues of expression, most constitutional differences with the Charter result from retained governmental powers to regulate or limit potential abuse of free speech rights.¹⁹⁷ National freedom of association rights similarly depart from the Charter because of various limitations on open air assemblies and notice or licensing requirements.¹⁹⁸ The discrimination provisions of the Charter are arguably inconsistent with five constitutions because the Charter provides anti-discrimination protection to a larger list of protected classes than national constitutions.¹⁹⁹

Children’s rights and social security issues complete the list of the “top five” national departures from the specifications of the Charter. This should not be terribly surprising. Children’s rights jurisprudence is relatively new – first gaining ground with the rapid negotiation and adoption of the UN Convention on the Rights of the Child in 1989.²⁰⁰ Similarly, economic and social rights (such as the Charter’s right to social security) raise questions that many countries do not comprehensively set out in their constitutions.

¹⁹⁶ Germany’s constitutional terms may differ from those of the Charter with regard to expression, association, education, asylum, discrimination, children’s rights, social security and the right to movement. Ireland, for its part, has differential constitutional terms involving right to life, expression, association, discrimination, children’s rights, the elderly, child labor and social security.

¹⁹⁷ See Explanatory Notes for Belgium, France, Germany, Ireland and Spain. Belgium and France permit regulation of speech to avoid offenses or disruption of the public order. Germany regulates speech to prevent abuse. Spain, for its part, limits freedom of expression to “truthful” information.

¹⁹⁸ See Explanatory Notes for Belgium, Germany, Ireland, Portugal and Spain.

¹⁹⁹ See Explanatory Notes for Belgium, France, Germany, Ireland and Spain.

²⁰⁰ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

In any event, deviations in the area of children's rights arise from limited national constitutional emphasis upon the specific rights of children²⁰¹ or, alternatively, from national schemes that emphasize parental rights rather than the child's autonomy rights stressed by the Charter.²⁰² Most differences in social security protections arise from divergence between the affirmative social rights stated in the Charter and the somewhat more limited protections expressly granted under national constitutions. On the question of social security, two nations (Belgium and Germany) do not guarantee the same enumerated rights set out in the Charter, while two other nations (Portugal and Spain) do not extend social benefits to as lengthy a list of candidates as the Charter and retain more governmental discretion than may be authorized by the precise terms of the Charter.²⁰³ Ireland, for its part, merely pledges that resources will be allocated to serve the public good.²⁰⁴

The next most frequent departures from the precise provisions of the Charter come in the area of education, with three countries – Germany, Italy and the Netherlands – providing more limited constitutional guarantees for education than the Charter suggests.²⁰⁵ Because education, like social security, involves questions of social policy, the fact that three of nine European constitutions do not precisely mirror the policy stance of the Charter is not surprising.

Three subject areas under the Charter – physical and mental integrity, equality, and the rights of the elderly – raise two possible instances each of possible inconsistency with national constitutions. Belgium and France do not appear to

²⁰¹ See Explanatory Notes for Germany, Ireland and Portugal.

²⁰² See Explanatory Notes for Italy and Spain.

²⁰³ See Explanatory Notes for Belgium, Germany, Portugal and Spain.

²⁰⁴ See Explanatory Note for Ireland.

²⁰⁵ See Explanatory Notes for Germany, Italy and the Netherlands.

protect against assaults on mental integrity as provided in the Charter.²⁰⁶ The same two country's constitutional equality provisions differ from the Charter in that Belgium provides that only Belgians are equal before the law, while France makes certain constitutional exceptions to equality based upon the public good.²⁰⁷ The rights of the elderly set out in the Charter may not be given similar emphasis in the constitutions of Ireland and Spain.²⁰⁸

The remaining departures from the wording of the Charter involve only one country in each area of rights. Belgium provides less robust protection for health rights than may be demanded by the Charter.²⁰⁹ Germany's asylum rights are less extensive, and its restrictions on movement more restrictive, than the terms of the Charter.²¹⁰ Ireland mentions the right to life only in the context of unborn children and regulates rather than prohibits child labor.²¹¹ Italy arguably does not provide rights to the disabled that are mandated by the Charter,²¹² while the Netherlands' protections for personal data and the right to an occupation may not equate precisely with Charter requirements.²¹³ Portugal's constitutional guarantees regarding working conditions may be less extensive than those of the Charter.²¹⁴ Spain, finally, has not abolished the death penalty in all cases, but keeps open the possibility of the imposition of such a sentence in time of war.²¹⁵

²⁰⁶ In addition, some physical integrity offenses listed in the Charter are not expressly outlawed by the constitutions of Belgium and France. *See* Explanatory Notes for Belgium and France.

²⁰⁷ *Id.*

²⁰⁸ *See* Explanatory Notes for Ireland and Spain.

²⁰⁹ Belgium guarantees a simple right to health care rather than a "right of access to preventive health care" as required by the Charter. Article 35, Charter. *See* Explanatory Notes for Belgium.

²¹⁰ *See* Explanatory Notes for Germany.

²¹¹ *See* Explanatory Notes for Ireland.

²¹² *See* Explanatory Notes for Italy.

²¹³ The constitution of Portugal permits regulation of personal data by parliament, while the Charter requires control of such data by "an independent authority." Article 8(3), Charter. Unlike the Charter, which extends its protections widely, the Netherlands constitution guarantees the right to an occupation only to Dutch nationals. *See* Explanatory Notes for the Netherlands.

²¹⁴ *See* Explanatory Notes for Portugal.

²¹⁵ *See* Explanatory Notes for Spain.

The above comparative study, considered as a whole, demonstrates a fair degree of compliance with the provisions of the Charter. Nevertheless, our analysis also reveals numerous tensions between national constitutions and the Charter. If, as we predict, the Charter over time becomes applicable to member states,²¹⁶ these tensions may produce head-on clashes between the respective decisional authority of member states and the central government. But, while these controversies will undoubtedly be heated, the outcome already seems clear. As the draft EU Constitution states, the “Constitution, and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.”²¹⁷

CONCLUSION

The Charter is, without question, a bold and significant attempt to codify the fundamental rights of Europeans. As with all bold and significant actions, it is certain to engender controversy. The drafters of the Charter sought to deflect some of this controversy by providing, in its final Articles, that the Charter creates no new powers or tasks for the EU, should be interpreted to be consistent with existing European treaties and member state constitutions, and should be applied pursuant to the principle of subsidiarity.²¹⁸ The European Convention emphasized these provisions by declaring that the Charter does not “extend the scope” of EU law,²¹⁹ and “full account shall be taken of national laws and practices” in applying the Charter.²²⁰ It is not at all clear, however, that such language will avoid the serious questions raised by the Charter.

²¹⁶ See Section III A, above.

²¹⁷ Article I-10(1), EU Constitution.

²¹⁸ Articles 51 and 53, Charter.

²¹⁹ Article II-51(2), Charter (as incorporated into Draft EU Constitution).

²²⁰ Article II-52(6), Charter (as incorporated into Draft EU Constitution).

The principle of subsidiarity, even as re-emphasized in Articles 51, 52 and 53 of the Charter by the European Convention, may not provide a significant level of protection for local decision making. Constitutional experience in the United States suggests that pliable doctrines such as subsidiarity are unlikely to safeguard the potentially valuable and unique constitutional perspectives of the constituent members of a shared-power governmental structure. If protection of local decisionmaking is desired, a categorical delineation of the decisional competencies of the respective state and central jurisdictions may be required. Although the drafters of the Charter attempted this difficult task, because the proposed EU Constitution often restates and overlaps Charter principles, there are serious questions whether the Charter's efforts to reserve national discretion can succeed.

Precisely because the Charter will erode the sovereign decisional authority of EU member states, the breadth of its enunciated rights is certain to prompt fierce future controversies. The ethical, moral, social and economic contours of the numerous rights proclaimed by the Charter are not yet fully known. Nevertheless, these potentially expansive rights may well be invoked by European legislators and – perhaps most prominently – the European court of Justice to decide political questions of great import.

The Charter will be integrated into a multi-part Constitution that repeats, restates, echoes, amplifies and enforces the Charter's themes throughout the Constitution's numerous divisions. Thus, it is hardly clear that the Charter "does not extend the scope of application or Union law" or "establish any new power" or "task."²²¹ As a practical matter, the Charter announces numerous rights not previously enunciated in the ECHR and its various protocols – and time has already

²²¹ Article II-51(2), EU Constitution (as incorporated into Draft EU Constitution).

demonstrated that the ECHR's principles can intrude upon the constitutional policies of member states.²²² Moreover, the principles announced in the Charter, in part because of their extensive integration throughout the various Parts of the EU Constitution, may evolve rather quickly into fundamental principles of law applicable throughout the EU system of justice. And, even if Charter rights are found to be non-justiciable,²²³ pressure on the legislative and executive organs of the EU to enact and execute legislation to fill in the numerous details of the Charter's rights regime will be intense.

Finally, even though a comparison of the Charter with the language of nine European constitutions demonstrates a fair level of conformity with the Charter, only one of the nine countries examined possesses a constitution entirely consistent with the newly announced regime. There are also significant areas of possible divergence. Thus, the rights announced in the Charter may not settle as comfortably upon the European scene as some might expect. The tensions inherent in a shared-power regime with diverse constitutional expectations at the national and supra-national levels may be more troublesome than anyone can anticipate.

²²² Notes 62-63, above.

²²³ Article II-52(5), Charter (as incorporated into Draft EU Constitution).