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Federalism in Rights Cases†

This Article examines whether and how, in a federal state, the federated entities' constitutions, laws, case law, and practices may impact federal fundamental rights cases. Such bottom-up influence may occur in particular when (i) the federated entities have jurisdiction over the relevant area of law and enjoy broad autonomy; (ii) the question raised is controversial, relates to conflicting values, and is linked to the diversity which the constitution protects; (iii) the applicable federal fundamental right is "unenumerated" or not clearly grounded in the constitution; and (iv) the scope of this right is vague. In this respect, federated entities in a federal state may become "constitutional indicators" or even "trailblazers." They indeed have the potential to indicate a future federal path when, for constitutional reasons, many of them have made similar decisions or choices, or when one or a few pioneering entities wander through unexplored constitutional fields.

Introduction

In a federal state, the case law on fundamental rights has a multilevel impact and thereby affects the autonomy of federated entities.[1] Other sources of rights, such as binding international conventions,

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1. Regarding the United States, see, e.g., Michael S. Greve, *Federalism*, *in* The Oxford Handbook of the U.S. Constitution 431, 437 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) (going so far as to state that "[a]ll else equal, more rights mean less state autonomy"); Ilya Somin, *The Supreme Court of the United States: Promoting Centralization More than State Autonomy*, *in* Courts in Federal Countries: Federalists or Unitarists? 440, 477–80 (Nicholas Aroney & John Kincaid eds., 2017). Regarding Canada, see, e.g., José Woehrling, *Les conséquences de l'application de la Charte canadienne des droits et libertés pour la vie politique et démocratique et l'équilibre du système fédéral* [*Consequences of the Application of the Canadian Charter of Rights and Freedoms for the Political and Democratic Life and the Balance of the Federal System*], *in* Le fédéralisme canadien contemporain [Contemporary Canadian Federalism] 251, 264–74 (Alain-G. Gagnon ed., 2006).

may also be relevant and reduce the state's margin of appreciation at all levels.[2]

One may, however, ask whether the federal structure of a given country influences case law when the issue at stake is within the constitutional jurisdiction of the federated entities. Do new developments in the rights jurisprudence suppose that a supreme or constitutional court should determine beforehand how the issue has been addressed or solved by the various federated entities? If so, how much weight does this comparative study carry? In which situations and for which rights is such an analysis justified or even necessary?

These questions invite reflection regarding the place of federalism in rights cases across several different countries. On the one hand, the federated entities in a federal state may, *ceteris paribus*, collectively enjoy a larger autonomy if their constitutions, laws, case law, and practices influence the interpretation of all or some federal rights or if the latter leave them a margin of appreciation, as compared to the situation where all these rights are autonomously and uniformly interpreted. On the other hand, such an approach links, to a certain extent, the evolution of the rights case law to the choices made by all or part of the entities. This "bottom-up" effect could, in some cases, produce a freezing or even a weakening impact in terms of rights protection.

The interactions between the federal structure of a given country and the rights case law can actually be described or observed at least in two different ways. First, the federated entities may enjoy a margin of appreciation within their areas of jurisdiction, as far as the interpretation or the implementation of federal rights is concerned. For instance, the actual protection resulting from the freedom of religion in public schools could vary from one entity to another should public schooling be within the jurisdiction of the federated entities in a country where this freedom leaves them a margin of appreciation. Second, the meaning of a federal right may be determined, *inter alia*, by reference to the federated entities' constitutions, laws, case law, and practices. How do the federated entities understand, for example, the notion of marriage in countries where they have jurisdiction over this institution? A relevant comparative analysis of different federated entities within a country is of potential interest to courts having to define the scope of the federal freedom of marriage or another broader freedom. One should finally note that, for both types of impact, the scope of the federal rights is at stake. Accordingly, the reflections made in this Article may affect the various aspects of the duty to respect, protect, and fulfil federal rights.

This Article, which is comprised of four parts, presents reflections drawn from a comparative constitutional law study. Part I sets out

2. Regarding the level of the federated entities, see, e.g., JUDITH WYTTENBACH, UMSETZUNG VON MENSCHENRECHTSÜBEREINKOMMEN IN BUNDESSTAATEN [IMPLEMENTATION OF HUMAN RIGHTS CONVENTIONS IN FEDERAL STATES] 562–64 (2017).

some features of a federal state, which are relevant to the topics covered. Part II discusses various aspects of the case law of the European Court of Human Rights linking certain new developments to the existence of a consensus, notably among the member states of the Council of Europe. It also examines whether this perspective is shared by other international or supranational courts and committees. In addition, it addresses the question of whether this approach can be transposed to a federal state and used by a federal supreme or constitutional court. Part III describes when and how federal rights cases may be influenced by the federated entities' constitutions, laws, case law, and practices. Part IV contains a typology of situations in which federalism may influence rights cases in a federal state. In the Article's Conclusion, the federated entities are described as potential indicators and trailblazers for the interpretation of federal fundamental rights.

I. Diversity and Homogeneity in a Federal State

Diversity, especially due to the federated entities' constitutional autonomy and substantial powers, is a key feature of a federal democratic country.[3] Constitutional, legal, or jurisprudential diversity may be effective or not, as the entities are usually not required to differ from one another. In some federal states, all or many federated entities tend to adopt similar institutions and constitutional rules, although this is not compulsory. This observation can be made to a certain extent for instance in Switzerland.

Homogeneity within a federal state typically constitutes a characteristic of such a country. It notably results from specific provisions of the constitution and from the obligation to comply with federal fundamental rights. Even in Australia, where the Constitution guarantees few fundamental rights,[4] which, for the most part, are implied in institutional provisions referring to the Commonwealth, some rights may impact the autonomy of the states and territories.

The intensity of decentralization varies from one federal state to another.[5] The Canadian provinces, the Swiss cantons, or the states in the United States, for instance, enjoy a substantial level of autonomy and retain jurisdiction over many areas of law. The Austrian *Bundesländer*, the Brazilian states, the German *Länder*, and the

3. *See*, *e.g.*, Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)*, 17 Jus Politicum 209, 213 (2017) (noting that "federalism enables participatory opportunities that create plural sources of law, enabling layered political identities of its citizens, comparative inquiries into legal rights, and differing responsibilities").

4. *See*, *e.g.*, Cheryl Saunders, The Constitution of Australia: A Contextual Analysis 257–82 (2011); Rosalind Dixon, *An Australian (Partial) Bill of Rights*, 14 Int'l J. Const. L. 80 (2016).

5. *See*, *e.g.*, Ronald L. Watts, *Comparative Conclusions*, *in* Distribution of Powers and Responsibilities in Federal Countries 322, 326–27, 331–33 (Akhtar Majeed, Ronald L. Watts & Douglas M. Brown eds., 2006).

Mexican states, however, have less autonomy and jurisdiction, especially with respect to tax issues. In addition, the intensity of diversity, be it ethnic, religious, linguistic, cultural, historical, political, or societal, varies considerably from one federal state to another.

When a state's federal structure relates to the ethnic, linguistic, religious, cultural, historical, political, or societal diversity within the country, and when the constitution tends to protect this diversity, these two features may impact the interpretation of several constitutional norms. Such an approach sees a constitution as an "open, interacting ensemble" and aims to preserve its unity.[6] The ensemble is deemed "open" due to the possible influence of external sources, and "interacting" due to interactions among its various parts or provisions. Accordingly, the interpretation of federal fundamental rights may have to take into account the constitutional protection of this diversity and the constitutional norms that safeguard the jurisdiction of the federated entities.[7]

Some rights cases relating to an area within the jurisdiction of the federated entities include a prominent ethnic, linguistic, religious, cultural, historical, political, or societal dimension. When the constitution explicitly or implicitly protects diversity in this regard, the way in which the constitutional question raised is answered at the entities' level, may have an impact on the interpretation of the federal right or rights at stake. Such an influence may exist, in particular, where the answers of the federated entities are based on constitutional grounds, such as a provision of the country's constitution or the corresponding provisions of the federated entities' constitutions. One can call this

6. Regarding the U.S. Constitution, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (urging interpreters to read the Constitution "more holistically"). *See also* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 210 (2008) ("Invoking the tacit postulates of the constitutional plan—neither a technique of the Left nor a technique of the Right—is an enterprise that should unite all who accept the Constitution as their lodestar."). Regarding the Swiss Federal Constitution, see Bundesgericht [BGer] [Federal Supreme Court] June 28, 2016, 143 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 297, 322–23. *See also* RENÉ RHINOW, MARKUS SCHEFER & PETER UEBERSAX, SCHWEIZERISCHES VERFASSUNGSRECHT [SWISS CONSTITUTIONAL LAW] 98, 103 (3d ed. 2016). Regarding the German Basic Law, see, e.g., KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [MAIN FEATURES OF THE FEDERAL REPUBLIC OF GERMANY'S CONSTITUTIONAL LAW] 26–28 (20th ed. 1999); UWE VOLKMANN, GRUNDZÜGE EINER VERFASSUNGSLEHRE DER BUNDESREPUBLIK DEUTSCHLAND [MAIN FEATURES OF A CONSTITUTIONAL THEORY OF THE FEDERAL REPUBLIC OF GERMANY] 217–18 (2013). From a comparative perspective, see Thomas Kleinlein, *Federalisms, Rights, and Autonomies: The United States, Germany, and the EU*, 15 INT'L J. CONST. L. 1157, 1157–64 (2017).

7. On this issue, see Resnik, *supra* note 3, at 245–68, who notes that there may be "federalism discounts and court discounts" in federal systems. A "federalism discount" results "in a given case either in the differentiated enforcement of specified legal precepts or in the under-appreciation of the identitarian claims of the subunit authority" (*id.* at 245), the word "discount" aiming to "underscore that authorizing variation may be loyal to federalisms' commitments to diversity but also entails tolerating deviation from previously-set norm" (*id.* at 248).

a form of bottom-up influence.[8] Should the evolution of the federal rights case law actually depend on a consensus among the federated entities in a given country? Or is the influence of diversity—or the lack thereof—on rights cases, more diffuse and less schematic, or even nonexistent? These questions will be addressed in Parts II and III.

II. Consensus Among States or Federated Entities

Courts at various levels may search for a consensus among states or other entities in rights cases. An examination of some of the developments in the interpretation of human rights and EU fundamental rights might prove useful in this context (Parts II.A, II.B, and II.C) before we turn to the interpretation of fundamental rights in a federal state (Part II.D).

A. The Interpretation of the European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention")[9] has been ratified by the forty-seven member states of the Council of Europe. Especially when it faces a question that may require an evolutive interpretation of the Convention, the European Court of Human Rights tends to examine whether there is a "consensus"—sometimes called "European consensus"—or "at least a certain trend among the member States" on the issue at stake.[10] The search for a consensus is based primarily on the laws and practices of the member states, as well as on international treaties.[11] Why does the Court feel the need to carry out such an analysis? Several answers come to mind.

The Council of Europe promotes human rights, democracy, and the rule of law. Its member states do no transfer much power to this organization, which is thus not comparable to the European Union. In this regard, although its missions are of utmost importance, the Council of Europe is a rather loose organization. This may explain why its member states remain a focal point for the European Court of Human Rights. Regarding controversial issues, the Court probably

8. For a broader reflection on this issue, see Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 Yale L.J. 1889, 1917–18 (2014) (concluding that "[s]tates [in the United States] now serve demonstrably national ends and, in doing so, maintain their central place in a modern legal landscape"). For a mapping of the issues relating to "bottom-up federalism and rights," see Thomas Kleinlein & Bilyana Petkova, *Federalism, Rights, and Backlash in Europe and the United States*, 15 Int'l J. Const. L. 1066, 1076–79 (2017).

9. Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

10. *See, e.g.*, Naït-Liman v. Switzerland, App. No. 51357/07, ¶ 175 (Mar. 18, 2018), https://hudoc.echr.coe.int/eng?i=001-181789; Magyar Helsinki Bizottság v. Hungary, App. No. 18030/11, ¶¶ 124–25, 138–40, 148–50 (Nov. 8, 2016), http://hudoc.echr.coe.int/eng?i=001-167828; Biao v. Denmark, App. No. 38590/10, ¶¶ 131–33 (May 24, 2016), http://hudoc.echr.coe.int/eng?i=001-141941.

11. *See* Kanstantsin Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights 39–49 (2015).

considers that its own voice is not strong enough and that it should somehow echo that of most of the member states.[12] The search for a consensus is not, however, an inexorable command,[13] and the Court does not describe a given consensus as binding.[14]

Moreover, the European Court of Human Rights has to build its acceptance by the member states of the Council of Europe and its legitimacy. This implies a long—probably never-ending—process, which requires careful interactions between the Court and the member states. In linking its evolutive interpretation of the Convention to the existence of a consensus on the issue at stake, the Court may reinforce this acceptance[15] and may be regarded as legitimate by said member states and their citizens.[16] Additionally, this approach potentially favors the Convention's effectiveness. An individual country may be more willing to accept the Court's decisions if it feels that they not only reflect the view of a majority of the judges but of a vast majority of the member states.[17]

12. For a good example, see S.A.S. v. France, App. No. 43835/11, ¶ 129 (July 1, 2014), http://hudoc.echr.coe.int/eng?i=001-145466 ("It is also important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight . . . . This is the case, in particular, where questions concerning the relationship between State and religions are at stake . . . ." (citations omitted)). The Court concludes that "in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public spaces." *Id.* at ¶ 156. *See*, *e.g.*, Frédéric Sudre, Droit européen et international des droits de l'homme [European and International Law of Human Rights] 227–28 (14th ed. 2019) (supporting this outcome).

13. Naït-Liman v. Switzerland, App. No. 51357/07, ¶ 175 (Mar. 18, 2018), https://hudoc.echr.coe.int/eng?i=001-181789 ("[I]n cases involving issues that are subject to constant developments in the Council of Europe member States, the Court *may* examine the situation in other member States in respect of the issues at stake in a given case in order to assess whether there exists a 'European consensus' or at least a certain trend among the member States . . . ." (emphasis added) (citations omitted)); On this question, see, e.g., Dzehtsiarou, *supra* note 11, at 36–37 (arguing that "European consensus is a rebuttable presumption in favour of the solution adopted by a significant majority of the Contracting Parties, which is identified on the basis of comparative analysis of laws and practices of these Parties"). *See also* Dzehtsiarou, *supra* note 11, at 119, 206–09; Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee*, 65 Int'l & Comp. L.Q. 21, 28 (2016).

14. Luzius Wildhaber, Arnaldur Hjartarson & Stephen Donnelly, *No Consensus on Consensus? The Practice of the European Court of Human Rights*, 33 Hum. Rts. L.J. 248, 256 (2013).

15. *See*, *e.g.*, Andrew Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality 144, 222–23 (2012).

16. On this question, see Dzehtsiarou, *supra* note 11, at 207–11; Frédéric J. Doucet, *Les origines et les fondements du recours au consensus en droit européen des droits de l'homme* [*The Origins and Foundations of the Use of Consensus in the European Law on Human Rights*], 43 Revue de droit de l'Université Sherbrooke [R.D.U.S.] 709, 740–41, 747–48 (2013).

17. *See*, *e.g.*, Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 Eur. J. Int'l L. 101, 102, 115 (2008).

Moreover, human rights are formulated in vague and general terms. They are subject to multiple interpretations. The evolution of the case law may be quite unpredictable. Facing a new difficult question, will the European Court of Human Rights simply say that the states do enjoy a wide margin of appreciation or, on the contrary, that they must adapt their laws and practices in light of the evolution of the Convention's interpretation? This line of reasoning is not theoretical: it is the core of many controversial cases. The existence of a European consensus demonstrating an evolution at the member-state level may help reduce this unpredictability, as mentioned by the Court itself.[18] When increasingly isolated in Europe on an issue that may be addressed to and by the European Court of Human Rights, a member state should understand that it may actually be violating the Convention.[19] This supposes, however, that such a consensus can be relatively easily identified and that it is clear and not subject to many caveats and uncertainties. The methodology of the search for an eventual consensus must be robustly elaborated and adequately applied.[20] There is scope for improvement on the part of the Court in this respect.[21]

Finally, a European consensus on a given issue may be the basis for an evolutive interpretation of the Convention "in the present," as noted by a judge of the European Court of Human Rights.[22] A decision this Court makes may indeed mark an evolution in the case law, but it is not disconnected from reality. In such a case, it is indirectly connected to the laws and practices of many member states. Consequently,

18. Bayatyan v. Armenia, App. No. 23459/03, ¶ 108 (July 7, 2011), http://hudoc.echr.coe.int/eng?i=001-95386; Dzehtsiarou, *supra* note 11, at 137, 141; Marisa Iglesias Vila, *Subsidiarity, Margin of Appreciation and International Adjudication Within a Cooperative Conception of Human Rights*, 15 Int'l J. Const. L. 393, 410 (2017).

19. *See*, *e.g.*, Nino Tsereteli, *Emerging Doctrine of Deference of the Inter-American Court of Human Rights?*, 20 Int'l J. Hum. Rts. 1097, 1104 (2016).

20. For a rather positive evaluation of the practice of the European Court of Human Rights, see Wildhaber, Hjartarson & Donnelly, *supra* note 14, at 256–62.

21. *See*, *e.g.*, Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 Colum. J. Eur. L. 113, 138–40, 145–46 (2004); Laurence Burgorgue-Larsen, *"Decompartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties*, 16 Int'l J. Const. L. 187, 205–06 (2018). *See also* Amrei Müller, *Domestic Authorities' Obligations to Co-develop the Rights of the European Convention on Human Rights*, 20 Int'l J. Hum. Rts. 1058, 1068–70 (2016). For a dispute among judges of the Court on the existence of a "European consensus" on the right of an accused to defend her or himself without the assistance of a registered lawyer, see Correia de Matos v. Portugal, App. No. 56402/12, ¶ 137 (opinion of the Court), ¶ 18 of the second separate opinion (Tsotsoria, Motoc, and Mits, JJ., dissenting), ¶¶ 13–20 of the third separate opinion (Pinto de Albuquerque, J., dissenting), as well as ¶ 9 of the fourth separate opinion (Pejchal and Wojtyczek, JJ., dissenting) (Apr. 4, 2018), https://hudoc.echr.coe.int/eng?i=001-182243.

22. Magyar Helsinki Bizottság v. Hungary, App. No. 18030/11, ¶ 16 (Nov. 8, 2016), http://hudoc.echr.coe.int/eng?i=001-167828 (Sicilianos, J., concurring). *See*, *e.g.*, Bilyana Petkova, *The Notion of Consensus as a Route to Democratic Adjudication?*, 14 Cambridge Y.B. Eur. Legal Stud. 663, 681 (2012).

the evolution does not imply any change for these member states; only those outside of the consensus are actually impacted.

B. The Interpretation of Other Human Rights Instruments

Other international human rights courts and committees do not seem to follow the same approach adopted by the European Court of Human Rights. They do not usually carry on an analysis of the laws and practices of the state parties to the convention or the pact that they are in charge of interpreting, before they decide controversial cases.[23]

While they do not search for any consensus, they still tend to leave a margin of appreciation to the states in certain cases,[24] at least implicitly.[25] Besides, various scholars invite the Human Rights Committee and the Inter-American Court of Human Rights to develop a margin of appreciation doctrine notably based on the consensus among states.[26]

One may, however, argue that the case law and practice of the various international human rights courts and committees do not affect, globally speaking, the states concerned, with the same intensity as do the precedents set by the European Court of Human Rights. This Court renders many more decisions and does not hesitate to impose obligations on state parties, which reflects an extensive interpretation of the European Convention on Human Rights. This may explain the need for the Court to search for a European consensus when it faces certain delicate questions.

C. The Interpretation of the EU Charter of Fundamental Rights and the Treaty on European Union

Article 52 of the Charter of Fundamental Rights of the European Union (the Charter)[27] relates to the scope and the interpretation of

23. *See*, *e.g.*, McGoldrick, *supra* note 13, at 44; DZEHTSIAROU, *supra* note 11, at 128; Marijke De Pauw, *The Inter-American Court of Human Rights and the Interpretive Method of External Referencing: Regional Consensus v. Universality*, *in* THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE 3, 20–23 (Yves Haeck, Oswaldo Ruiz-Chiriboga & Clara Burbano-Herrera eds., 2015).

24. For an example relating to the right to participate in government (the right to run for the Office of the President of the United Mexican States, *in casu*), see Castañeda-Gutman v. Mexico, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶¶ 197–200 (Aug. 6, 2008).

25. Regarding the case law of the Inter-American Court of Human Rights, see Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 NW. J. INT'L HUM. RTS. 28, 79–81 (2012). *See also* Burgorgue-Larsen, *supra* note 21, at 208.

26. *See*, *e.g.*, Neuman, *supra* note 17, at 123; Contreras, *supra* note 25, at 81; McGoldrick, *supra* note 13, at 44, 56–60; Tsereteli, *supra* note 19, at 1104–07; Andreas Follesdal, *Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights*, 15 INT'L J. CONST. L. 359, 367–71 (2017).

27. Consolidated Version of the Charter of Fundamental Rights of the European Union, June 7, 2016, 2016 O.J. (C 202) 389 [hereinafter Charter].

the Charter's text. According to paragraph 4 of this article, "[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions." Paragraph 6 additionally states that "[f]ull account shall be taken of national laws and practices as specified in this Charter."

Article 52(4) of the Charter links the interpretation of part of the Charter with the national laws, practices, and traditions in a comparative perspective.[28] However, it is not clear in which cases this provision is applicable.[29] The preparatory works of the Charter, especially, point to certain rights that were supposed to be rooted in national constitutional traditions,[30] but an evolutive interpretation of these rights does not strictly depend on a corresponding evolution of said traditions.[31]

Article 52(6) of the Charter seems to focus on the laws, practices, and traditions of a given member state,[32] notably when that state is subject to a proceeding before the Court of Justice of the European Union. Several articles of the Charter indeed explicitly refer to national laws and practices.[33] Other articles point to national laws with respect to the exercise of guaranteed rights.[34] The added value of this paragraph, as compared to the other paragraphs of Article 52, seems minimal at best.[35]

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28. *See*, *e.g.*, Ulrich Becker, *Artikel 52 GRC*, *in* EU-Kommentar [EU-Commentary] 3539, ¶ 17 (Jürgen Schwarze ed., 4th ed. 2019); Koen Lenaerts & Kathleen Gutman, *The Comparative Method and the European Court of Justice: Echoes Across the Atlantic*, 64 Am. J. Comp. L. 841, 858–59 (2016); Angela Schwerdtfeger, *Artikel 52, in* Charta der Grundrechte der Europäischen Union [Charter of Fundamental Rights of the European Union], 940, ¶ 68 (Jürgen Meyer & Sven Hölscheidt eds., 5th ed. 2019).

29. Steve Peers & Sacha Prechal, *Article 52—Scope and Interpretation of Rights and Principles*, *in* The EU Charter of Fundamental Rights—A Commentary 1455, ¶¶ 52.151–.158 (Steve Peers et al. eds., 2014).

30. *See id.*, ¶¶ 52.151–.152.

31. Explanations relating to the Charter of Fundamental Rights, 2007 O.J. (C 303) 17, 34 ("[R]ather than following a rigid approach of 'a lowest common denominator,' the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions."). *See also* Peers & Prechal, *supra* note 29, ¶¶ 52.157–.158; Rudolf Geiger, Daniel-Erasmus Khan & Markus Kotzur, European Union Treaties: A Commentary 1099 (2015).

32. *See*, *e.g.*, Jörg Philipp Terhechte, *Artikel 52 GRC*, *in* 1 Europäisches Unionsrecht [European Union Law] 829, ¶ 19 (Hans von der Groeben, Jürgen Schwarze & Armin Hatje eds, 7th ed. 2015); Becker, *supra* note 28, ¶ 19.

33. Charter, *supra* note 27, arts. 16 (freedom to conduct a business), 27 (workers' right to information and consultation within the undertaking), 28 (right of collective bargaining and action), 30 (protection in the event of unjustified dismissal), 34 (social security and social assistance), 35 (health care), 36 (access to services of general economic interest).

34. *Id.* arts. 9 (right to marry and right to found a family), 10(2) (freedom of thought, conscience, and religion), 14(3) (freedom to found educational establishments with due respect for democratic principles and right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical, and pedagogical convictions).

35. *See* Schwerdtfeger, *supra* note 28, ¶ 90.

The case law of the Court of Justice of the European Union contains almost no references to the aforementioned paragraphs 4[36] and 6.[37] Furthermore, national laws, practices, and traditions are not regarded as constraining the evolution of the Court's case law. A high level of autonomy of the Charter is thus preserved in this perspective,[38] and, as a rule, the Court does not seem to—at least explicitly—search for a European consensus on issues that it must deal with in its rights cases.

Paragraphs 4 and 6 of Article 52 of the Charter are nevertheless interesting. Indeed, they show that rights are not isolated creations, but have several roots, including the constitutional traditions of the member states of the European Union. Moreover, EU rights interpretation is a complex process based, to a certain extent, on multilevel elements. One can only wish that the Court of Justice would clarify the scope of these paragraphs and the relationships between the rights and principles of the Charter, on the one hand, and national laws, practices, and traditions, on the other.

Finally, Article 6(3) of the Treaty on European Union also refers to the constitutional traditions of the member states: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the [European] Union's law."

As far as general principles of the European Union's law are concerned, rights are more directly connected to national constitutional traditions.[39] When an alleged right is not guaranteed by the European Convention on Human Rights and does not result from these traditions, it is not supposed to constitute a general principle of the European Union's law. When said traditions exist, however, they can constitute

36. *See* Joined Cases C-293/12 and C-594/12, Digital Rights Ireland v. Minister for Commc'ns, Eur-Lex CELEX LEXIS 293, ¶ 21 (Apr. 8, 2014). The Constitutional Court of Austria referred the following question to the Court of Justice: "Having regard to Article 52(4) of the Charter, does it follow from the principle of the preservation of higher levels of protection in Article 53 of the Charter that the limits applicable under the Charter in relation to permissible restrictions must be more narrowly circumscribed by secondary law?" The Court of Justice does not answer this question in its decision.

37. *See* Case C-271/08, Comm'n v. Germany, 2010 E.C.R. I-7091, I-7176 ("It is apparent from Article 28 of the Charter, read in conjunction with Article 52(6) thereof, that protection of the fundamental right to bargain collectively must take full account, in particular, of national laws and practices."). This decision does not contain any analysis of the scope of said paragraph 6.

38. Skeptical about the influence of the constitutional traditions common to the member states, see 2 Ulrich Haltern, Europarecht—Dogmatik im Kontext [European Law—Dogmatic in Context] 636–37 (2017).

39. Koen Lenaerts, *La Cour de Justice de l'Union européenne et la méthode comparative* [*The Court of Justice of the European Union and the Comparative Method*], *in* Le droit comparé au XXIe siècle—Enjeux et défis [Comparative Law in the 21st Century—Issues and Challenges] 35, 40–46 (Bénédicte Fauvarque-Cosson ed., 2015).

general principles within the European Union[40] at the same time—*a fortiori*, if the Convention guarantees the rights at stake—and create "conceptual continuity" between the European Union and its member states.[41]

D. The Interpretation of Fundamental Rights in a Federal State

Much more integration is usually required in a federal state as compared to the situation within the Council of Europe or even the European Union. Jurisdiction over many issues is retained at the federal level or transferred to it, and the federal political, administrative, and jurisdictional institutions are granted broad powers.

The legitimacy of the supreme or constitutional court is usually accepted, even if some of its decisions are criticized. The federated entities must comply with the constitution and cannot disregard the jurisdiction of these courts. In most federal countries, federated entities cannot unilaterally leave the federation even if the case law of the supreme or constitutional court impacts too heavily on their autonomy. By contrast, a European state may denounce the European Convention on Human Rights[42] or leave the European Union.[43]

The federal bill of rights in a federal state can usually be considered autonomous. To a great extent, its interpretation does not depend on a consensus among the federated entities, or on the laws, practices, and case law that would be adopted or developed by a majority of those entities.[44] The search for such a majority is not an appropriate way to deal with the so-called counter-majoritarian difficulty[45] in cases where nonelected federal justices can overturn laws or even constitutional provisions voted by the legislature or the people of a federated entity. The constitution has its own meaning, even its own life, be it dynamic or static. As far as fundamental rights are concerned, the constitution usually guarantees a minimum level of

40. Case C-218/15, Paoletti v. Procura della Repubblica, Eur-Lex CELEX LEXIS 218, ¶ 25 (Oct. 6, 2016).

41. Koen Lenaerts, *Protejarea valorilor Uniunii în vremuri de schimbări de ordin social: Rolul Curţii de Justiţie a Uniunii Europene* [*Upholding Union Values in Times of Societal Change: The Role of the Court of Justice of the European Union*], 2 Revista Romana de Drept Eur. 18, 30 (2014).

42. ECHR, *supra* note 9, art. 58.

43. Consolidated Version of the Treaty on European Union art. 50, June 7, 2016, 2016 O.J. (C 202) 13.

44. For a similar view, see Resnik, *supra* note 3, at 251 ("[Federalism] can provide a discount. But it is not a blank check. Thus, even as the U.S. Supreme Court has expanded a variety of doctrines so as to insulate state judges and executive officers from review, the Court has also in recent decades regularly displaced state law through the doctrine of preemption . . . and through constitutional interpretation . . . . These rulings eclipse areas of state tort, criminal, and family law . . . .").

45. Regarding this notion, see initially Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (2d ed. 1986).

protection, which the federated entities are allowed to supplement.[46] In this perspective, the latitude that the entities may enjoy simply relates to the ability of going beyond the federal minimum. No federal country has openly developed a margin of appreciation doctrine similar to the one framed by the European Court of Human Rights, which would flow into the rights interpretative process at the federal level. The issue of deference towards the state parties[47] to the European Convention on Human Rights is constantly and inevitably raised; it may also exist, *mutatis mutandis*, in some federal states, but it does not have the same strength and breadth, as it is usually limited to specific questions.[48] Additionally, the path to a more homogenous protection of human rights at the international or supranational level is typically gradual,[49] more so than in mature federal states.

Still, the actual and potential diversity among the federated entities is a structural element of a federal state and is explicitly or implicitly protected by the constitution. Accordingly, it may influence the interpretation of the latter, including in rights cases. The whole difficulty lies in determining which rights and situations are concerned. As an example, a supreme or constitutional court may find it harder to impose same-sex marriage on the federated entities when the latter have jurisdiction over this issue and no entity allows same-sex marriage, as opposed to a situation where a significant minority, a majority, or—*a fortiori*—nearly every entity has already granted the right to marry to same-sex couples.[50] In other words, the federated entities' constitutions, laws, case law, and practices may play a role in federal rights cases.[51] An intranational comparative analysis may help to clarify vague constitutional notions and, consequently, determine the meaning and scope of federal fundamental rights. Here lies the core of this Article. In my view, such an approach differs from the one followed by the European Court of Human Rights, which focuses, *inter alia*, on the states' margin of appreciation. Nevertheless, the comparative analysis performed by the latter and the one eventually made by a constitutional or supreme court in a federal state may lead to the same results, i.e., that the diversity among the state parties or the federated entities hinders, or even precludes an evolution in rights jurisprudence

46. *See*, *e.g.*, Francesco Palermo & Karl Kössler, Comparative Federalism: Constitutional Arrangements and Case Law 321–45 (2017).

47. Within a given federal state, the federated entities may ultimately benefit from this deference, as they have jurisdiction over the relevant area of law. This question is not addressed here, as federalism within the state parties does not influence the interpretation of the Convention rights in such a case and does not reduce the states' obligations (see the case law of the European Court of Human Rights: e.g., Assanidze v. Georgia, App. No. 71503/01, ¶ 141 (Apr. 8, 2004), http://hudoc.echr.coe.int/eng?i=001-61875).

48. Regarding Canada, see Woehrling, *supra* note 1, at 271–73.

49. *See*, *e.g.*, Sudre, *supra* note 12, at 219–20, 230–31.

50. *See* Brian Soucek, *Marriage, Morality, and Federalism: The USA and Europe Compared*, 15 Int'l J. Const. L. 1098, 1113 (2017).

51. Regarding Canada, see Woehrling, *supra* note 1, at 272.

or, on the contrary, that the—existing or emerging—consensus among them supports or even advocates in favor of such an evolution.

III. Diversity—or the Lack Thereof—and Rights Cases

The diversity, or lack thereof, among the federated entities in a federal country may play a role in rights cases. Not all the rights are concerned, however; or at least, they are not all concerned to the same extent (Part III.A). Several criteria should also be taken into account in various situations (Part III.B). If they are cumulatively met, then a bottom-up influence on the interpretation of federal rights may exist and even be substantial, depending on the country (Part III.C).

A. The Rights Concerned

The bottom-up influence of federalism on rights cases, due to the diversity, or lack thereof, among the federated entities in a given country, may depend on the rights at stake. It can especially occur when the rights are "unenumerated" (Part III.A.1), vague and comparison prone (Part III.A.2), or diversity prone (Part III.A.3).

1. Unenumerated Rights

In some countries, certain rights are not clearly stated in the constitution; in others, they are not mentioned at all. Nevertheless, these rights are considered guaranteed at the federal level, according to the case law in these countries. When it recognizes or interprets them, the federal supreme or constitutional court may feel the need to establish their roots and, to do that, may turn to the constitutions, laws, case law, and practices of the federated entities.

In Switzerland, the old non-written freedoms were recognized at the federal level through case law, and the Federal Tribunal referred to the cantonal constitutions in several major decisions.[52] New "unwritten" federal rights would probably have roots in these constitutions or, more broadly, in the laws and practices of many cantons.[53] In other federal countries, "unwritten" or "unenumerated" federal constitutional rights or principles also have—or are supposed to have—roots in the constitutions, laws, case law, practices, or traditions of the federated entities.[54]

52. *See* Michel Rossinelli, Les libertés non écrites [The Unwritten Freedoms] 174–75, 209–10 (1987).

53. On this last aspect, see 1 Jacques Dubey, Droits fondamentaux [Fundamental Rights] 18 (2018).

54. Regarding the United States, see Michael W. McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. Ill. L. Rev. 1985, 1996–97 ("Rights become national by virtue of time, consensus, and experience."). *See also* Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live by 136, 158, 469 (2012). Regarding Germany, see Heinrich Amadeus Wolff, Ungeschriebenes Verfassungsrecht unter dem Grundgesetz [Unwritten Constitutional Law Under the Basic Law] 263–64 (2000).

In the United States, the right to privacy is probably a good example of this, as opposed to, for instance, the rights directly guaranteed by the First Amendment. To illustrate, in *McCreary County v. American Civil Liberties Union of Kentucky*, the Supreme Court held that the Ten Commandments displayed in courthouses violated the First Amendment's bar against the establishment of religion.[55] A comparative analysis of the states' rules and practices on this issue was rightfully considered unnecessary. Such a survey was, however, performed in several prominent cases dealing with the right to privacy. This approach is described in Part IV of this Article, using practical examples of its application.

2. Vague and Comparison-Prone Rights

Rights that are vague leave a broad scope for interpretation by the courts, which may use other sources to appropriately interpret them. The constitutions, laws, case law, and practices of federated entities could, therefore, become relevant in this context. Inter-level judicial interaction—the magic word "dialogue" may be uttered in this context[56]—may even take place.[57] Other rights, which are more precisely defined in constitutions, do not raise the same interpretational issues.

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment." These words are vague, and the second adjective implies a comparison (unusual versus usual). Since the states have the most general power to pass criminal laws, they may be regarded as relevant in this respect, even if they do not all carry the same weight in a comparative analysis.[58] In several death penalty cases, the Supreme Court carried out such an analysis and sought a national consensus on sensitive issues.[59] This Article neither assesses the methodology used by the Supreme Court in its

55. McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005).

56. AMAR, *supra* note 54, at 138 (advocating for the emergence of "a genuine dialogue among judges, legislators, and ordinary citizens"). *See also* Kleinlein & Petkova, *supra* note 8, at 1069–70.

57. On this issue, see CÉLINE FERCOT, LA PROTECTION DES DROITS FONDAMENTAUX DANS L'ÉTAT FÉDÉRAL [THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE FEDERAL STATE] 647–53 (2011).

58. *See* AMAR, *supra* note 54, at 133 ("If 240 million modern Americans live in states that flatly prohibit punishment X, while only 60 million live in states that vigorously practice punishment X, then X is 'unusual' in the ordinary everyday meaning of that word. This is true regardless of state lines—true whether the 60 million live in the two most populous states or the 26 least populous states. Citizens, not states, should count equally in interpreting both the Eighth Amendment word 'unusual' and modern America's lived Constitution more generally." (citation omitted)). *See also* Kevin White, *The Constitutional Limits of the "National Consensus" Doctrine in Eighth Amendment Jurisprudence*, 2012 BYU L. REV. 1367, 1386 ("While use of a national-consensus-only approach could demonstrate that a particular punishment is or is not 'unusual,' it could not explain whether or why it is or is not 'cruel.'"). To Akhil Amar, one could reply that the states—not the citizens—"punish."

59. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 314–17 (2002); Roper v. Simmons, 543 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."); Hall v. Florida, 134 S. Ct. 1986, 1996–98 (2014).

national-consensus approach, nor examines whether a consensus was correctly admitted in controversial cases.[60] Nor does it suggest that consensus is the deciding factor in a case. Confronted with the question of whether a punishment is "unusual," and bearing in mind that most "punishments" are inflicted by the states, the justices or judges arguably look to state constitutions, laws, case law, and practices;[61] a comparative analysis is, however, only one piece of the judgment, and the justices or judges are not bound by it. Hence federal rights remain autonomously interpreted.[62] One may nevertheless go one step further in considering that clearer and more homogeneous results of the comparison will carry, *ceteris paribus*, more weight in a judicial interpretation of the word "unusual," compared to unclear and mixed results. The current national-consensus approach is too binary (consensus, be it existing or only emerging, versus no consensus).

In Germany, Article 2(1) of the Basic Law provides that "[e]very person shall have the right to free development of his personality insofar as she or he does not violate the rights of others or offend against the constitutional order or the moral law"[63] and leaves a wide margin of interpretation to the Federal Constitutional Court. In its evolving case law, the Court could have referred, among other elements, to similar provisions in the constitutions of the *Länder*[64] and the related case law, but it does not seem to be interested in the latter in this context.[65] This does not mean that the *Länder* should have a margin of appreciation with respect to Article 2(1) of the Basic Law, but that their constitutions, laws, case law, and practices may be a source of interest or even, in some cases, of inspiration for the Federal Constitutional Court when it faces new issues and interprets this constitutional provision in areas within the *Länder*'s jurisdiction.

3. Diversity-Prone Rights

Finally, some rights are related to the ethnic, linguistic, religious, cultural, historical, political, or societal diversity among the federated

60. For various criticisms, see Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. Rev. 1089, 1123–58 (2006); Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 Fla. St. U. L. Rev. 853, 877–84 (2013). *See also* Roderick M. Hills Jr., *Counting States*, 32 Harv. J.L. & Pub. Pol'y 17, 21 (2009).

61. *See*, *e.g.*, Hills, *supra* note 60, at 22–24; Petkova, *supra* note 22, at 676–78.

62. *See* White, *supra* note 58, at 1387 ("[The Supreme] Court should adopt an independent-judgment-based rationale that would render the national-consensus inquiry of secondary importance."). In favor of abandoning objective indicia, see Jacobi, *supra* note 60, at 1156–58; Farrell, *supra* note 60, at 900–05.

63. Grundgesetz [GG] [Basic Law], *translation at* www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf.

64. *See* Horst Dreier, *Artikel 2 Abs. 1*, *in* Grundgesetz—Kommentar [Basic Law—Commentary] 330, ¶¶ 20, 31–39, 69–84 (Horst Dreier ed., 3d ed. 2013).

65. *See*, *e.g.*, Udo di Fabio, *Artikel 2 Abs. 1*, *in* Grundgesetz—Kommentar [Basic Law—Commentary] 1, ¶ 43 (Theodor Maunz & Günter Dürig eds., 2001) (noting that the influence on the interpretation of Article 2(1) of the German Basic Law comes instead from the European Convention on Human Rights).

entities. When this diversity is constitutionally protected, the constitutions, laws, case law, and practices of the federated entities may influence the interpretation of these rights. The supreme or constitutional court of a given country will have to interpret the whole constitution in order to determine if and, where appropriate, to what extent diversity matters and is constitutionally protected. To perform this task, it should, in principle, apply the relevant criteria that it usually uses to interpret the constitution.

The impact of the federated entities on each other's development may remain limited when federalism—*a fortiori* asymmetric and "multinational"—is supposed to accommodate different ethnic, linguistic, religious, and cultural identities.[66] Nevertheless, federal fundamental rights provide overarching values[67] and must be interpreted, also in the relevant countries.

When considering an evolutive interpretation of certain rights linked to this diversity, a federal court might be inclined to look at the way the entities address the issue at stake, especially when they have made choices or decisions on constitutional grounds.[68] Depending, among other things, on the results of such an analysis, the court may interpret a right in a way that limits the entities' autonomy. Although most entities will not be affected by this change, which, in any event, corresponds to the solution they have chosen, an outlying entity will. The limit for the latter does not directly come from the other entities, but from a federal fundamental right that remains autonomous. When a consensus to maintain rules or practices, which are now considered as disputable, can be identified among the federated entities, a federal court will perhaps adopt a conservative position and refrain, for instance, from an extensive interpretation of a given federal right.[69] When carefully performed, such an approach enriches the judicial reasoning and is not antithetical to federal principles.[70] It goes beyond

66. See, in a broader perspective, Alain-G. Gagnon, *Le fédéralisme asymétrique au Canada* [*Asymmetric Federalism in Canada*], *in* LE FÉDÉRALISME CANADIEN CONTEMPORAIN [CONTEMPORARY CANADIAN FEDERALISM], *supra* note 1, at 287, 288 (emphasizing "identity pluralism" in the model of multinational federalism).

67. Richard Simeon & Daniel-Patrick Conway, *Federalism and the Management of Conflict in Multinational Societies*, *in* MULTINATIONAL DEMOCRACIES 338, 361, 363 (Alain-G. Gagnon & James Tully eds., 2001); Ronald L. Watts, *Multinational Federations in Comparative Perspective*, *in* MULTINATIONAL FEDERATIONS 223, 244 (Michael Burgess & John Pinder eds., 2007).

68. See, in a broader perspective, Ferran Requejo, *Value Pluralism and Multinational Federalism*, 50 AUSTL. J. POL. & HIST. 23, 35–36 (2004) (considering that it is "necessary, wherever possible in federations, to adopt some kind of balanced solution based on procedures that reflect the accommodation of the national pluralism in the polity").

69. Regarding the United States, see Hills, *supra* note 60, at 22–23, 28.

70. Regarding the Eighth Amendment of the U.S. Constitution and the related case law of the Supreme Court, see, however, Jacobi, *supra* note 60, at 1105–23. For a more moderate view, see Farrell, *supra* note 60, at 889–90 (concluding that "states legislatures could not only curtail other states" and that "by acting together, states could constitutionalize their enactments").

the mere reference to selected cases of superior courts of a few federated entities[71] or to a provision of the constitution of the federated entity which is directly involved in a federal case,[72] and is comparative in nature.

Federalism could be jeopardized where a federal court completely disregards the choices and decisions made by the federated entities on constitutional grounds and extensively interprets a right in an area over which the entities have jurisdiction, and where there is significant diversity among them, which is constitutionally—although not absolutely—protected. Once again, this does not mean that these choices and decisions prevent any evolution of the federal rights case law. Evolution, may, however, require strong supporting arguments.

The freedoms of education, language, and religion are interesting examples in this regard, at least within some federal states.[73] Some rights are, in other words, more diversity prone than others. In Spain, which is a regional state with several federalist features, the Constitutional Tribunal has rendered several decisions on regional languages. In some decisions, a comparative perspective between Spanish autonomous communities seems to be implicitly adopted. In its decision on the language of education for instance, the Tribunal noted that the communities did not have the same linguistic policy and came to the conclusion that the Spanish Constitution permits different linguistic models.[74]

B. The Relevant Situations

The influence of diversity, or the lack thereof, among the federated entities on the interpretation of federal rights may depend not only on the applicable fundamental rights in a given case, but also on context. It presupposes that the entities have jurisdiction over the relevant area of law and enjoy broad autonomy in this respect (Part III.B.1),

71. For two examples in this regard, see Shayara Bano v. Union of India (2017) 9 SCC 1, ¶¶ 12–14, 17–23 (Joseph, J., concurring) (setting aside "triple talaq," a Muslim practice that allows men to instantly divorce their wives). *See also* Danial Latifi v. Union of India (2001) 7 SCC 740, ¶ 35 (upholding the right of divorced Muslim women to lump-sum amounts as "fair and reasonable settlements" from their former husbands).

72. For an example in this regard, see a case of the Austrian Constitutional Court allowing crucifixes or crosses in public classrooms: Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 9, 2011, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] 19349/2011, ¶ 68.

73. Regarding Canada, see Woehrling, *supra* note 1, at 271–72. Regarding the United States, see Roderick M. Hills Jr., *Decentralizing Religious and Secular Accommodations*, *in* Institutionalizing Rights and Religion: Competing Supremacies 108, 109 (Leora Batnitzky & Hanoch Dagan eds., 2017) ("The federal system as a whole . . . extends equal concern and respect to rival and reasonable conceptions of religious liberty by giving each conception a larger area in which it can be acknowledged as authoritative.").

74. S.T.C., Dec. 23, 1994 (B.O.E. No. 337, p. 24) (see especially section 7 of the decision).

and that the actual or potential diversity among the federated entities is constitutionally protected (Part III.B.2).

1. The Jurisdiction and Autonomy of the Federated Entities

In a rights case, the question must be raised in a situation involving an area within the constitutional jurisdiction of the federated entities; public schooling is, for instance, an appropriate example in many federal countries.[75] Otherwise, the constitutions, laws, case law, and practices of federated entities should not, as a rule, be relevant in a federal rights case.

The entities may have absolute jurisdiction or enjoy joint or parallel jurisdiction with the government at the federal level. For example, where both a country's constitution and the constitutions of its federated entities contain a bill of rights, the constitutions of the federated entities may influence the state constitution, especially when the federal supreme or constitutional court is considering whether it should recognize a federal "unenumerated" or "unwritten" right or principle.

The federated entities must, moreover, enjoy a wide autonomy in their area of jurisdiction. They are entitled to adopt their own constitutional provisions or laws and develop their own practices in compliance with the country's constitution. In other words, they are autonomous within the federal constitutional and legal framework. *Ceteris paribus*, the tighter that framework, the less influential—from a federal fundamental rights perspective—the constitutions, laws, case law, and practices of the federated entities become. When the federated entities are only responsible for implementing federal rules and principles, they most probably do not make fundamental decisions and choices that would be susceptible to produce a bottom-up effect in federal rights cases.

2. The Protected Diversity Among the Federated Entities

In a given situation, the question raised before the federal supreme or constitutional court may be differently viewed and answered, and the—actual or potential—diversity protected by the constitution may be relevant in this respect. Ethnic customs, religious beliefs, history, and characteristics of linguistic groups as well as historical, political, and cultural traditions or societal values may, in other words, influence the interpretation of the applicable fundamental rights. The constitution, laws, case law, and practices of a federated entity may provide an indication in this regard, especially when the latter

75. Regarding Germany, see Klaus Ferdinand Gärditz, *Grundrechte im Rahmen der Kompetenzordnung* [*Fundamental Rights Within the Framework of the System of Competences*], *in* 9 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [MANUAL OF CONSTITUTIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY] 225, 248–49 (Joseph Isensee & Paul Kirchhof eds., 3d ed. 2011).

has a diversity pattern, i.e., it differs from other federated entities from an ethnic, linguistic, religious, cultural, historical, political, or societal point of view. Some important decisions of the Swiss Federal Tribunal on the freedom to vote, which is a federal fundamental right in Switzerland, exemplify this (Part IV.D).

Nonetheless, a few issues, even if they are very sensitive from a federalist point of view, hurt fundamental values and rights and lead to federal cases that disregard diversity among the federated entities. In other words, the kind of diversity at stake is not constitutionally protected.

In Emmen, a commune of the canton of Lucerne, Switzerland, the naturalization applications of immigrants from Turkey and the former Yugoslavia were denied by popular vote. Even if the procedure of ordinary naturalization is, to a large extent, governed by cantonal laws, it cannot violate the applicants' fundamental rights.[76] Thus, in this case, the Swiss Federal Tribunal rightfully considered that a popular vote by secret ballot infringes the prohibition against discrimination and the right to obtain a reasoned decision.[77]

C. The Variable Relevance of the Federated Entities

The constitutions, laws, case law, and practices of the federated entities do not seem to be relevant for the interpretation of federal rights in all federal countries (Part III.C.1). Nevertheless, if the aforementioned criteria (Parts III.A and III.B) are mostly or, *a fortiori*, all met, then the analysis of the situation prevailing in the federated entities may present a certain interest in federal rights cases (Part III.C.2).

1. A Variety of Approaches

The Australian High Court, the Canadian Supreme Court, the Swiss Federal Tribunal, and, especially, the Supreme Court of the United States refer to the constitutions, laws, case law, and practices of the federated entities in some cases, as explained in Part IV. Some scholars in Canada even advocate inquiring as to whether a consensus among provinces exists in controversial federal rights cases.[78]

The Argentinian Supreme Court of Justice of the Nation, the Austrian Constitutional Court, the Belgian Constitutional Court, the

76. *See*, *e.g.*, Céline Gutzwiller, Droit de la nationalité et fédéralisme en Suisse [Nationality Law and Federalism in Switzerland] 367–442, 605–10 (2008).

77. Bundesgericht [BGer] [Federal Supreme Court] July 9, 2003, 129 Entscheidungen des schweizerischen Bundesgerichts [BGE] I 217.

78. Doucet, *supra* note 16, at 715, 748–49. *See also* Jeremy A. Clarke, *The Charter of Rights and a Margin of Appreciation for Federalism: Lessons from Europe*, *in* The State in Transition—Challenges for Canadian Federalism 119, 129–35 (Michael Behiels & François Rocher eds., 2011) (addressing this issue, but not drawing a definitive conclusion).

Brazilian Federal Supreme Court, the German Federal Constitutional Court, the Indian Supreme Court, the Mexican Supreme Court of Justice of the Nation, the Nigerian Supreme Court, the Spanish Constitutional Tribunal, and the South African Constitutional Court do not seem to follow this approach, at least not explicitly.[79] In South Africa, which is not often regarded as a federal state, this is quite understandable, as the provinces do not have constitutions per se, but rather legislation that applies specifically to provincial governance and services. In Spain, the autonomous communities do not have their own constitutions either. The same is true of Belgian communities and regions,[80] which do not have either constitutional courts or similar institutions. That being said, the distinction between this group of countries and the group consisting of Australia, Canada, Switzerland, and the United States, is not clear cut, as the case law may evolve.

In other words, the federal context prevailing in each country should not be ignored, and generalizations about the influence of federalism on rights cases should be, if not avoided, at least very carefully nuanced.[81] The powers—numerous or limited—that the federated entities have kept or obtained and the rights issues that the powers raise, as well as the quality and the intensity of the constitutional debates at the political, administrative, or judicial level of the entities, certainly play a role. Additionally, the federal system in some countries, such as Belgium, is rather "top-down" in nature, notably as far as judicial review is concerned.[82]

2. The Possible Existence of Common Criteria

Notwithstanding the variety of approaches, a bottom-up influence of federalism in rights cases may occur especially when the following conditions and circumstances are cumulatively met: (i) the federated entities have jurisdiction over the relevant area of law and enjoy broad autonomy; (ii) the question raised is controversial,

79. For a more general perspective on the role of courts in federal states, see the national reports published in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?, *supra* note 1.

80. *See*, *e.g.*, DIDIER BATSELÉ, TONY MORTIER & MARTINE SCARCEZ, INITIATION AU DROIT CONSTITUTIONNEL [INITIATION TO CONSTITUTIONAL LAW] 60 (2d ed. 2014).

81. *See, e.g.*, Michel Rosenfeld, *A Comparativist Critique of US Judicial Review of Fundamental Rights Cases: Exceptionalisms, Paradoxes and Contradictions*, *in* RIGHTS-BASED CONSTITUTIONAL REVIEW 29, 61 (John Bell & Marie-Luce Paris eds., 2016) ("If we add up originalism, Lockean negative rights and the role of US federalism rights adjudication, nothing comparable comes to mind in connection with other jurisdictions with developed practices of constitutional adjudication. On further reflection, however, . . . the US example may well yield some worthy insights to comparativists examining constitutional adjudication in other jurisdictions.").

82. *See* Raffaele Iacovino & Jan Erk, *The Constitutional Foundations of Multinational Federalism: Canada and Belgium*, *in* MULTINATIONAL FEDERALISM: PROBLEMS AND PROSPECTS 205, 214–17 (Michel Seymour & Alain-G. Gagnon eds., 2012).

relates to conflicting values, and is linked to the diversity which the constitution protects; (iii) the applicable federal fundamental right is "unenumerated" or not clearly grounded in the constitution; and (iv) the scope of this right is vague.[83] This does not mean, however, that the federated entities enjoy a margin of appreciation under these conditions and circumstances; rather, there may simply be a bottom-up influence on the interpretation of federal constitutional rights. At least conceptually then, this approach differs from the one followed by the European Court of Human Rights.

The foregoing analysis may also be valid in federal states whose supreme or constitutional courts have not launched such an inquiry. This analysis is rooted in the principle that regards a constitution as an open, interacting ensemble, due to the possible influence of external sources and interactions among its various parts or provisions. It also relates to the idea that the federated entities take some decisions and make some choices on constitutional grounds. Collectively or individually, these decisions and choices may point in a certain direction that may interest the constitutional or supreme justices in controversial cases,[84] where the entities have constitutional jurisdiction and enjoy a wide margin of appreciation. This may help them structure their reasoning and frame their personal beliefs or values,[85] regardless of the school of interpretation—if any—to which they belong.[86]

In Germany, the Federal Constitutional Court decided, in 2015, that a general ban on headscarves for teachers at state schools was not compatible with the German Basic Law.[87] In such a case, where

83. *See* Clarke, *supra* note 78, at 134 ("The 'margin of appreciation' is the recognition that otherwise universal rights or values can, depending on diverse circumstances, legitimately assume different forms and require different limits, so long as those forms or limits do not transgress the 'core' meaning of those rights or values.").

84. Regarding the United States, see, e.g., Bryan A. Garner et al., The Law of Judicial Precedent 549 (2016) ("State-court decisions may play a role in federal constitutional debates . . . : they may provide evidence of the kinds of evolving norms that the U.S. Supreme Court has recognized from time to time in expanding the guarantees beyond their original understanding." (citation omitted)).

85. Regarding the European Court of Human Rights, see Dzehtsiarou, *supra* note 11, at 142. Regarding the United States Constitution, see Hills, *supra* note 60, at 23; Soucek, *supra* note 50, at 1113 (suggesting that "[c]ounting states—and doing so explicitly—offers a potential check on judges' personal views on how constitutional protections have (or should have) evolved"). On this issue, see also, in relation to the Eighth Amendment of the U.S. Constitution, Richard A. Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government 60–61 (2014) (considering that "judicial bodies are ill equipped to measure the changes in popular sentiment to which they purport to find allegiance").

86. Regarding the United States, see Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 211–12 (2018).

87. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 27, 2015, 138 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 296, 2015, *translation at* https://bit.ly/2Zy5IQv.

several fundamental rights interact[88] and the *Länder* have jurisdiction, it makes sense to compare the practices and experiences of the latter. The decision is probably justified on the basis of the proportionality principle,[89] but one can also see that a prohibition on a case-by-case basis, which the Court seems to be willing to consider,[90] can create conflicts and is not easy to implement.[91] The Court accepts the diversity agreement, but within one *Land* rather than between *Länder*:

> [T]here might be a constitutionally relevant legal interest in prohibiting religious expression by outer appearance or conduct . . . at certain schools or in certain school districts if, due to considerable situations of conflict regarding correct religious conduct in those schools or districts, the threshold of a sufficiently specific danger to the school peace or to state neutrality has been reached in a substantial amount of cases in a specific area. In this respect, the legislature may also take due account of such a situation preventively . . . with area-specific solutions.[92]

In their dissenting opinion, Justices Wilhelm Schluckebier and Monika Hermanns came to the conclusion that "it is not constitutionally objectionable to prohibit expressions of religious belief by the outer appearance of educational staff even if there is only an abstract danger to the peace at school and the neutrality of the state."[93] Their reasoning was, *inter alia*, based on the practices adopted by several *Länder* on constitutional grounds.[94] This comparative analysis could have been deepened, and it would have been interesting to see how the Court would have responded to the analyses and experiences of the *Länder*. Incidentally, the Court has already been reproached in

88. *Id.* at 333 ("Among the constitutionally protected interests that might come into conflict here with the freedom of faith are not only the state's educational mandate (art. 7 sec. 1 GG), which must be fulfilled in observance of the duty of ideological and religious neutrality, but the parents' right to the upbringing of their children (art. 6 sec. 2 GG), and the pupils' negative freedom of faith (art. 4 sec. 1 GG) . . . . Resolving the normative tension among these constitutionally protected interests in consideration of the principle of tolerance is a task for the democratic legislature, which, within the public process of policy formulation, must seek a compromise that all can reasonably be expected to comply with." (citation omitted)).

89. *See* Stefan Muckel, *Pauschales Kopftuchverbot an öffentlichen Schulen verletzt die Religionsfreiheit* [*A General Ban on Headscarves at Public Schools Infringes the Freedom of Religion*], 2015 JURISTISCHE ARBEITSBLÄTTER 476, 478.

90. 138 BVERFGE at 341–42.

91. *See* Muckel, *supra* note 89, at 478.

92. 138 BVERFGE at 138, 342 (citation omitted).

93. *Id.* at 370 (Schluckebier and Hermanns, JJ., dissenting).

94. *Id.* at 363.

the past for not taking sufficient account of the federal dimension in certain freedom of religion cases.[95]

This is not to say that federal fundamental rights should guarantee a different level of protection from one *Land* to another or recognize a margin of appreciation to the *Länder*. The protection is the same in the whole *Bund*, but when it comes to defining this protection, the constitutions, laws, case law, practices, and experiences of the *Länder* may be of interest. The German Federal Constitutional Court acknowledges this point in some cases, but not in a comparative perspective between *Länder*.[96]

Finally, one should note that the autonomy of interpretation of federal rights remains intact.[97] Indeed, even for a right that is not solidly grounded in a constitution and that is linked to the diversity existing in the relevant federal state, there is room for an evolutive interpretation that does not simply follow the evolution happening at the level of the federated entities. Drawing a typology of several situations that might exist in a federal state is, therefore, interesting.

IV. The Various Situations

A bottom-up influence of federalism on rights cases may occur in various situations. It is especially possible where all but one or almost all federated entities (Part IV.A) or a majority of them (Part IV.B) have progressively opted for a given solution in their constitutions, laws, case law, and practices. It may also be observed where a significant minority of the entities have made such a change, (Part IV.C) and even where very few of them are at the forefront of an evolution or, on the contrary, make strong diversity arguments to maintain traditional rules or institutions (Part IV.D).

A. The "All but One" or "Almost All" Situation

When all but one, or almost all federated entities have progressively opted for a given solution in their constitutions, laws, case law,

95. 4/2 Klaus Stern, Michael Sachs & Johannes Dietlein, Das Staatsrecht der Bundesrepublik Deutschland [Constitutional Law of the Federal Republic of Germany] 456–57, 562 (2011) (regarding the famous decision in which the Court declared unconstitutional an article of a Bavarian law that mandated crucifixes or crosses in public classrooms: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 16, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 296, 1995)). *See also* Axel Freiherr von Campenhausen & Heinrich de Wall, Staatskirchenrecht [State Church Law] 74–75 (4th ed. 2006). For a rather positive evaluation of this case law, see Peter Unruh, Religionsverfassungsrecht [Constitutional Law of Religion] 82 (4th ed. 2018).

96. For an example, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 25, 2014, 137 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, 22 (quoting a decision of the Constitutional Court of Rheinland-Pfalz).

97. Regarding the United States, see, e.g., Garner et al., *supra* note 84, at 549.

and practices, this may impact the case law of the supreme or constitutional court. This is especially true if the change was made for constitutional reasons, i.e., the entities considered that constitutional rights or principles compelled them to act. In other words, a consensus has emerged among these entities. In a case challenging the constitution, laws, case law, or practices of a federated entity that has chosen another solution, the supreme or constitutional court can then render a decision based on the evolution that has taken place within the country. This is a rather strong foundation in controversial cases where values are conflicting.

The *Lawrence v. Texas* decision of the Supreme Court of the United States[98] provides an illustrative example, given that the vast majority of the states—but not all of them—did not criminalize adult consensual same-sex sexual activity in a private setting. The Court noted the following:

> The 25 States with laws prohibiting the relevant conduct referenced in [a previous] decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.[99]

On the basis of several arguments, the Court concluded that, by making it a crime for two persons of the same sex to engage in certain intimate sexual conduct, the Texas statute violated the Due Process Clause of the Fourteenth Amendment. The Court further noted that those who drafted and ratified the Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[100]

This decision is very interesting, as it mentions an evolution, partly based on constitutional grounds,[101] that took place at the state level.[102] In the constitutional context of the United States, this development is probably more important than the case law of the European Court of Human Rights,[103] cited by the Supreme Court,[104] even if such

98. 539 U.S. 558 (2003).
99. *Id.* at 573 (referring to Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986)). *See*, *e.g.*, DZEHTSIAROU, *supra* note 11, at 173–75.
100. *Lawrence*, 539 U.S. at 579.
101. *Id.* at 572, 576.
102. *Id.* at 570–73, 576. *See*, *e.g.*, Petkova, *supra* note 22, at 678–79.
103. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 14 (1981). *See, e.g.*, TRIBE, *supra* note 6, at 183.
104. *Lawrence*, 539 U.S. at 573.

a cross-Atlantic comparison may be appreciated. Of course, this evolution neither binds the Court, nor is necessary for it to hold the Texas statute to be unconstitutional. Even without any change in the states, the Supreme Court could and should have come to the same conclusion. As it states, "*Bowers* was not correct when it was decided, and it is not correct today."[105] Nevertheless, the constitutions, laws, case law, and practices of most states pointed in one direction in 2003: the direction toward which the Supreme Court now looks ahead.

In Australia, the Constitution provides relatively few rights, but some significant rights and limitations on power are implied in constitutional provisions concerning the representative form of government and democracy, including the freedom of political communication and restrictions on the possibility to limit voting rights.[106] The High Court had to determine, for instance, whether a law further limiting the voting rights of prisoners was constitutional. In the *Roach v. Electoral Commissioner* decision,[107] the six justices admitted the validity of the disenfranchisement of prisoners serving sentences of three or more years, but four of them judged an amendment of the federal Electoral Act, prohibiting a person serving any sentence of imprisonment from voting, to be unconstitutional. In an attempt to understand the historical context, the justices directly or indirectly referred, *inter alia*, to the laws and practices of the states before the Constitution came into effect.[108] They mentioned the "common assumptions" in the 1890s,[109] and one justice even noted that "[a]ll States excluded some prisoners from voting."[110] The justices felt neither the obligation nor the need to classify the states into one group or another, especially with respect to the duration of the sentences or the type of crimes leading to a prohibition from voting.[111] Generally speaking, the High Court also looks at the case law of other countries,[112] and, comparatively, the practice applied in the states of the Commonwealth of Australia tends to bear less weight.

B. The "Majority" Situation

Another situation arises when there is no broad consensus among the federated entities, but a majority has opted for a solution. This

105. *Id.* at 578.

106. *See*, *e.g.*, George Williams, Sean Brennan & Andrew Lynch, Blackshield and Williams Australian Constitutional Law and Theory—Commentary and Materials 770–87, 1328–406 (7th ed. 2018).

107. *Roach v Electoral Commissioner* [2007] HCA 43.

108. *Id.* ¶¶ 19 (Gleeson, C.J.); *id.* at 102 (Gummow, Kirby, and Crennan, JJ.); *id.* at 121–42 (Hayne, J.); *id.* at 181 (Heydon, J.).

109. *Id.* ¶ 102 (Gummow, Kirby, and Crennan, JJ.).

110. *Id.* ¶ 138 (Hayne, J.).

111. *But see id.* ¶ 140 (Hayne, J.) (giving some general information about the content of the State provisions).

112. In this case, see *id.* ¶¶ 13–18 (Gleeson, C.J.); *id.* at 100–01 (Gummow, Kirby, and Crennan, JJ.), concerning Canada and the United Kingdom.

solution, or another chosen by one of the federated entities, is then challenged on constitutional grounds. The constitutional or supreme federal court may have to decide the case based on the constitutions, laws, or practices of a majority of the federated entities or in some other way.

The *Roe v. Wade* decision of the Supreme Court of the United States[113] corresponds, to a certain extent, to such a situation. The Court first noted that statutes similar to the one in Texas "[were] in existence in a majority of the States."[114] On the basis of the right to privacy, not explicitly mentioned in the United States Constitution,[115] the Court came to the conclusion that "the Texas abortion statute, as a unit, must fall."[116] In his dissent, then-Justice William Rehnquist noted the following:

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental" . . . . Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.[117]

The Supreme Court did not have to follow the solution adopted by a majority of the states. In such a case where the right at issue is not explicitly mentioned in the constitution, the question raised relates to an area within the jurisdiction of the states, and different views coexist—societal diversity in a sense—the Court faces two challenges that are actually obligations. First, it must provide strong arguments to support its ruling. Some arguments are presented in the opinion of the Court, but could have been deepened and strengthened to make the decision more robust.[118] This does not, however, mean that the case was wrongly decided. Second, the Court should be careful in very controversial and difficult cases and, unless there are compelling reasons, avoid decisions whose scope is very broad from the outset: "one case at a time"[119] or, at least, "not too many cases at a time" seems to be

113. 410 U.S. 113 (1973).

114. *Id.* at 118, 129. *See also* Jeffrey Rosen, *Dissenting*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 170, 175 (Jack M. Balkin ed., 2005); McConnell, *supra* note 54, at 1990, 1997.

115. *Roe*, 410 U.S. at 152.

116. *Id.* at 166.

117. *Id.* at 174 (Rehnquist, J., dissenting) (citation omitted).

118. See, e.g., certain parts of the revised opinions drafted by Jack M. Balkin et al., *published in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION, *supra* note 114.

119. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 114 (1999).

sound advice in this context. The Supreme Court could have limited its ambition in this case,[120] with the—not necessarily negative—consequence that it would then have provided state legislatures with less guidance.[121]

The recent *Janus v. State, County, and Municipal Employees* decision of the Supreme Court of the United States dealt with the power of labor unions to collect fees from non-union members in the public sector.[122] The Court ruled that such fees violate the First Amendment, overturning a decision that had previously allowed them.[123] It considered, among other things, that states permitting public-sector unions to collect fees from non-union members can, from now on, "follow the model of the federal government and 28 other States."[124] Towards the end of her dissenting opinion, Justice Elena Kagan yet insisted on the following:

120. *See*, *e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 922 (1973) ("A plausible narrower basis of decision, that of vagueness, is brushed aside in the rush toward broader ground."); Robin West, *Concurring in the Judgment*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION, *supra* note 114, at 121, 146 ("[The Supreme] Court should take care not to overstate its interpretive authority. More importantly, it should take care not to preclude or foreclose the most aspirational, generative, and simply generous understandings of the Constitution by providing clipped, abbreviated, and preemptive constitutional remedies."); *Comments from the Contributors*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION, *supra* note 114, at 255, 257 (Mark Tushnet) ("Methodologically, the Court could have taken a different route, in the abortion and reproduction cases, than it chose: it might have signaled to the country and to Congress that Congress has a central role to play in implementing the grand and far-reaching promises of the Fourteenth Amendment and restrained its own rhetorical impulses so as to not impede that role."); Cass R. Sunstein, *Concurring in the Judgment*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION, *supra* note 114, at 148, 248 ("The Court had several plausible routes in *Roe*. One of the least plausible, I think, was the route it took: a broad ruling, in its very first confrontation with the abortion question, that invalidated an extraordinary range of judgments by the states. This route seems to be among the least plausible of the options for one reason: it went so far so fast. It is highly relevant, in this connection, that the democratic process was in a state of flux and that states were in the midst of increasing the availability of abortion."); Akhil Reed Amar, *Concurring in the Judgment in Part and Dissenting in Part*, *in* Roe v. Wade*, No. 70-18, and Dissenting in* Doe v. Bolton*, No. 70-40*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION, *supra* note 114, at 152, 160 ("Given the vast legal and moral complexities and profundities implicated by the abortion question, and given that today is the Court's first real occasion to consider the topic, members of this Court should proceed with extraordinary humility and caution.").

121. *But see* Jack M. Balkin, *Comments*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION, *supra* note 114, at 232, 235 ("The key point is that judges do not have to write minimalists opinions to respect democratic process or to avoid political backlash. To the contrary, giving a legislature guidance about what constitutional principles are at stake may be a better way of facilitating a legislative solution that is both constitutionally and democratically acceptable.").

122. 138 S. Ct. 2448 (2018).

123. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

124. *Janus*, 138 S. Ct. at 2485 n.27.

> Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of inbetweeners). Today, that healthy—that democratic—debate ends.[125]

This Article cannot attempt to assess the merits of each view in this complex case. However, a comment combining the perspectives of both federalism and stare decisis can be made. The fact that "22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions" had by then enacted "statutes authorizing fair-share provisions"[126] may help demonstrate that the Supreme Court's relevant precedent remained workable.[127]

In Canada, in a landmark decision *Reference re Same-Sex Marriage*, the Supreme Court noted the following: "[S]ame-sex marriages have generally come to be viewed as legal and have been regularly taking place in British Columbia, Ontario and Quebec. Since this reference was initiated, the opposite-sex requirement for marriage has also been struck down in the Yukon, Manitoba, Nova Scotia and Saskatchewan . . . ."[128]

The Supreme Court referred, *inter alia*, to the case law and practices of a majority of the provinces and the Yukon territory. It came to the conclusion that the proposed federal statute, which extended

125. *Id.* at 2501 (Kagan, J., dissenting).

126. *Id.* at 2499.

127. Justice Kagan rather focused, in this context, on the criterion of reliance, stating that "*Abood* has generated enormous reliance interests." *Id.* at 2501. For a critique of the *Janus* decision *inter alia* on stare decisis grounds, see Kate Andrias, Janus*'s Two Faces*, 2018 SUP. CT. REV. 21, 28–30; Erwin Chemerinsky, *Does Precedent Matter to Conservative Justices on the Roberts Court?*, ABA JOURNAL (June 29, 2019), www.abajournal.com/news/article/chemerinsky-precedent-matters-little-to-conservatives-on-the-roberts-court. For an account of the debate on stare decisis in the *Janus* case, see Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 136–38. On the criterion of workability in general, see, e.g., GARNER ET AL., *supra* note 84, at 360–61; RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 111 (2017) ("The proper reasons for paying attention to a decision's workability . . . deal with whether courts, litigants, and other stakeholders have been able to understand and apply a rule without undue difficulty.").

128. Reference Re Same-Sex Marriage, [2004] 3 S.C.R. 698, 725 (citations omitted). The Supreme Court also mentioned the fact that "the province of Quebec ha[d] established a civil union regime as a means for individuals in committed conjugal relationships to assume a host of rights and responsibilities" (*id.* at 715). *See*, *e.g.*, Peter W. Hogg, *Canada: The Constitution and Same-Sex Marriage*, 4 INT'L J. CONST. L. 712, 715, 717–18 (2006); Linda A. White, *Federalism and Equality Rights Implementation in Canada*, 44 PUBLIUS J. FEDERALISM 157, 169–76 (2014).

the capacity to marry to persons of the same sex, was consistent with the Canadian Charter of Rights and Freedoms.[129] This reference to provinces and a territory is particularly interesting, as the Canadian Constitution confers on the federal Parliament exclusive competence with respect to "Marriage and Divorce," while the "solemnization of marriage" falls within provincial legislative authority.[130] Nevertheless, a trend occurred at the provincial and territorial level, and the Supreme Court used it, and several other considerations, as a basis for its decision.

C. The "Significant Minority" Situation

There might be cases where the constitutions, laws, case law, or practices of a significant minority of the federated entities have been changed on constitutional grounds. Such change eventually marks the beginning or the continuation of a trend within the federal state. However, the majority of the federated entities still stick to older rules, possibly for constitutional reasons as well.

The landmark case of the Supreme Court of the United States in *Obergefell v. Hodges*[131] is insightful in this regard,[132] the road having been paved by the Massachusetts Supreme Judicial Court.[133] The Supreme Court noted that "[a]fter years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage."[134] The Court made it clear that "[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right."[135] It went on to conclude that "same-sex couples may exercise the fundamental right to marry in all States" and that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."[136]

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129. *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. at 728.

130. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 5, ss. 91(26), 92(12). *See Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. at 715 ("If we accept that provincial competence in respect of same-sex relationships includes same-sex marriage, then we must also accept that provincial competence in respect of opposite-sex relationships includes opposite-sex marriage. This is clearly not the case. Likewise, the scope of the provincial power in respect of solemnization cannot reasonably be extended so as to grant jurisdiction over same-sex marriage to the provincial legislatures."). *See also* Hogg, *supra* note 128, at 714–15.

131. 135 S. Ct. 2584 (2015).

132. *Id.* at 2595–97, 2605–11.

133. Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003). *See* Sutton, *supra* note 86, at 207 ("It's hard to imagine the U.S. Supreme Court's decision twelve years later in *Obergefell v. Hodges* without *Goodridge* and without the additional state-level activity it prompted. Whether in state supreme courts or state houses, the states led this innovation in American law." (citation omitted)).

134. *Obergefell*, 135 S. Ct. at 2597.

135. *Id.* at 2605.

136. *Id.* at 2607–08.

In his dissent, Chief Justice John G. Roberts Jr., made the point that "the Court invalidate[d] the marriage laws of more than half the States and order[ed] the transformation of a social institution that has formed the basis of human society for millennia" and that "[a]llowing unelected federal judges to select which unenumerated rights rank as 'fundamental'—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role."[137] Justice Samuel A. Alito added the following:

> The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not.[138]

The *Obergefell* decision is interesting in many ways. From the standpoint of federalism,[139] it illustrates the interactions between, on the one hand, the interpretation of federal fundamental rights and, on the other, the constitutions, laws, case law, and practices of the states.[140] The fact that a majority of the states retained the traditional definition of marriage does not and should not prevent the Supreme Court from concluding that the Fourteenth Amendment guarantees the right to same-sex marriage. It should, however, not be ignored, and the Court should bring strong arguments to support its holding. It does so when it makes reference to the fundamental notions of dignity[141] and the liberty of the person.[142] These arguments, which could have been further developed in this context—especially as far as

137. *Id.* at 2612, 2616 (Roberts, C.J., dissenting).

138. *Id.* at 2643 (Alito, J., dissenting).

139. On this issue, see Resnik, *supra* note 3, at 243 ("The *Obergefell* majority's decision to ignore federalism was not the first time it gave little attention to arguments from localism in marriage discrimination."). *See also* Soucek, *supra* note 50, at 1112–15.

140. *See*, *e.g.*, Céline Fercot, *Liberté, égalité, dignité: Le nouveau visage du droit de se marier aux Etats-Unis* [*Liberty, Equality, Dignity: The New Face of the Right to Marry in the United States*], 2015 REVUE DES DROITS DE L'HOMME 1, 8–12; Somin, *supra* note 1, at 472–73.

141. *Obergefell*, 135 S. Ct. at 2608 ("[The petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right."). *See*, *e.g.*, Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17, 19–28, 32 (2015); Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT'L J. CONST. L. 26, 32–44 (2016).

142. *Obergefell*, 135 S. Ct. at 2604–05 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."). *See* Kenji Yoshino, *A New Birth of Freedom?* Obergefell v. Hodges, 129 HARV. L. REV. 147, 170 (2015). *See also* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2357–59 (2017); Connor M. Ewing, *With Dignity and Justice for All: The Jurisprudence of Equal Dignity and the Partial Convergence of Liberty and Equality in American Constitutional Law*, 16 INT'L J. CONST. L. 753, 767–73 (2018).

human dignity is concerned[143]—may convincingly explain this form of centralization regarding the institution of marriage.[144]

In Mexico, the Supreme Court of Justice of the Nation issued several decisions in same-sex marriage cases in 2012, 2014, and 2015.[145] The Court's reasoning was based on various elements, especially Article 1 of the Mexican Constitution[146] and the American Convention on Human Rights.[147] It could also have based those decisions on the fact that several Mexican states—approximately one-third at the time of writing—have legalized same-sex marriages.[148]

D. The "Almost None" Situation

A federated entity is sometimes at the forefront of an evolution.[149] In such a case, its constitution, laws, case law, or practices may serve as one of several grounds for a supreme or constitutional court's decision. In other words, it may help support the reasoning adopted by the federal justices.[150]

In its famous *Carter v. Canada* decision, the Supreme Court of Canada concluded that two provisions of the Criminal Code infringed upon Section 7 (life, liberty, and security of person) of the Canadian Charter of Rights and Freedoms

> to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the

143. For a concise but compelling argument in this respect, see PAUL BREST ET AL., PROCESS OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1600 (7th ed. 2018) ("[T]he issue is government actions that deny *appropriate respect* for human dignity. When the state fails to accord people the equal concern and respect that they deserve, this violates the Equal Protection Claus of the Constitution.").

144. *See*, *e.g.*, Fercot, *supra* note 140, at 36. For a critique, see, e.g., Augusto Zimmermann, *Judicial Activism and Arbitrary Control: A Critical Analysis of* Obergefell v. Hodges, 17 U. NOTRE DAME AUSTL. L. REV. 77, 83–85 (2015).

145. *See, e.g.*, Primera Sala (Reiteración) Suprema Corte de Justicia de la Nación [SCJN], Gaceta del Semanario Judicial de la Federación [GSJF], Décima Época, tomo II, Marzo de 2015, Tesis 1a./J. 67/2015, Página 1315; Primera Sala SCJN, GSJF, Décima Época, tomo I, Diciembre de 2015, Tesis 1a./J. 84/2015, Página 110; Primera Sala (Reiteración) SCJN, GSJF, Décima Época, tomo I, Diciembre de 2015, Tesis 1a./J. 85/2015, Página 184; Primera Sala (Reiteración) SCJN, GSJF, Décima Época, tomo I, Diciembre de 2015, Tesis 1a./J. 86/2015, Página 187.

146. Constitución Política de los Estados Unidos Mexicanos [CP], Diario Oficial de la Federación [DOF] 05-02-1917, últimas reforma DOF 27-01-2016.

147. Nov. 22, 1969, 1144 U.N.T.S. 123.

148. *See* PEW RESEARCH CTR., GAY MARRIAGE AROUND THE WORLD (Aug. 8, 2017), www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013/#mexico.

149. For an example relating to the first legal supervised injection site in North America, see Canada (Attorney General) v. PHS Cmty. Servs. Soc'y, [2011] 3 S.C.R. 134, 192 ("Where, as here, the evidence indicates that a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the [federal] Minister [of Health] should generally grant an exemption [under section 56 of the Controlled Drugs and Substances Act].").

150. Regarding the United States, see, however, Hills, *supra* note 60, at 28 ("State counting is more an assurance that a judicial opinion is consistent with the national majority's current preferences than a protection of outlier states' experimentation.").

> termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.[151]

In its decision, it referred to the newly adopted Act Respecting End-of-Life Care in the Province of Quebec,[152] as well as to rules and practices of eight countries and some U.S. states.[153]

This decision is particularly noteworthy, as the provincial act was not yet in force and was the only one of its kind. This did not prevent the Supreme Court from mentioning it to show an emerging trend in favor of reforms permitting, in some circumstances, assistance in dying. The aforementioned act was based on a report of the Quebec National Assembly's Select Committee on Dying with Dignity.[154] At the core of this Committee's work was the dignity of the person, a constitutional value.[155]

Finally, one or very few federated entities may have maintained an institution or rules that are now regarded as being, at least, hardly consistent with the country's constitution. In such a case, the concern for the entities' constitutional autonomy may influence the interpretation of federal fundamental rights.

The *Willy Rohner* decision of the Swiss Federal Tribunal[156] provides one of the most illustrative examples. The institution of *Landsgemeinde*—i.e., a system of public, non-secret voting by ballots in a general assembly of citizens—was challenged before the Swiss Federal Tribunal. The Tribunal came to the conclusion that the flaws of such a system are not sufficient to discount the institution of *Landsgemeinde* as unconstitutional and contrary to the freedom to vote,[157] a federal fundamental right in Switzerland.[158] The Tribunal was impressed by the fact that this institution had existed for ages in some Swiss cantons[159] and displayed great deference toward the institution.

The *Willy Rohner* decision can be criticized on fundamental rights grounds. The defects of the non-secret ballot-voting process in

151. Carter v. Canada (Attorney General), [2015] 1 S.C.R. 331, 396. *See, e.g.*, ROBERT SCHERTZER, THE JUDICIAL ROLE IN A DIVERSE FEDERATION: LESSONS FROM THE SUPREME COURT OF CANADA 292 n.26 (2016).

152. *Carter*, [2015] 1 S.C.R. at 345, 364.

153. *Id.* at 345.

154. ASSEMBLÉE NATIONALE DE QUÉBEC, MOURIR DANS LA DIGNITÉ (Mar. 2012), www.rpcu.qc.ca/pdf/documents/rapportcsmd.pdf. *See* Sébastien Grammond, *Louis LeBel et la société distincte* [*Louis LeBel and the Distinct Society*], 57 CAHIERS DE DROIT 251, 256 (2016).

155. ASSEMBLÉE NATIONALE DE QUÉBEC, *supra* note 154, at 19.

156. Bundesgericht [BGer] [Federal Supreme Court] Apr. 19, 1995, 121 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] I 138.

157. *Id.* at 148–49.

158. CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 34.

159. 121 BGE I at 145–46.

a general assembly, where citizens must be physically present, cannot be ignored. Today, cantonal *Landsgemeinde* still exist, but only in two out of the twenty-six cantons. Some cantons have abandoned this institution for constitutional reasons. The Swiss Federal Tribunal could have limited the type of decisions to be made in a *Landsgemeinde*. Secret-ballot voting should at least be required for revisions of the cantonal constitution, the "supreme law" of the canton in which this institution is anchored.[160] In other words, the people of the cantons concerned should, at the very minimum, be in a position to freely accept these revisions without the influences present in a general assembly, and without having to attend the assembly despite ill health or other legitimate reasons. This would be the minimum compromise between the freedom to vote and the cantons' constitutional autonomy.

A more recent decision of the Swiss Federal Tribunal is also instructive in this context. In the *Walker* case,[161] the Tribunal had to deal with the question of whether the cantons are entitled to choose a majoritarian electoral system or hybrid electoral system with majoritarian elements for the election of their parliament. This is a fundamental rights issue in Switzerland, as the electoral system must respect the constitutional freedom to vote.[162] Although, for constitutional reasons,[163] an overwhelming majority of the cantons have opted for a proportional electoral system, the Tribunal took account of the concerns of the other cantons[164] and concluded—after having, however, addressed several critiques to these systems[165]—that a majoritarian or hybrid system is not prohibited by the Federal Constitution. One should note in this regard that the federal limits on the constitutional autonomy of the cantons are particularly vague. The cantons must comply with the freedom to vote and adopt a "democratic constitution."[166] On this indeterminate basis, it would have been difficult for the Swiss Federal Tribunal to significantly reduce the cantons' autonomy with respect to their cantonal electoral systems through an extensive interpretation of the aforementioned constitutional provisions.[167] The Swiss Federal Tribunal very recently reaffirmed that

160. VINCENT MARTENET, L'AUTONOMIE CONSTITUTIONNELLE DES CANTONS [THE CANTONS' CONSTITUTIONAL AUTONOMY] 345–48 (1999).

161. Bundesgericht [BGer] [Federal Supreme Court] Sept. 26, 2014, 140 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] I 394.

162. CST art. 34.

163. 140 BGE I at 398.

164. *Id.* at 400–01.

165. *Id.* at 401–06.

166. CST art. 51, para. 1.

167. *See* Giovanni Biaggini, *Majorz und majorzgeprägte Mischsysteme: Parlamentswahlverfahren mit Verfalldatum?* [*Majoritarian and Hybrid, With Majoritarian Elements, Systems: Parliamentary Election Process with an Expiration Date?*], 117 SCHWEIZERISCHES ZENTRALBLATT FÜR STAATS- UND VERWALTUNGSRECHT 409, 413–29 (2016).

the cantons can choose their electoral system and that the freedom to vote leaves them a wide autonomy,[168] but it decided, at the same time, to further frame and actually limit the latter.[169] As this last example shows, the interaction between federalism and rights protection evolves and must thus be assessed from a dynamic perspective.

Conclusion

The influence of federalism in rights cases varies from one federal state to another. It is particularly perceptible in Canada, Switzerland, and the United States. In these three countries, the federated entities have jurisdiction over many questions, including those that raise controversial societal or political issues. This may explain the fact that, in some federal rights cases, the Supreme Court of Canada, the Swiss Federal Tribunal, and the Supreme Court of the United States refer to the constitutions, laws, case law, and practices, respectively, of the provinces, cantons, and states.

In federal states, including Canada, Switzerland, and the United States, federal rights can, nevertheless, be considered autonomous. In other words, their interpretation, even if evolutive, does not usually depend on the way the federated entities have made decisions and choices on constitutional grounds. Supreme or constitutional courts in federal countries have not developed a margin of appreciation doctrine similar to the one framed by the European Court of Human Rights.[170]

Nonetheless, the situation prevailing in the federated entities of a federal state still presents a certain interest in rights cases, especially when (i) the federated entities have jurisdiction over the relevant area of law and enjoy broad autonomy; (ii) the question raised is controversial, relates to conflicting values, and is linked to the diversity which the constitution protects; (iii) the applicable federal fundamental right is "unenumerated" or not clearly grounded in the constitution; and (iv) the scope of this right is vague. In particular when these conditions are met, the federal supreme or constitutional court may be influenced, for instance, by the fact that almost all or many federated entities have changed their constitutions, laws, case law, or practices for constitutional reasons. Collectively, these decisions and choices point in a certain direction, which may help constitutional or supreme court justices structure their reasoning and frame their personal beliefs or values. The justices remain, however, free to base their opinions on other constitutional grounds. The approach described here may also be valid in federal states whose supreme or constitutional court does not currently make such an inquiry, as it is rooted in the general

168. Bundesgericht [BGer] [Federal Supreme Court] July 29, 2019, 1C495/2017, *to be published in* 145 Entscheidungen des schweizerischen Bundesgerichts [BGE] I, ¶ 4.
169. *Id.* at ¶¶ 7–8.
170. Regarding Canada, see, however, Clarke, *supra* note 78, at 130–35.

principle that considers the constitution to be an open, interacting ensemble, susceptible to external influence and interactions among its various parts or provisions.

Characterized as "laborator[ies]" of democracy by Justice Louis Brandeis,[171] the American states and, more generally, federated entities in a federal state, may also be constitutional indicators or even trailblazers. They may indicate a future federal path when many of them have made similar decisions or choices for constitutional reasons, especially when there is "[c]onsistency of the direction of change,"[172] or when one or a few pioneering entities wander through unexplored constitutional fields.

171. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In the context of this Article, see SUTTON, *supra* note 86, at 216.

172. Hall v. Florida, 134 S. Ct. 1986, 1997 (2014). *See*, *e.g.*, Petkova, *supra* note 22, at 692.