Incorporation Doctrine's Federalism Costs

A Cautionary Note for the European Union

Lee J. Strang[*]

Abstract

In this article, I first briefly describe the U.S. Supreme Court's decades-long process of incorporating the federal Bill of Rights against the states. Second, I argue that incorporation of the Bill of Rights has come with significant costs to federalism in the United States. Third, I suggest that the American experience provides a cautionary note for the European Union as it grapples with the question of whether and to what extent to apply the Charter of Fundamental Rights to its constituent nations. I end by identifying options available to the European Union to avoid at least some of this harm to federalism while, at the same time, securing some of the benefit that might be occasioned by incorporating the Charter.

Keywords: Bill of Rights, Charter of Fundamental Rights, diversity of human flourishing, federalism, incorporation, individual liberty, jurisdictional competition.

A Introduction

The United States has experienced both the 'incorporation'[1] of a Bill of Rights against its constituent states and the resulting costs of that incorporation to the United States' federal structure. Incorporation is the constitutional doctrine by which the Bill of Rights, adopted in 1791 and originally applicable only to the federal government,[2] applied to and limited the states. The United States' experience without and (later) with incorporation sheds light on the impact on federalism caused by incorporation. This experience hold lessons for the European Union as

* John W. Stoepler Professor of Law and Values, University of Toledo College of Law. Thank you to Csongor Istvan Nagy for organizing and hosting this conference, and to the conference participants for their thoughtful comments and criticisms. Thank you as well to Michael Stahl for his valuable research assistance. This volume (The EU Bill of Rights' Diagonal Application to Member States. Ed. Csongor István Nagy) was published as part of the research project of the HAS-Szeged Federal Markets 'Momentum' Research Group.

1 *See generally McDonald v. Chicago*, 561 U.S. 742, 759-66 (2010) (Describing the history of incorporation.)

2 *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

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it decides whether and to what extent to incorporate its Charter of Fundamental Rights[3] against member nations.

In this article, I first briefly describe the U.S. Supreme Court's decades-long process of incorporating the federal Bill of Rights against the states. Second, I argue that incorporation of the Bill of Rights has come with significant costs to federalism in the United States. Third, I suggest that the American experience provides a cautionary note for the European Union as it grapples with the question of whether and to what extent to apply the Charter of Fundamental Rights to its constituent states.

Before I begin, however, a brief note of caution: I am confident that my evaluation of the United States' experience is reasonable because of my expertise in American constitutional law. However, my proffered lessons for the European Union are made with significantly less confidence because of my lack of expertise in European Union law.

Before describing incorporation, let me say a few introductory words about American federalism.

B Federalism Is an Important Structural Principal of the U.S. Constitution

Federalism is one of the key structural principles of the U.S. Constitution. The U.S. Constitution contains a number of structural principles. These are principles drawn from the text and structure of the document itself, and from the government that the Constitution created, but they do not originate from their own clauses or texts. For example, there is no principle of limited and enumerated powers clause; instead, this principle is evidenced by Article I, Section 1, Clause 1's statement that Congress possesses only the 'legislative Power' 'herein granted', coupled with the discrete listing of powers in Article I, Section 8, among other evidence.[4]

Federalism is a crucial structural principle of the U.S. Constitution. The Constitution describes an enduring federal-state relationship,[5] and in many ways. Most fundamentally, because the federal government is one of limited and enumerated powers, by implication and following historical practice, the rest of potential governmental power, including such important areas as property, tort and contract law – called the police power in the American legal system[6] – must be

3 Charter of Fundamental Rights of the European Union (2009), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (last accessed 6 September 2017).

4 For instance, scholars have argued that the requirement that congressional statutes passed pursuant to Congress' Necessary and Proper Clause authority must be 'proper' includes the principle of limited and enumerated powers. *See* G. Lawson & P.B. Granger, 'The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause', *Duke Law Journal*, Vol. 43, 1993, p. 267-336. (Showing that 'proper' requires that statutes must be consistent with the Constitution's structural principles.)

5 *See Texas v. White*, 74 U.S. 700, 725 (1868). ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.")

6 *See, e.g.*, D.B. Barros, 'The Police Power and the Takings Clause', *University of Miami Law Review*, Vol. 58, 2004, p. 473-498. (Describing the history of this concept.)

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exercised by someone, and the states are the only alternative in the American constitutional system. States authorized the Constitution pursuant to Article VII,[7] and Article V makes state consent necessary for constitutional change.[8] And states play continuing roles in the political processes of the federal government including their representation in the Senate via two senators from each state.[9]

Federalism continues to play a significant role in American legal and political life, though, as I describe below, its role has been changed and muted, in part by incorporation of the federal Bill of Rights, to which I now turn.

C The Emergence of Incorporation in the United States

I Introduction

Incorporation is the name of the constitutional doctrine that the Bill of Rights – the first ten amendments to the Constitution – applies to and limits the states.[10] The incorporation doctrine emerged, with fits and starts,[11] over a period of approximately 60 years,[12] and it occurred after over a century during which time the Bill of Rights limited only the federal government.[13]

II The Bill of Rights Initially Limited Only the Federal Government

The original Constitution faced significant opposition during the ratification process.[14] One of its critics' most persuasive claims was that the proposed Constitution was fatally defective because it lacked a list of protected rights, like those that had become popular in state constitutions following the Revolution and which were the most recent example of an American tradition of written protections for rights.[15] For instance, the first and most famous such state Bill of Rights

7 U.S. Constitution, Art. VII.

8 *Ibid*., Art. V.

9 *Ibid*., Art. I, Section 3, cl. 1.

10 *McDonald v. Chicago*, 561 U.S. 742, 759-67 (2010).

11 The Supreme Court clearly rejected incorporation as late as 1899. *See Brown v. New Jersey*, 175 U.S. 172, 174 (1899). ("The first ten Amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on [the] Federal Government.") The Supreme Court suggested the possibility of incorporation in *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), but did not clearly employ it until 1925, *Gitlow v. New York*, 268 U.S. 652 (1925).

12 From 1908, *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), to 1968, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

13 *See* C.I. Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's Federal Bill of Rights to Member States', *Indiana International and Comparative Law Review*, Vol. 27, No.1, 2017, p. 7-9 (Describing this history.); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). (Holding that the Bill of Rights did not apply to the states.)

14 For a collection of the key arguments against ratification, *see* W. B. Allen & G. Lloyd (Eds.), *The Essential Antifederalist*, 2nd ed., W.B. Allen & Gordon Lloyd, 2002.

15 *See* L.W. Levy, *Origins of the Bill of Rights*, New Haven, Yale University Press, 1999, p. 3-11. (Describing this history.)

was the Virginia Declaration of Rights, adopted in 1776.[16] This defect was fatal because of the Anti-Federalist concern that the proposed federal government's powers were ambiguous and, hence, capable of abuse that would harm the states and individual Americans.[17]

Though the Federalist proponents of the Constitution initially argued that a Bill of Rights was imprudent – because it would imply that the federal government possessed the power to violate such rights,[18] which the Federalists denied – they saw that their argument was unpersuasive, and agreed to adopt a Bill of Rights once the Constitution was ratified and went into effect.[19] With this promise in place, ratification proceeded apace.

Once the Constitution went into effect, James Madison introduced into the first session of the first Congress the initial draft of the Bill of Rights, which he had derived from state bills of rights and state proposals made during the ratification process.[20] The Bill of Rights, which sought to limit federal power, both through direct prohibitions on federal action,[21] and through rules of interpretation that mandated narrow constructions of federal power,[22] was ratified by the requisite number of states in 1791.[23]

The Bill of Rights' text suggests that it is applicable only to the federal government. For instance, the First Amendment identified only 'Congress' as the limited actor.[24] Other parts of the text, however, do not expressly identify whether the federal government or the states are limited. The Second Amendment, for instance, protects "the right of the people to keep and bear Arms", but does not say from what.[25] There are, however, additional textual clues that the Bill of Rights only applied to the federal government. The Bill of Rights' syntax, for instance, fit the Article I, Section 9 limits on the *federal* government, but did not fit the Article I, Section 10, *state* limits.[26] Every time a limitation on states is identified in Sections 9 and 10, it specifically identifies 'State[s]' as the limited entities. Therefore, the absence of a textually identified limited actor, as occurs in some of the amendments, suggests that only the federal government was limited.

16 *Virginia Bill of Rights*, *in* B. Frohnen, *The American Republic: Primary Sources*, Liberty Fund, 2002, p. 157.
17 Levy, 1999, p. 27-28.
18 *Ibid*., at p. 20-21.
19 *Ibid*., at p. 31-32.
20 *Ibid*., at p. 43.
21 Such as the First Amendment's restrictions. U.S. Constitution, Amendment I.
22 Such as the Ninth and Tenth Amendments' rule that the federal government's powers must be narrowly interpreted. U.S. Const., amends. IX, X. *See* K.T. Lash, 'A Textual-Historical Theory of the Ninth Amendment,' *Stanford Law Review*, Vol. 60, 2008, p. 920. ("The Tenth limits the federal government to only enumerated powers. The Ninth limits the interpretation of enumerated powers.")
23 Virginia's ratification in 1791 made the Bill of Rights part of the Constitution. Brent Tarter, 'Virginians and the Bill of Rights', *in* J. Kukla (Ed.), *The Bill of Rights: A Lively Heritage*, Virginia State Library, 1987, p. 13-15.
24 U.S. Constitution, Amendment I.
25 *Ibid*., Amendment II.
26 *See* J. Mazzone, 'The Bill of Rights in Early States Courts', *Minnesota Law Review*, Vol. 92, 2007, p. 28, n. 109. (Making and supporting this point.)

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The Constitution's structure and history likewise suggest that the Bill of Rights' framers and ratifiers intended and understood that it limited only the federal government. For example, the structural principle of limited and enumerated powers meant that the federal government did not have the power to restrict gun rights and, on this view, the Second Amendment served as an express confirmation of that structural principle and of this legal conclusion. The Tenth Amendment, which provided that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people",[27] was "originally understood .... to emphasize, clarify, and amplify restrictions on *federal* power contained in the Constitution of 1787".[28]

The case-law in the early Republic generally adhered to this view and applied the Bill of Rights (only) to the federal government, though state supreme courts sometimes applied the Bill of Rights to their state governments.[29] The U.S. Supreme Court definitively ruled on the issue in 1833, in a case called *Barron v. Baltimore*.[30] There, Chief Justice Marshall, writing for a unanimous Court, ruled that the Fifth Amendment's Takings Clause and, by parity of reasoning, the rest of the Bill of Rights, limited only the federal government.[31]

III The Century-Long Incorporation Process

The Civil War initiated a sea change in American constitutional structure.[32] The Republicans that controlled Congress – who wished to preserve the civil rights gains made during the Civil War and to prevent states from reverting to their former ways – drafted the Fourteenth Amendment. Section 1 imposed unprecedented limits on the states, including the Privileges or Immunities Clause,[33] which the Republicans adopted to incorporate the Bill of Rights against the states.[34] However, a mere four years later, in 1872, the Supreme Court misinterpreted the Clause to *not* apply the Bill of Rights against the states in *The Slaughter-House*

27 *Ibid*., Amendment X.

28 G. Lawson, 'A Truism with an Attitude: The Tenth Amendment in Constitution Context', *Notre Dame Law Review*, Vol. 83, 2008, p. 471 (emphasis added).

29 J. Mazzone, 'The Bill of Rights in Early States Courts', *Minnesota Law Review*, Vol. 92, 2007, p. 23-24.

30 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

31 *Ibid*.

32 *See, for instance*, E. Foner, 'The Strange Career of the Reconstruction Amendments', *Yale Law* Journal, Vol. 108, 1999, p. 2007. ("Reconstruction [w]as a moment of revolutionary change.") However, the sea change did not culminate with the Reconstruction Amendments; indeed, it stalled by the late nineteenth century. M.W. McConnell, 'The Forgotten Constitutional Moment', *Constitutional Commentary*, Vol. 11, 1994, p. 115-144.

33 U.S. Constitution, Amendment. XIV, Section 1. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.")

34 *See* K.T. Lash, *The Fourteenth Amendment Privileges and the Privileges and Immunities of Citizenship*, Cambridge University Press, 2014. (Explaining this view.) There is a robust scholarly debate over whether the Clause also applied *un*enumerated rights against the states. *See* R.E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton, Princeton University Press, 2004, p. 60-68. (Articulating this view.)

Cases.[35] To this day, the Supreme Court continues to follow *The Slaughter-House Cases*, despite repeated and powerful arguments to overrule it.[36]

This set up a dynamic where the Fourteenth Amendment's framers' and ratifiers' goal of limiting the states via the Bill of Rights was unfulfilled, and the reasons behind that goal remained,[37] but the Supreme Court's precedent seemed to preclude utilizing the natural home of incorporation, the Privileges or Immunities Clause. Following the 1872 *Slaughter-House Cases*, parties continued to bring cases to the Supreme Court arguing that the Bill of Rights limited the states via some facet of the Fourteenth Amendment.[38] The Due Process Clause was frequently utilized by such parties as the textual 'hook' for such claims.[39] The Supreme Court rejected incorporation until the early twentieth century.

The U.S. Supreme Court first clearly incorporated a portion of the Bill of Rights in *Gitlow v. New York* in 1925,[40] where, without much explanation,[41] it applied the Free Speech and Press Clauses to New York. From then and for the next four decades, the justices debated whether and to what extent the Bill of Rights applied to the states.

There were two basic views advocated by the justices: selective incorporation and total incorporation. Justice Frankfurter was the most prominent advocate of selective incorporation and Justice Black was the most effective spokesman for total incorporation. Selective incorporation was the idea that only some facets of the Bill of Rights applied to the states, only those rights that are

> the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".[42]

Total incorporation, by contrast, required incorporation of all of the rights. As argued by Justice Black,

35 *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

36 *McDonald v. Chicago*, 561 U.S. 742 (2010).

37 For example, mistrust of states to protect their citizens' privileges or immunities.

38 *Twining v. New Jersey*, 211 U.S. 78 (1908); *Brown v. New Jersey*, 175 U.S. 172 (1899); *Hurtado v. California*, 110 U.S. 516 (1884); *United States v. Cruikshank*, 92 U.S. 542 (1875).

39 *See Twining v. New Jersey*, 211 U.S. 78, 100 (1908) (noting a party's argument to this effect).

40 *Gitlow v. New York*, 268 U.S. 652 (1925). The Supreme Court may have applied the Takings Clause to the states in the 1897 case of *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. (1897), but it is unclear, both because of the ambiguous opinion itself and the possible other nonincorporation legal resolutions of the case, and also because of the Court's later continued rejection of incorporation.

41 The Court offered only a one-sentence 'justification': "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow*, 268 U.S. at p. 666.

42 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969)) (internal citation omitted).

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> [m]y study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.[43]

Though the Supreme Court utilized a selective incorporation theory,[44] the ultimate result was near-total incorporation of the Bill of Rights against the states[45] by 1971.[46] Today, after incorporation of the Second Amendment right to keep and bear arms in 2010, only four of the rights in the Bill of Rights remain unincorporated.[47]

IV The Contemporaneous Demise of Dual Federalism

During the same period when the Supreme Court slowly incorporated the Bill of Rights against the states, the Court also abandoned one conception of federalism for another. The Supreme Court abandoned dual federalism for cooperative federalism. The timing of these two doctrinal changes is not a coincidence and suggests that the Court understood (implicitly or explicitly) that its move towards incorporation either required a change to its federalism doctrine or that the change to federalism doctrine was the result of the same impetus for incorporation.

Dual federalism was the dominant conception of the federal-state relationship from the Republic's founding to the New Deal. Dual federalism is the conception of federalism where the federal and state governments have respective spheres of authority and that those spheres do not overlap.[48] Across a wide array of constitutional doctrines, the Supreme Court worked to maintain dual federalism. For example, in both its Interstate Commerce Clause and Dormant Commerce Clause case-law, the Court articulated a number of doctrines that supported dual federalism. The direct-indirect effects test, used in both contexts, prohibited *federal* regulation of *intrastate* activities that indirectly affected interstate

43 *Adamson v. California*, 332 U.S. 46, 71 (1947) (J. Black, dissenting) (overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964)).

44 *McDonald v. Chicago*, 561 U.S. 742, 759-61 (2010).

45 *Ibid*., at p. 759-766.

46 *See Schilb v. Kuebel*, 404 U.S. 357 (1971). (Incorporating the Eighth Amendment's prohibition against excessive bail.)

47 They include the Third Amendment, the Fifth Amendment grand jury indictment requirement, the Seventh Amendment right to civil jury trials and the Eighth Amendment prohibition on excessive fines. *McDonald*, 561 U.S. 765 n. 13.

48 *See* E.A. Young, 'Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception', *George Washington Law Review*, Vol. 69, 2001, p. 139. ("For much of our history, the Supreme Court has tried to preserve the balance between the states and the nation by dividing up the world into two separate spheres: 'local' and 'national,' 'intra-' and 'inter-state,' 'manufacturing' and 'commerce,' to name just a few. These dichotomies were intended to describe distinct fields of regulatory jurisdiction in which one government or the other would have exclusive authority. The Court's effort, commonly known as 'dual federalism,' died an ignominious death in 1937 or shortly thereafter.")

commerce,[49] and prohibited *state* regulation of intrastate activities that directly affected *interstate* commerce.[50] The most direct implementation of dual federalism doctrine was the Court's judicial enforcement of the Tenth Amendment to limit the scope of congressional power.[51]

As in many areas of constitutional law, the Supreme Court shifted gears during the New Deal,[52] and it adopted the cooperative federalism conception in place of dual federalism. Cooperative federalism is the idea that federalism is enhanced when the federal and state governments 'cooperate' in common programmes and processes. Under cooperative federalism, the federal government's powers are broad and overlap with the states.[53] The Supreme Court does not identify discrete spheres of power. Within these spheres of overlapping authority, the federal and state governments work out their respective regulatory roles. The results of these negotiations are federal statutes that enlist the states in their implementation. Many, if not most, of the major federal social welfare programmes established by Congress are principally administered by the states. For example, the major federal welfare programme, Temporary Assistance to Needy Families, is primarily funded by the federal government[54] and administered by the states, within very broad federal guidelines.[55]

The Supreme Court adopted cooperative federalism by changing a number of its interpretations of the Constitution's structural provisions. Most directly, the Court ruled that the Tenth Amendment was a mere 'truism'[56] and ceased enforcing it until the late-twentieth century.[57] In other areas, similar changes to the Court's constitutional interpretations cumulatively led to an unprecedented expansion of federal power and jurisdiction, and a corresponding contraction of exclusive state jurisdiction. For instance, in a series of New Deal cases, the Court effectively ceased enforcing limits on Congress' Commerce Clause power.[58] In principle, few, if any, areas of American life remained beyond the reach of the fed-

49 *See United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895). ("Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly.")

50 *See DiSanto v. Pennsylvania*, 273 U.S. 34, 37 (1927). ("A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed.")

51 *See United States v. Butler*, 297 U.S. 1, 68, 74-75 (1936).

52 *See generally*, B. Ackerman, *We the People: Transformations*, Vol. II, Cambridge, Harvard University Press, 1998.

53 *See* Young, 2001, p. 145-146, 50-53. (Describing the concurrent jurisdiction of federal and state governments that underlays cooperative federalism.)

54 42 U.S.C. § 603 (2017).

55 *See* 42 U.S.C. § 602 (2017). (Describing 'state plans' for providing assistance to needy families.)

56 *United States v. Darby*, 312 U.S. 100, 124-125 (1941).

57 *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

58 *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100, 124-125 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

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eral government,[59] and Congress used its new-found powers to regulate vast swaths of American life.

However, and for a host of reasons, Congress rarely entirely displaced the states. Instead, Congress generally – depending on one's perspective – co-opted or cooperated with states to implement federal regulations and programmes.

D Incorporation's Federalism Costs

I Introduction

In this part, I catalogue the impact incorporation had on federalism in the United States. To be clear, I do not evaluate whether the loss of federalism occasioned by incorporation was greater than its benefits.

II Federalism's Three Primary Benefits

Let me begin by briefly describing the three main benefits of federalism identified by the Supreme Court and scholars. First, federalism protects individual liberty through two main mechanisms. The first mechanism is dividing power among different governments. Vertically dividing power among governments prevents the concentration of power, which is a necessary precondition to suppressing liberty. For example, the federal government does not possess an enumerated power over education, and states are the primary providers and regulators of education. Relatedly, dividing power among different governments also provides mechanisms to check governmental power. One government can check another government by active or passive resistance to its exercises of power and, in doing so, protect individual liberty. For instance, after the federal government passed the controversial Affordable Care Act, many states pushed back. My own state, Ohio, passed a state constitutional amendment forbidding state cooperation with implementation of the Act.[60] Florida led twenty-five other states to litigate the Act's constitutionality to the Supreme Court.[61]

The second mechanism by which federalism preserves individual liberty is creating jurisdictional competition for the affections of the American people. Humans value liberty and when governments compete for citizens and their affections, one of the axes upon which they compete is liberty. The states and federal governments compete to offer regulatory 'packages' that contain the most liberty. For instance, many states are currently liberalizing their restrictions on marijuana usage, and they are doing so self-consciously contrary to the federal government's rigorous restrictions on marijuana.[62]

Second, scholars and the Supreme Court argue that federalism is valuable because it provides a forum for jurisdictional experimentation. In a unitary state,

59 This analysis is putting to one side the Court's slightly later expansion of its interpretations of individual rights.

60 Constitution of Ohio, Art. I, Section 21.

61 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 540 (2012).

62 K. Steinmetz, 'These States Just Legalized Marijuana', *Time*, 2016, available at: http://time.com/4559278/marijuana-election-results-2016.

there is only one jurisdiction and only that government can experiment with different approaches to subject matters. Experimentation presents significant risk because the entire jurisdiction suffers if the experiment fails. And, that assumes that experimentation will occur, which is more difficult in unitary states because of the difficulty garnering a sufficient consensus to experiment, assuming a nation with differing preferences that are relatively equal within that nation.

Federalism both increases the likelihood of experimentation and reduces the risks posed by it. It is more likely that experimentation will occur in a federal system because one state is more likely to have a consensus to experiment than the entire nation because of the uneven distribution of preferences. Also, if an experiment fails to provide net benefits, the experiment's costs are limited to that one state, and the other jurisdictions in fact benefit from that state's failed experiment by not duplicating it. For example, beginning in the 1980s, Wisconsin experimented with significant changes to its provision of welfare.[63] At that time, welfare reform was not possible on the national level, because preferences were relatively evenly spread throughout the nation.[64] The potential costs of welfare reform were internalized to Wisconsin. Other states, and the federal government, learned from and followed Wisconsin's successful experiment.[65]

Third, scholars and the Supreme Court argue that federalism provides a greater variety of environments in which the reasonable diversity of forms of human flourishing can find a home. Humans flourish when we participate in the basic human goods.[66] The basic human goods are the analytically distinct components of a full human life. These goods include activities like acquiring knowledge, engaging in leisure activities and cultivating friendships. A person who has friends is happier than one who is lonely. Human beings flourish through a nearly infinite variety of combinations of the basic human goods. Some humans, for example, value the good of knowledge relatively more than others, while others value friendship more than others, *etc*. Both are reasonable approaches to human happiness.[67]

This same reasonable diversity of approaches to human flourishing occurs on the state level. Federalism enables Americans to pursue their reasonably diverse approaches to human flourishing in jurisdictions that most closely match their conception of human flourishing. States in a robust federal system have the capacity to construct reasonably different conceptions of the common good that cater to different forms of human flourishing. For example, Iowa's state government promotes a different combination of goods than does California. To take

63 *See* M. Kwaterski Scanlan, 'The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights', *Berkeley Women's Law Journal*, Vol. 13, 1998, p. 155.

64 *Ibid*.

65 *Ibid*.

66 *See* J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 1980, p. 90-91.

67 So long, of course, as one does not act against one of the basic human goods or diminish one's participation in a good to such an extent that one is not acting practically reasonably. *Ibid*., at p. 118.

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just one example, Iowa generally privileges farming over environmental protection,[68] while California takes the opposite approach.[69]

III Incorporation Imposed Significant Federalism Costs

The Supreme Court's incorporation of the federal Bill of Rights harmed federalism in the United States on each of the three federalism benefits identified. First, incorporation dampened federalism's ability to protect individual liberty, and in two ways.

First, incorporation lessened the ability of states and, in particular, state courts, to impede the concentration of power in the federal government. The incorporation doctrine concentrates power in the hands of the federal government in two ways. First, and most obviously, incorporation concentrates power in the U.S. Supreme Court. The Supreme Court's grandiose conception of its own interpretative power was laid out in *Cooper v. Aaron*.[70] There, the Court claimed that its interpretations of the Constitution *were the Constitution*, and therefore received the label "supreme law of the land" under the Article VI Supremacy Clause. This was the *Cooper* Court's conclusion that it drew from its enthymeme:

> [i]t follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[71]

Second, and to a lesser degree, incorporation of the Bill of Rights concentrates power in Congress. This is because Congress possesses the power under Section 5 of the Fourteenth Amendment to 'enforce' the Fourteenth Amendment's rights against the states.[72] Following incorporation, Section 5 of the Fourteenth Amendment authorizes Congress to enforce the Bill of Rights against the states.[73] This federal legislation is part of the 'supreme law of the land' under Article VI that all state officers must follow.[74] Coupling these two propositions together leads to the conclusion that incorporation means that states and state courts, in principle, have no independent authority over the important subjects covered by the Bill of Rights.

A Supreme Court interpretation of the Bill of Rights, and Congress' enforcement of those rights via legislation, are 'the Supreme Law of the Land', and state

68 Iowa Code § 352.11 (2017).

69 *See* J. Medina, 'California Cuts Farmer's Share of Scant Water', *N.Y. Times* (12 June 2015), available at: https://www.nytimes.com/2015/06/13/us/california-announces-restrictions-on-water-use-by-farmers.html.

70 *Cooper v. Aaron*, 358 U.S. 1 (1958).

71 *Ibid.*, at p. 17.

72 U.S. Constitution, Amendment XIV, Section 5.

73 *See The Civil Rights Cases*, 109 U.S. 3 (1883). (Stating that Congress has the power to enforce the provisions of Section 1 against the states.)

74 U.S. Constitution, Art. VI, cl. 2.

officials, who take an oath to support and uphold the Constitution,[75] have no legal mechanism to stop concentration of this interpretative power in the federal government.[76] Since the subjects covered by the Bill of Rights are so important, incorporation means that the federal government has a monopoly on those subjects.

One might argue that the concentration of control of interpretation of the Bill of Rights in the Supreme Court and Congress is not the type of concentration of governmental power that is likely to stifle individual liberty. One could argue that federal control over the meaning of the freedom of speech, for example, does not threaten individual liberty in the same way that federal control over commerce could threaten individual liberty. This argument is not persuasive for a number of reasons. First, the argument depends on a distinction between rights-protecting provisions and power-granting provisions that cannot carry the weight. Both types of provisions affect liberty depending on how broadly they are construed. A power-granting provision affects liberty the broader the power, and a rights-protecting provision affects liberty the more narrowly it is construed. Therefore, to the extent federal control of legal decisions more generally threatens individual liberty, its control over the meaning of individual rights may do so as well.

Second, and relatedly, a federal monopoly over the meaning of the Bill of Rights permits the federal government to narrowly construe those rights to the detriment of individual liberty. To the extent the federal government narrowly interprets the Bill of Rights, its interpretations govern both federal and state governments, and lead to less liberty protection.[77]

Incorporation also harms federalism's benefit of protecting individual liberty because it stifles jurisdictional competition for Americans' affections. By definition, the incorporation doctrine means that all jurisdictions have to protect the rights identified in the Bill of Rights with the same protection as identified by the U.S. Supreme Court. Therefore, incorporation precludes jurisdictional competition for Americans' affections on those subjects. The Bill of Rights protects numerous rights, and there are reasonably different conceptions of many or all of the rights. For instance, though it is the case that a just government must protect the freedom of speech to some degree, there is reasonable variation on the extent and kind of protection that just governments may provide.[78] Prior to incorporation, to the extent states chose to follow and interpret the Bill of Rights differently in their own jurisdictions, they provided different conceptions of those

75 *Ibid*., Art. VI, cl. 3.

76 Outside of the Article V amendment process or changing the Supreme Court's interpretations through changing the Supreme Court's personnel.

77 The Supreme Court's interpretations of the Bill of Rights theoretically allows some interpretative freedom to states through the Court's doctrine that its interpretations set a baseline or floor for protection, and that states may increase individual rights protections beyond that. W.J. Brennan Jr., 'The Bill of Rights and the States: the Revival of State Constitutions as Guardians of Constitutional Rights', *N.Y. U. L. Rev*., Vol. 61, 1986, p. 535, 548-550. As I describe below, however, that interpretative freedom is, in practice, modest.

78 This is evidenced by the variation of protection provided among Western nations.

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rights which, in turn, provided a 'market' of jurisdictional competition on the subject of individual rights. Incorporation stopped that competition.

One might argue that state supreme courts continue to possess the authority to interpret their state constitutions' rights-protecting provisions independently of the Supreme Court's interpretation of the federal Bill of Rights, and that this provides the legal space for jurisdictional competition in the constitutional rights context. This counterargument rests on what is known as the 'baseline' rule: the Supreme Court's interpretation of the Bill of Rights establishes a 'baseline' of protection for a protected right, and states may protect beyond the baseline through their state constitutional rights. This argument's premise is true, but in practice, its conclusion has not followed. In practice, the vast majority of states protect the vast majority of their state constitutional rights identically to the Supreme Court. This phenomenon is called 'lock-step'. Though state supreme courts possess the authority to interpret their state constitutional provisions differently from the Supreme Court's interpretations of the Bill of Rights, they generally do not do so. There are a variety of proffered explanations for this phenomenon of lock-step[79]; regardless of the cause, the effect is to reduce jurisdictional competition for individual rights.

Since states provide the same protection for the Bill of Rights, and interpret their state constitutions in lock-step with federal rights, they cannot compete for their peoples' affections. Instead, the citizens of each state look to the U.S. Supreme Court as the – sole – guardian of the Bill of Rights. This inclines many people to transfer their loyalty away from their state and its institutions, and to the federal government. For instance, why would I care about Ohio, its supreme court and constitution, when it is the U.S. Supreme Court interpreting the Bill of Rights that determines the scope of, and protects, my most important rights?

A limited way to measure this is to look at those areas where the states continue to possess modest interpretative independence from the Supreme Court. State interpretative autonomy currently exists where states can interpret their state constitutions to provide 'greater' protection to individual rights than the U.S. Supreme Court's interpretations of the federal Constitution. This has occurred, for instance, in some states following the Supreme Court's rulings that the Free Speech Clause did not protect free speech activities in privately owned shopping centres.[80] The California Supreme Court interpreted the California Constitution's Free Speech Clause to provide protection of speech in privately owned shopping malls.[81] The California Supreme Court's interpretative independence rejected the federal interpretation so that, within California, greater freedom of speech prevailed.[82] If the state courts would do this regarding all of the Bill of

79 One explanation is that state supreme courts do not wish to subject themselves to criticism for interpreting rights protections differently from the Supreme Court. Another is that state supreme courts lack the institutional resources, or that state constitutions themselves lack the interpretative resources, to reasonably support divergent interpretations. There are other explanations as well.

80 *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972).

81 *Robins v. Pruneyard Shopping Center*, 592 P. 2d 341 (Cal. 1079).

82 Though, and correspondingly, less property protection prevailed in California.

Rights, it would increase states' abilities to attract the American people's loyalty, but it has generally not occurred.

Second, incorporation has limited federalism's ability to facilitate jurisdictional experimentation. It does so by requiring states to follow one position – the U.S. Supreme Court's interpretation – on the meaning and scope of the Bill of Rights, and precluding other prima facie reasonable interpretations of those rights.

The Bill of Rights covers a broad array of very important subjects. For example, it specifies a robust scope for the freedom of speech; it provides moderate protection for religious liberty and broad reign to individual gun rights. Americans take prima facie reasonably different positions on the extent to which these rights should be protected.[83] For instance, many Americans argue that campaign contributions should not be protected by the Free Speech Clause or that the protection does not preclude significant regulation[84]; many other Americans argue that the Free Exercise Clause should protect religiously motivated activity from government regulation, including regulations not targeted at religion[85]; and many Americans argue that the Second Amendment does not proscribe reasonable gun control legislation, such as limits on handgun ownership and possession.[86]

States may not adopt any of these *prima facie* reasonable positions because of incorporation. States may not experiment with any of these *prima facie* reasonable positions to help determine whether they are, in fact, reasonable. This is because the U.S. Supreme Court has ruled that: campaign contributions are protected by the freedom of speech from significant regulation, and that the federal government and states may not significantly restrict corporate campaign contributions[87]; the free exercise of religion provides minimal protections to religious exercise incidentally burdened by laws[88]; and the right to keep and bear arms proscribes much common gun control legislation.[89] If states could adopt such restrictions, they would be able to serve as experiments to determine whether the restrictions or the Supreme Court's interpretations were harmful or valuable, and how much so.

A limited way to measure this is to look at those areas where the states continue to exercise modest interpretative independence from the U.S. Supreme Court. Existing state interpretative autonomy has led to some experimentation. For instance, the U.S. Supreme Court has interpreted the Takings Clause to permit government taking of private property and transferring it to another private

83 These positions are prima facie reasonable because of the large number of Americans who hold these positions, and the reasonable arguments advanced by Americans in favour of these positions.

84 R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, Harvard University Press, 1996, p. 18.

85 M.W. McConnell, 'Free Exercise Revisionism and the Smith Decision', *The University of Chicago Law Review*, Vol. 57, 1990, p. 1109-1153.

86 *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).

87 *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010).

88 *Employment Division v. Smith*, 494 U.S. 872 (1990).

89 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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party to obtain the public benefit (purportedly) generated by increased economic activity from the new use(s) for the property.[90] Both before and after *Kelo*, state courts interpreted their state constitutions to provide a different and greater level of protection for property owners. In my home state of Ohio, for example, the Ohio Supreme Court in *City of Norwood v. Horney* expressly rejected the federal interpretation and ruled that the Ohio Constitution's Takings Clause prohibited such takings.[91] The interpretative independence exercised by states like Ohio is providing a series of experiments on which interpretation provides the most net benefit. If the state courts did this regarding all of the Bill of Rights, it would increase states' abilities to experiment.

Third, incorporation undermined the United States' ability to provide a wide variety of different jurisdictional approaches to human flourishing. There are a variety of reasonable and reasonably different ways for individuals and societies to pursue and promote human flourishing. For instance, on the societal level, some countries pursue a relatively vigorous protection for free speech, like the United States, which protects even so-called hate speech,[92] and other countries protect relatively less free speech, like the Council of Europe, which suggests significant limits on hate speech.[93]

The rights protected in the Bill of Rights govern important facets of human flourishing. To take an obvious example, nearly everyone agrees that some amount of free speech is necessary for human flourishing.[94] At the same time, many, if not all, of the rights protected by the Bill of Rights are subject to reasonably different manners of protecting them. Think of all the rights about which reasonable Americans can and do disagree: free speech; religious liberty; establishment of religion; gun rights; and that's only from the first two amendments. Incorporation forecloses nearly all different reasonable approaches and imposes on the United States a one-size-fits-all rule. The U.S. Supreme Court chooses one reasonable manner of protection and precludes nearly all other forms of protection.

Incorporation hinders states from catering to the reasonable diversity of forms of human flourishing. If a state, such as California, wished to, for example, protect gun rights relatively less than another state, such as Wyoming, it cannot do so under incorporation. This means that many reasonable approaches to these rights are not present in any jurisdiction in the United States.

90 *Kelo v. New London, Conn.*, 545 U.S. 469 (2005).

91 *See Norwood v. Horney*, 853 N.E. 2d 1115, 1141 (Ohio 2006). ("[W]e find that the analysis by the Supreme Court of Michigan in *Hathcock*, 471 Mich. 445, 684 N.W.2d 765, and those presented by the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio's Constitution.")

92 *See Virginia v. Black*, 538 U.S. 343 (2003). (Reversing a conviction for cross-burning on free speech grounds.); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (same).

93 *See* Council of Europe, Recommendation No. R (97) 20 (30 October 1997). (Suggesting that member states legally limit and punish 'hate' speech.)

94 *See, for instance*, R.P. George, *Making Men Moral: Civil Liberties and Public Morality*, Wotton-under-Edge, Clarendon Press, 1993, p. 192-208. (Providing a pluralist perfectionist account of speech.)

Furthermore, the activities protected by the Bill of Rights also interrelate in complex ways, and states are precluded from moulding these complex relationships to suit their diverse conceptions of human flourishing. One could imagine that a state that wished to facilitate robust religious practice would embrace broad conceptions of free speech and religious exercise, and it might also adopt a narrow conception of establishment. (There are, of course, many other approaches a state could take to facilitate religious exercise.)

A limited way to measure this is to look at those areas where the states continue to exercise modest interpretative independence from the U.S. Supreme Court. Existing state interpretative autonomy has provided some space for the reasonable diversity of human life to find a home in the United States. One area where Americans have reasonably diverged is the extent to which the law should protect religious beliefs and religiously motivated actions from legal regulation when that regulation is not targeted at the religion. Religion is a basic human good the exploration of which is a component of human flourishing.[95] However, the fact that religion is valuable does not, by itself, determine the extent to which religiously inspired activity should be shielded from government regulation.

The U.S. Supreme Court famously ruled that the Free Exercise Clause did not protect religiously motivated activity from neutral government regulation, that is, regulation not targeted at the religiously motivated activity.[96] That is a reasonable, though not (at least at the time) a popular, approach. State supreme courts prior to and after *Smith* utilized their interpretative independence to provide more robust protection to religiously motivated activity. For instance, the Ohio Supreme Court rejected *Smith* and ruled that the Ohio Constitution's Free Exercise Clause provided greater protection to religiously motivated activity.[97] If the state courts could and would do this regarding all of the Bill of Rights – both increasing and decreasing protection – it would increase states' abilities to pursue reasonably different approaches to human flourishing

III Conclusion

In sum, the U.S. Supreme Court's incorporation of the Bill of Rights against the states has come at the price of significant costs to federalism. In particular, incorporation has harmed federalism's capacity to protect individual liberty, promote jurisdictional experimentation and provide fora for reasonably different approaches to human flourishing.

E Lessons for the European Union

I Introduction

The European Union is in a position analogous to the United States before 1925 where the Union's Charter of Fundamental Rights currently does not apply broadly to member states in their own capacities and instead only applies to the

95 J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 1980, p. 85-86.
96 *Employment Division v. Smith*, 494 U.S. 872 (1990).
97 *Humphrey v. Lane*, 728 N.E. 2d 1039 (Ohio 2000).

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Union itself and member states acting on behalf of the Union. The United States' experience potentially offers evidence to support the conclusion that robust incorporation of the Charter against member states will cause significant harm to federalism within the Union.

II The United States' Experience Suggests that Incorporating the Charter of Fundamental Rights Will Significantly Harm European Union Federalism

Below I describe how, regarding each of the three benefits from federalism, European Union federalism is likely will be harmed to the extent that the Charter is applied to member nations. First, individual liberty is likely to be harmed through incorporation. Incorporating the Charter of Fundamental Rights will empower the Court of Justice of the European Union (CJEU), and take power away from member nations and their courts. This will diminish member nations' capacity to resist liberty-diminishing actions by the European Union.

One countervailing factor is that, at least some member nations have resisted the CJEU's jurisdiction, especially the German Constitutional Court and, one could argue, that resistance would continue even after incorporation. On the other hand, at one time, some American states strongly resisted federal power,[98] but today they tend no longer to do so.

Furthermore, incorporating the Charter will hinder member nations from retaining their citizens' loyalty because it will make the European Union and CJEU the focus of loyalty for rights protection. One countervailing factor is that member nations have much thicker identities than do the U.S. states, so that they may be able to resist this harm. For example, Italy is more distinct from Germany, than California is distinct from Utah. On the other hand, at one time, American states possessed significantly different identities,[99] and incorporation was one of the ways those distinct identities diminished.

Second, incorporating the Charter will severely diminish member nations' ability to experiment with different approaches to the rights protected by the Charter. Every member nation will have to provide at least as much protection as the CJEU provides, which will preclude member state experimentation with varying levels of protection. I suspect that this problem will be exacerbated by the Charter's lengthy list of vaguely worded and contestable 'rights' including, for example: Article 2(1): "Everyone has the right to life"; Article 14(1): "Everyone has the right to education … ." These more vaguely worded and contestable 'rights' would normally be subject to substantially reasonably different approaches, so that member nations could take a variety of different paths of experimentation. Therefore, the CJEU's univocal interpretation would cut off a relatively large amount of experimentation.

Third, incorporating the Charter will hamper member nations' ability to provide a diversity of options for different reasonable forms of human flourishing.

98 *See, e.g.*, during the antebellum era, Wisconsin effectively nullified the 1850 Fugitive Slave Act. *See generally Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

99 *See, e.g.*, in the early Republic, the Virginia Court of Appeals rejected U.S. Supreme Court supervisory authority. *See generally Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

Every member nation will have to provide the same package of rights protection. I think that this harm may be especially pronounced in Europe, where the member nations have significantly different ways of promoting human flourishing so that the loss of this distinctiveness would be profound.

III Mechanisms to Preserve Federalism

However, the European Union has options available to it to avoid at least some of this harm to federalism while, at the same time, securing some of the benefit that might be occasioned by incorporating the Charter. First, the Union could adopt the legal doctrine that incorporates the Charter's rights against member nations, but it could do so at a relatively low baseline. This way, the Charter's rights are respected, while member nations may, if they wish, protect the Charter significantly more robustly. This would be like how many American states have treated the Fifth Amendment's Public Use Clause, prior to and after *Kelo v. New London* ruled that public use included increased economic activity, tax base growth, and improved aesthetics.[100] This is a very slight limit on government takings, and most states have gone beyond that baseline. The CJEU might make a similar move regarding Article 17(1) "except in the public interest".

Second, the Union could incorporate the Charter and the CJEU could adopt rules of construction for their implementation that protect federalism. A rule of construction is an interpretative guide[101]; it pushes or pulls an interpreter to choose one reasonable interpretation instead of another. For example, the U.S. Supreme Court frequently uses a "clear statement rule" to protect federalism.[102] Under this rule of interpretation, Congress can only pre-empt state authority over an area of traditional state governance if it states its intent clearly.[103] Similarly, the European Court of Justice could employ a rule of construction under which a member nation's interpretation of the Charter is illegal only if it is a clearly erroneous interpretation. Given the vagueness of many of the Charter's rights, this rule of construction should frequently protect member state interpretative independence.

Third, the Union could incorporate the Charter and reduce the CJEU's supervisory authority over member nation courts. To the extent member nation courts wield interpretative independence from the CJEU, their interpretations of the Charter will differ, because reasonably different interpretations of the Charter's vague rights are plausible. This interpretative independence would allow the member nations to practice interpretative federalism. The trick would be to provide sufficient CJEU oversight, so that a member nation could not eliminate Charter protection. This could be done through relatively simple institutional means. For example, if the CJEU could not take a case without a high percentage of the justices supporting it, this would limit the number of cases and ensure that only cases about which there is an interpretative consensus are taken. Or, the

100 *See generally Kelo v. New London, Conn.*, 545 U.S. 469 (2005).
101 *See, for instance, In re Binghamton Bridge*, 70 U.S. 51, 74 (1865).
102 *See, for instance, Bond v. United States*, 134 S. Ct. 2077 (2014).
103 *Ibid.*, at p. 2093-2094.

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CJEU could overrule a member nation's interpretation only with a high percentage of justices supporting it. This would ensure that only cases about which there is an interpretative consensus are taken. Or, the CJEU's judgements could be subject to a member nation's or another European Union institution's override upon a high percentage vote. This would provide an *ex ante* check on the CJEU, and an *ex post* check leading the CJEU to interpretative modesty. Lastly, the CJEU's justices could be selected by the member nations' legislatures instead of their governments (typically the executive). This would more closely tie the justices to their member nations as separate nations.[104]

F Conclusion

In this article, I made three moves. First, I described the U.S. Supreme Court's decades-long process of incorporating the federal Bill of Rights against the states. Second, I argued that incorporation of the Bill of Rights has come with significant costs to federalism. Third, I suggested that the American experience provides a cautionary note for proposed European Union incorporation of the Charter of Fundamental Rights.

In this article, I make no comment on whether the harms to federalism in the European Union that would be occasioned by Charter incorporation are acceptable to achieve other goals. By way of analogy, in the American context, many scholars argued that loss of federalism was an easy-to-bear cost because of the much greater good gained, such as robust individual rights protection. One could plausibly make the same move in the European Union context and argue that the project of greater union provides so many and/or so powerful benefits that any federalism losses are acceptable.

I am sceptical of this move for a number of reasons. First, I believe that the rights protected by the Charter are subject to reasonable disagreement. By

104 Each member nation appoints one CJEU justice, and those justices from nations with parliamentary systems are appointed by member nation governments. In light of this, one might argue that a sufficient number of the justices are already relatively closely tied to their member nations and that my proposal is unnecessary. However, my proposal retains traction for at least two reasons. First, executives of member nation governments may tend to identify more closely with the European Union than with their ostensible constituents. *See also* E.A. Young, 'Protecting Member States Autonomy in the European Union: Some Cautionary Tales from American Federalism', *N.Y.U. L. Rev*., Vol. 77, 2002, p. 1612, 1692 (making a similar point regarding the Council of Ministers). This greater connection to the European Union could occur for many reasons. For instance, an executive may be ideologically more closely aligned with the Union than with his constituents. Or, an executive may seek professional advancement in the Union. Second, member nation legislative appointment of CJEU justices would more closely tie those justices to their member nations because the nation's legislature more fully represents and is an expression of the nation *qua* nation than the executive. This can be seen from a number of perspectives. For example, jurisprudentially, it is typically held that a nation's parliament, and not its prime minister, is the legal sovereign in the nation. *See* J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, 1999 (making this claim regarding the United Kingdom). Practically, the United States' switch from legislative election of U.S. senators to popular election made senators less tied to their states as states.

hypothesis, then, any gains made to individual rights protection are subject to dispute and should be discounted. Second, without federalism, there is no 'exit' option for states or individuals, and this means that the Union government has a monopoly on power and is likely, over the long term, to use its monopoly status like other monopolists: it will exert control over its 'customers' and diminish rights protections.

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