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ARTICLE

Beyond Incomplete Dichotomies: A Structural Typology of Dual Rights in the EU and the US

Dr. Mohamed Moussa

Lecturer in Law, Director of Studies, Murray Edwards College, University of Cambridge, Cambridge, U.K.
Corresponding author: mmam4@cam.ac.uk

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Abstract
The two widely used dichotomies of floor/ceiling and centralization/decentralization often fail to capture the full interactions of rights in multilevel constitutional systems such as the EU or the US. This article offers a comprehensive yet straightforward classification linking rights to the division of power between the center and component states. The typology comprises three overarching categories: plurality, partial and full centrality. These categories are broken down into further subcategories and illustrated through comparative examples from the EU and the US. The typology reveals mezzanine structural levels which go unnoticed when analysis is confined to existing dichotomies. The purpose of the typology is, first, to facilitate more accurate comparisons of the EU and the US's composite systems and make commonalities and divergences easier to identify. Second, through the ensuing clarity, it aids the normative inquiry into what level of government—the center or the state—is better suited to regulate different types of rights and to what extent. Thirdly, it reconnects the EU-US comparison with comparative constitutionalism's Aristotelian pedigree of utilizing robust categorization as a necessary cognitive tool for maintaining rationally ordered analyses.

Keywords: Multilevel Constitutionalism; Fundamental Rights in the EU & the US; Leaky Floors and Ceilings; Typologies

A. Introduction: On the Need for a Typology

Implicit in any system of multiple constitutional layers—state/federal or state/union—is the existence of a plurality of authoritative legal rulings regarding some constitutional rights.[1] Within the same system, when one moves from a component jurisdiction to the other, often the existence and the scope of certain rights vary considerably. The plurality originates from the multiplicity of constitutional sources or divergent interpretation of actors within their respective jurisdictions, as well as possible inter-jurisdictional dialogues or conflicts. Some rights are centrally defined and share a uniform core across jurisdictions. Yet, even these centralized rights vary in their degree of centrality, either as minimum, maximum, or others. The commonly used typology to capture the interaction of dual rights is to contrast ceilings with floors. The former refers to rights defined by the center—the union or the federal government—as a minimum protection which the state must adhere to but could diverge above, unlike ceilings which states cannot exceed.[2]

[1]A. Torres Pérez, *The Dual System of Rights Protection in the European Union in Light of US Federalism*, *in* FEDERALISM IN THE EUROPEAN UNION 110–130 (Elke Cloots, Geert De Baere & Stefan Sottiaux eds., 2012); ELLIS KATZ & GEORGE TARR, FEDERALISM AND RIGHTS 1–2 (1995).

[2]*See id.*; *see also* FEDERICO FABBRINI, FUNDAMENTAL RIGHTS IN EUROPE (2014); Eleanor Spaventa, *Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU*, *in* 50 YEARS OF THE EUROPEAN TREATIES: LOOKING BACK

Nevertheless, jurisdictional conflicts, dialogue or limits of both supremacy and judicial oversight often lead to a range of possibilities which go beyond the ceiling/floor dichotomy. As many have noted, the dichotomy is often "confusing,"[3] or "out of sync"[4] with how dual rights interact and represents only a "half-truth."[5] As will be shown later, areas such as rights of immigrants or those affected by the sovereign immunity doctrine in the US as well as certain rights falling under the EU's E-Privacy Directive, for instance, do not neatly fall within the floor or ceiling descriptions.[6] Neither does the centralization/decentralization dichotomy fare better in fully capturing the possible state/center interactions over rights. As will be shown in examples such as abortion in Europe or capital punishment in the US, there exist more nuanced categories and mezzanine levels beyond centralization/decentralization. In both examples, a substantive right is neither defined by the center, nor is the authority of the state thereof absolute. Robust cognizance of these mezzanine levels helps expand the choices "menu"[7] in the dialogic interaction between the two levels of government and gives more wiggle room for informed structural interactions, particularly in highly divisive rights where the role of central intervention is regularly discussed.

To heed Birks' memorable warning, "[w]ithout good taxonomy and a vigorous taxonomic debate, the law loses its rational integrity,"[8] the article offers a more accurate structural classification of the dual protection of rights in the EU and the US. It is structural because its vantage point lies at the intersection of the vertical division of powers and rights, namely, whether and to what extent jurisdiction regarding a certain right is exercised by the center, component state, or concurrently. Seen this way, the purpose of this classificatory attempt is *threefold*. First, to serve as a comprehensive yet simple connecting theme for comparisons conducted between the vastly dynamic structure of the two-centuries old US constitution and the composite EU constitutional architecture. Following Hohfeld's remark, when compared subjects are expressed "in terms of their lowest common denominators . . . comparison becomes easy, and fundamental similarity [and divergence] may be discovered."[9] To reformulate Varuhas, a "fine-grained" categorization is required for "enriching our understanding" of the two systems and "carrying forward knowledge more generally."[10]

Second, the typology is of fundamental utility for research engaging with federalism's "oldest question,"[11] i.e., which level of government—center or state—is better suited to regulate which type of right and to what extent. Often, centralizing certain rights proves vital by keeping the rights away from the majority's vicissitudes at the state level.[12] In other cases, centralization become a "threat" to the nuances of local diversity.[13] As many have noted, the literature lacks a proper

AND THINKING FORWARD 343 (Michael Dougan & Samantha Currie eds., 2009); William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 550 (1986); Kermit L. Hall, *Of Floors and Ceilings: The New Federalism and State Bills of Rights*, 44 FLA. L. REV. 637 (1992).

[3]Eleanor Spaventa, *Should We "Harmonize" Fundamental Rights in the EU? Some Reflections About Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System*, 55 C.M. L. REV. 999 (2018) (remarking that in the context of fundamental rights "the language of minimum harmonization is deceptive and confusing").

[4]Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227 (2008).

[5]Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123 (1992).

[6]Art 15(1) Directive 2002/58/EC authorizes Member States to "restrict the rights in that Directive relating to the confidentiality of communications, location and other traffic data and caller identification."

[7]An expression taken from ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 135 (2004).

[8]Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 UNIV. W. AUSTL. L. REV. 1, 22 (1996).

[9]Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 58 (1913).

[10]Jason Varuhas, *Taxonomy and Public Law*, *in* THE UNITY OF PUBLIC LAW?: DOCTRINAL, THEORETICAL, AND COMPARATIVE PERSPECTIVES 48 (Mark Elliott, Jason Varuhas & Shona Wilson Stark eds., 2018).

[11]Justice O'Connor described the question of "the proper division of authority between the Federal Government and the States" as "perhaps our oldest question of constitutional law." New York v. United States, 505 U.S. 144 (1992).

[12]E.g., when the ECJ centralized sex discrimination, it revolutionized equality across Europe; *see* Sweet *supra* note 7, at 147-198.

[13]Spaventa, *supra* note 3, at 998.

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compass to determine which rights are more suitable for centralization and which are not.[14] For example, in the US, federalism and decentralization "served as a code word" for "racism" for quite some time.[15] It is universally acknowledged that only after centralization of minority rights did protection of the rights of African Americans significantly improve.[16] Likewise in the EU, the centralization of equal pay opened avenues for sex equality that were not possible through national systems.[17] Conversely, a similar move to centralization for abortion in America triggered violence and defiance of state legislations.[18]

Exigences of space preclude overcurious investigation of these complex dynamics regarding abortion, minority rights and others. It suffices to say that reliance on the existing dichotomies may be factually insufficient for a normative assessment of these areas. As the examples below will show, certain rights appear to fall within the central prerogative while states *de facto* enjoy wide leverage regarding their content. In contrast, other rights that appear to fall within the state's regulatory power at first glance in fact can lead to reverse centralization through redundancy and convergence. Given that descriptive accuracy is a *sine qua non* of any normative inquiry, to normatively engage with federalism's boundary question, the existing incomplete dichotomies of centralization/decentralization or floor/ceiling cannot suffice. Rather, the proposed typology's more nuanced account of the locus of power over certain rights facilitates tracing the extent to which a change in that jurisdictional venue affects rights protection. This allows an informed assessment of which level of government, the union or the state, is better suited—acting exclusively or concurrently—to regulate which type of rights and to what extent. Seen this way, the typology becomes a needed tool and a requisite for proper engagement with federalism's boundary question, at least with regards to rights.

The third purpose of the typology stems from the interlinkage between cognitive approaches and comparative constitutional law. In cognitive sciences, it is contended that the human brain finds categorization convenient if not necessary for comprehending the complexity of the world.[19] As Birks remarked "it is not too much to say that taxonomy is the foundation of most of the science which late 20th century homo sapiens takes for granted. Had he been averse to taxonomy or a bad taxonomist, Darwin would have observed but would not have understood."[20] In comparative constitutional law, Zumabsen reminds us that the field itself was first established by Aristotle's categorization of different types of constitutional systems.[21] Likewise, Varuhas criticizes the contemporary public law scholarship by noting that "rigorous legal analysis may elude us without legal taxonomy."[22] Perhaps, then, to better approach legal inter-systematic comparisons (between different systems) as well as intra-systematic analysis, a clearly delineated taxonomy may

[14]See discussion in Daniel Halberstam, *Federalism: Theory, Policy, Law*, *in* The Oxford Handbook of Comparative Constitutional Law at 577, 592 (Michel Rosenfeld & András Sajó eds., 2012); Spaventa, *supra* note 2; Erwin Chemerinsky, Constitutional Law 338 (6th ed., 2019); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 Yale L.J. 2094 (2013).

[15]Riker famously said, "If in the United States one disapproves of racism, one should disapprove of federalism." William H. Riker, Federalism: Origin, Operation, Significance 155 (1964).

[16]Lawrence M. Friedman, A History of American Law 687 (4d ed. 2019).

[17]"[B]y accident rather than by design the signatories of the Treaty of Rome had the laid the foundation for development of EC policy for women," Jane Pillinger, Feminising the Market: Women's Pay and Employment in the European Community 81 (Springer. 2016); *see also* Evelyn Ellis, Eu Anti-Discrimination Law 26 (2012).

[18]For an overview of this response, see M. Ziegler, Abortion and the Law in America: Roe v. Wade to the Present (2020).

[19]Nicole Branan *"Are Our Brains Wired for Categorization?"* 20 Sci. Am. 7, 11 (2010).

[20]Birks, *supra* note 8, at 3.

[21]Peer Zumbansen, *Carving out Typologies and Accounting for Differences across Systems: Towards a Methodology of Transnational Constitutionalism*, *in* The Oxford Handbook of Comparative Constitutional Law 75, 76 (Michel Rosenfeld & András Sajó eds., 2012).

[22]Varuhas, *supra* note 10, at 78.

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be a first step towards developing a needed tool in examining the interlinkage of rights and division of powers in composite multi-level constitutional structures.

Before proceeding to the analysis, a prefatory note is due regarding the comparability of the US and the EU as well as the case selection rationale. Despite many divergences in details, the two systems share a "normative" denominator[23] and a "family" resemblance[24] that have long generated *functional comparisons* not only in literature[25] but also in judicial opinions.[26] This stems from the fact that the US federal structure, like the EU, came into being through a constitutional process of "coming together"[27] or what the President of the CJEU terms "integrative federalism."[28] As many have remarked, in both experiences, pre-existing states voluntarily agreed to integrate into a continent-sized polity.[29] The multiplicity of "norm entrepreneurs" concomitantly brings an inescapable tension between "uniformity and diversity" within a "unified" constitutional order.[30] This commonality is what makes a comparison of the two systems "obvious and fruitful."[31] The two systems remain thematically "the least different" if not "the most similar" among other possible comparator constitutional polities.[32]

Being the most similar comparators, the case selection method follows what Jackson terms "functional contextualism."[33] Given the taxonomical mode of inquiry,[34] focusing on functions has a potent explanatory force of illustrating the full range of interactions of rights within each jurisdiction,[35] while contextualism ensures that the necessary particularity of each system is not overlooked.[36] The selected cases are the ones that best describe and contextualize the function of whether and to what extent the jurisdictional locus regarding rights is allocated to the center, component state, or concurrently. Differently put, the selection criterion is to inquire what jurisdictional options are available in each system for distributing authority over rights, and then to illustrate each option through case law examples. This criterion, as a common denominator, helps navigate the often-labyrinthine regulation of rights within two composite constitutional systems

[23]Fedreco Fabbrini, Fundamental Rights in Europe 33 (2014).

[24]On comparing constitutional "families," see Viki Jackson, *Comparative Constitutional Law: Methodologies, in* Oxford Handbook of Comparative Constitutional Law (Michel Rosenfeld & András Sajo eds., 2012).

[25]See *e.g.*, Courts and Free Markets: Perspectives from the United States and Europe (Terrance Sandalow & Eric Stein, eds., 1982); Joseph Weiler, Integration Through Law: Europe and the American Federal Experience (1986); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. Rev. (2002); Viki Jackson, *Narrative of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 Duke L. J. (2001).

[26]*See e.g.,* Printz v. United States, 521 U.S. 898, 976–77 (Breyer, J., dissenting); Opinion of Advocate General Geelhoed ¶ 108, C-491/01, The Queen v. Brit. Amer. Tobacco Ltd., ECLI:EU:C:2002:476, ¶ 108 (Sept. 10, 2022).

[27]Alfred Stepan, *Federalism and Democracy: Beyond the Us Model*, *in* Theories Of Federalism: A Reader (2005).

[28]Writing extrajudicially, Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 Am. J. Const. L. 236 (1990).

[29]*Id.*

[30]Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, 55 Nomos 363 (2014).

[31]Daniel Halberstam, *The Issue of Commandeering*, *in* The Federal Vision: Legitimacy And Levels Of Governance In The United States and The European Union 329 (Robert Howse & Kalypso Nicolaidis eds., 2001).

[32]Fabbrini, *supra* note 2, at 29. On comparing similar cases, see Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (2014).

[33]Jackson, *supra* note 24, at 67.

[34]On how case selection follows and depends on the inquiry mode be it descriptive, normative, or taxonomical, see Hirschl, *supra* note 34, at 281.

[35]For definitions of functionalism, contextualism and other comparative methods see Jackson, *supra* note 25, at 67; *see also* Mark Tushnet, *The Possibilities of Comparative Constitutional Law,* 108 YALE L.J. 1308 (1999).

[36]Examples of how this article contextualizes each system's particularities include: contrasting how defiance in the EU is more judicial while in the US is legislative (section B.III); explaining the particular role of ECHR in the EU (section C.II); or the extent of prevalence of partial centrality in the EU (Section B.I).

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and facilitates identifying convergences and divergences in a manner liable to attain the taxonomy's previously discussed three-fold purpose.

With this in mind, the following classification weds scholarly concepts and judicial terminology from the two sides of the Atlantic while adding necessary refinement substantiated by a wide array of case law.[37] More specifically, the typology offers a contribution through its differentiation between three broad categories: plurality, partial and full centrality. Within these overarching categories, three sub-species are added to plurality and three to what is termed "leaky" floors/ceilings.[38] Each part of the classification is explained below with brief comparative examples from case law.

Categories	Full centrality	Partial centrality	Plurality
Sub-categories	Ceiling		Settled
	Floor		Mediated
	Leaky floors and ceilings		Converging

B. Centrality and its Subcategories

Centrality refers to cases where the authoritative rule regarding—at the least the *minimum*—protection of a particular right is defined *top-down*. Namely, the right originates from the central authority—the federal authorities in the US and the EU—as interpreted by either the US Supreme Court, the Court of Justice of the European Union (CJEU) or the respective central legislator.

Centrality can be full or partial. Full centrality is typically exemplified by the US Bill of Rights after its "incorporation" in the twentieth century. Since then, rights contained in the bill once incorporated by the US Supreme Court must be considered, at least as a minimum protection, by state courts.[39] This is irrespective of whether the case involves a purely internal state or inter-state matter.[40] The extent to which such rights are binding upon states, as minimum or maximum, will be explained later while contrasting the sub-categories of centrality.

Partial centrality is less straightforward. It occurs when the rights defined by the center are applicable before state courts only within a defined scope, but not in all cases. This reflects the current situation in the EU. There, fundamental rights bind component states only when they act within the scope of EU law but not in "purely internal situations."[41] Partial centrality also describes the case of the US Bill of Rights before incorporation; when state courts would only enforce the Bill when they applied federal laws. In the contemporary US, partial centrality exists in yet-to-be incorporated rights or when a federal act regulates part of the field while leaving the remainder to states. An example is the Wagner Act which applies to certain private-sector employers with inter-state activity but not to state officials, employees of religious organizations, agricultural or domestic workers.[42] Thus, the statutory right to strike contained in the Act does not

[37]See accompanying text in *supra* note 2. The concepts of floor and ceiling are often used by judges, for instance, Justice Holmes captured the ceiling idea: "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go," Charleston & W. Carolina R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915). Justice Brennan in his well-known article stated that "the Constitution and the Fourteenth Amendment allow diversity only above and beyond this federal constitutional floor," Brennan, *supra* note 2, at 550.

[38]On leaky floors, see Miller & Wright, *supra* note 4. Noting that I developed their concept by applying it to ceiling and creating further three subdivisions of it as explained in the different categories of "leaks" section B.III below.

[39]CHEMERINSKY, *supra* note 14, at 537.

[40]*Id.*

[41]The term refers to "activities in which all the elements are confined within a single Member State; *see e.g.*, Joined Cases C-29/94 & 35/94, Aubertin and others, ECLI:EU:C:1995:39, ¶ 9.

[42]29 U.S.C. § 152.

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apply to the latter categories and states remain free to diverge in regulating it beyond the Act's reach.[43]

Three notes on partial centrality are due. First, there have been rare occasions where the centrally defined right has only bound component states, but not the central authority. For example, the Equal Protection Clause in the American Constitution added after the Civil War clearly addressed the state and not the federal government. Yet, in 1956, the court extended the "Equal Protection" clause to the federal government.[44]

Second, a right which is partially central is on the other side partially plural. An example from the US is the already mentioned Wagner Act. Given that the scope of this federal act does not extend to public employees, regarding the latter states are free to diverge on this issue. Therefore, one sees a "minority of states" recognize, with varying degrees, the right to strike unlike most states which indeed prohibit their officials therefrom.[45] Stated differently, the right to strike can be seen as partially central yielding one authoritative legal answer—for private workers—and the other part is plural displaying a variety of answers—for different states' public employees.[46]

Examples abound in the EU, as the constitutional habitat of partial centrality. When the CJEU first introduced indirect sex discrimination, this centrally defined right was and is still "partially central" applying upon Member States only with the scope of EU law. In purely internal situations, the domestic systems of Member States diverged starkly on banning that form of discrimination. In fact, it was only the UK which internally recognized the concept.[47] Although, over time, the concept has "migrated" into the domestic systems of most of the EU states,[48] the conditions of what constitutes indirect discrimination and burden of proof vary considerably in domestic litigation in each jurisdiction.[49] Another example is voting rights of Union citizens or "second country nationals," namely, citizens of one of the EU Member States residing in another.[50] EU law has centralized a right to second-country nationals to vote in municipal and EU elections—but not national elections—in their state of residence.[51] Nonetheless, beyond this centrally defined sphere, EU states diverge on enfranchising EU residents in national elections. Plurality in this regard is clear when contrasting the few states, such as Ireland, which endow classes of second country nationals with the right to vote in national elections, while most of the Member States either significantly restrict or completely exclude this right.[52]

Thirdly, partial centrality is not one-size-fits-all. The extent to which a partially centralized right applies to component states may vary depending on the right in question. The point can

[43]Alvin L. Goldman & Roberto L. Corrada, Labour Law in the USA 419 (2018); *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002).

[44]In a companion case to Brown the Court cut from whole cloth the doctrine that the Due Process Clause of the Fifth Amendment has an "equal protection component" Bolling v. Sharpe, 347 U.S. 497 (1954). *See* Peter J. Rubin, *Taking its Proper Place in the Constitutional Canon:* Bolling v. Sharpe, Korematsu*, and the Equal Protection Component of the Fifth Amendment Due Process*, 92 Va. L. Rev 1879 (2006).

[45]Goldman & Corrada, *supra* note 43, at 406; for a brief survey of state laws, see Milla Sanes and John Schmitt, *Regulation of Public Sector Collective Bargaining in the States* 8 Ctr. Econ. & Pol'y Rsch. (2014).

[46]An example of state recognizing the right: Cnty. Sanitation Dist. v. L.A. Cnty. Emp.'s Ass'n, 8 Cal. 3d, 564, 591–592, cert. denied 474 U.S. 995 (1985). For an excellent comparison to the EU, see Fabbrini, *supra* note 2, Ch 4.

[47]Sweet, *supra* note 7, 169.

[48]Bruno de Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*, 60 Am. J. Compar. L. 49, 52 (2012)

[49]For a comparative survey, see: Isabelle Chopin and Catharina Germaine, *A Comparative Analysis of Non-Discrimination Law in Europe, in* European Network of Law Experts in Gender Equality and Non-Discrimination 47(2017).

[50]Fabbrini, Fundamental Rights in Europe, *supra* note 2, at 97.

[51]Consolidated Version of the Treaty on the Functioning of the European Union, Art. 22 TFEU (e.g., Art 19 TEC), May 9, 2008. 2008 O.J. (C 115) 47 [hereinafter TFEU]; Council Directive 93/109 OJ 1993 L 329/34 72 (EC); Council Directive 94/80/EC, OJ 1994 L 368/38, Art 39 Charter of Fundamental Rights; *Id.*

[52]Fabbrini, *supra* note 2, at 46 (contrasting Ireland, which has enfranchised some classes of foreigners for parliamentary elections, unlike most EU states restricting alien voting rights for aliens at the local level or even totally excluding them). *See also* Kees Groenendijk, *Local voting rights for non-nationals in Europe: What We Know and What We Need to Learn* 1 Migration Pol'y Inst. (2008).

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be illustrated by contrasting racial discrimination as protected by the Race Equality Directive (RED)[53] vis-à-vis discrimination on grounds of religion or belief and other grounds protected by the Framework Equality Directive (FED).[54] While both directives are partially centralized and thus only apply to member states within the scope of EU law, RED has a much broader scope of application which extends beyond employment-related fields to include social protection, healthcare, education and supply of goods and services such as housing.[55] Conversely, FED applies only in the context of employment. Accordingly, while EU protection extends to banning the denial of services to a member of a racial minority, EU law does not apply to denying services or goods to someone manifesting a religious symbol, be it a Sikh turban or a Jewish yarmulke.[56] Instead, the situation is governed by the divergent national rules.

Bearing this in mind, this article next examines the subcategories of centrality. Both full and partial centrality is divided into three sub-categories: Floor, ceiling, or leaky floors/ceilings.

I. Central Floor

Here the central interpretation serves as a "safety net" or a "minimum protection" to which the component state must offer equivalent or more expansive protection.[57] This is the classical category in which most rights fall. As is well known, it was Justice Brennan's famous 1977 article that brought the "floor" metaphor to the foreground of academic and judicial analysis.[58] The article ushered in an era of "new judicial federalism" which stresses the role of state constitutions and courts as "guardians of liberty" in offering a stronger protection of fundamental rights.[59] To harken back to the typology, the case of centrality can be either full or partial, and so can the category of floor. Below, examples from the US on full central floor is contrasted with that of the EU's partially central floor.

Examples of *fully central floor* in the US include state courts and constitutions bestowing more expansive protection than the federal equivalent in the area of freedom of expression. Unlike the state action requirement by the US Supreme Court whereby this freedom is only vertically enforceable against governmental bodies, two state courts have extended the freedom horizontally against private colleges.[60] In the protection against "unreasonable searches and seizures," where the Supreme Court accepted warrantless search of garbage waste,[61] many state courts extended constitutional protection to garbage.[62] Multiple examples exist in the areas of property rights[63]

[53]Council Directive (EC) 2000/43 *Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22 [hereinafter RED].

[54]Council Directive (EC) 2000/78 *establishing a general framework for equal treatment in employment and occupation* [hereinafter, FED].

[55]RED, *supra* note 53, at art 3.

[56]But if these symbols were classified as issue of race or ethnicity, the EU law would provide protection; Anna Śledzińska-Simon, *Unveiling the Culture of Justification in the European Union: Religious Clothing and the Proportionality Review*, *in* EU ANTI-DISCRIMINATION LAW BEYOND GENDER 207 (Uladzislau Belavusau & Kristin Henrard eds., 2019).

[57]JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 1–11 (4th ed. 2006); Pérez, *supra* note 1.

[58]William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[59]William J. Brennan, *Guardians of Our Liberties-State Courts No Less Than Federal*, 15 JUDGES J. 82 (1976). For a critique, see Earl M Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q 443 (1987).

[60]Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); State v. Schmid, 423 A.2d 615; see also the discussion in Friesen, *supra* note 57, at 5–83.

[61]California v. Greenwood 486 U.S. 35, 40–41 (1988).

[62]*E.g.*, State v. Goss, 834 A.2d 316, 319 (N.H. 2003); State v. Boland, 800 P.2d 1112, 1117 (Wash. 1990); State v. Morris, 680 A.2d 90, 94, 100 (Vt. 1996).

[63]After the Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005) many states adopted a more protective approach to private property. *See, e.g.*, Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006); *see also* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 NYU L. Rev. (2017).

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privacy[64] and others.[65] Indeed, an empirical study showed that one out of three state court judgements expand rights beyond the federal floor.[66]

The EU offers many examples on *partially central floors*. This includes the directive which sets the minimum period for maternity leave at 14 weeks, with 2 weeks compulsory leave before and/or after confinement as well as adequate allowance subject to national legislation. This aligns with the Charter right enshrined in Article 33(2), to reconcile family and professional life. The directive sets only a floor as many Member States have gone above the prescribed period of paid leave, including up to 52 weeks.[67] *Åkerberg Fransson* provides another example, where the applicant claimed a violation of the right against double jeopardy "*ne bis in idem*" for being prosecuted under Swedish law on account of a tax offence for which he had already been subject to administrative penalties. The CJEU, after establishing its jurisdiction, set only a floor of the right, leaving it to Member States to provide higher standards.[68]

Notably when the floor is not leaky, as discussed later, a key difference exists between a partially central floor and a full one. In the US, when states diverge in their expansion above the floor, it remains a one-way ratchet above the floor. Whilst this is true in the EU Member States when acting within the scope of EU law, it is not the case regarding purely internal situations. There, states are not limited by a one-way ratchet and are free to diverge both above or under the equivalent EU floor as in the previously mentioned cases of indirect discrimination or non-citizen voting where certain states have denied the right altogether in domestic situations.

II. Central Ceiling

The ceiling as a *maximum* prevents states from granting more generous protection. Surely, due to the US Supremacy Clause, this is the norm whenever state courts are applying federal law or the federal constitution. State courts are generally free to interpret their equivalent state rights more generously but not free when they are applying federal the Bill of Rights or federal laws.[69] In the case of the latter, they must follow and not expand the US Supreme Court's interpretation, otherwise they risk reversal.[70] That obvious scenario aside, ceilings also exist when state courts are interpreting rights under their own constitutions and laws which can be trumped by a less protective federal provision.

For example, California's constitutional provision on privacy was held to be pre-empted by the federal law mandating random drug testing for employees which adheres to a lower standard of privacy.[71] Another example is where California attempted to protect the feelings of its residents of Holocaust survivors and their descendants by passing an act which required insurance companies

[64]For a comparison, see JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW § 483, ch. 4 (2009).

[65]For a commendable survey of states' more protective rights see FRIESEN, *supra* note 57; JEFFREY S SUTTON, IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 51 (2018).

[66]James NG Cauthen, *Expanding Rights under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1202 (2000).

[67]Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [2019] OJ L 348, art 8; *The European Parliament, Maternity and Paternity Leave in the EU, infographic, (2019)* available at https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635586/EPRS_ATA(2019)635586_EN.pdf.

[68]Case C–617/10, Åkerberg Fransson, EU:C: 2013:105.

[69]*See* Friesen, *supra* note 57, at 1–4; *see also* Baltimore City Dept't of Social Servs. V. Bouknight, 493 U.S. 549 (1990); Maryland v. Craig, 497 U.S. 836 (1990).

[70]Friesen, at 1–5, note 17 (illustrating how the US Supreme Court was willing to accept appeals against state courts interpreting federal rights more expansively).

[71]Utility Workers of America v. S. Cal. Edison Co., 852 F.2d 1083 (9th Cir. 1988). For the Federal standard for authorizing drug testing, see Nat'l Treasury Emp.'s Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Lab. Exec.'s Ass'n, 489 U.S. 602 (1989); *see also* Robert F. Williams, The Law of American State Constitutions 102 (2009).

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doing business in the state to disclose information concerning policies sold in Europe between 1920-45. Yet, the US Supreme Court found the act to be pre-empted by executive agreements and dormant foreign power.[72] Other examples abound.[73]

In the EU, *Melloni* is the canonical example of a partially centralized ceiling. The more protective Spanish constitutional principal barring extradition for a conviction in *absentia* was set aside for the enforcement of the less protective European Arrest Warrant. The defendant, Mr. Melloni, a resident in Spain, was subject to an arrest warrant issued by Italian authorities based on a conviction in Italy which was in *absentia*, yet he was represented by two trusted lawyers. Trying to avail himself of the more protective constitution, he challenged the warrant for breach of the fair trial principle of the Spanish Constitution. The Spanish Constitutional Court lodged its first preliminary reference to the CJEU on whether Article 53 Charter allows, in this case, the overprotection of the right to a fair trial by the Spanish Constitution. The CJEU replied negatively on the premise that the EU states' more protective rights would undermine the "primacy, unity, and effectiveness" of the Warrant system.[74]

III. Leaky Floors/Ceilings (Rights Derogations)

The ceiling/floor dichotomy does not cover the full province of rights falling within centrality, rather there is an important further sub-category conceptualized as *leaky* floors and ceilings.[75] Often termed a right "derogation," a federal "discount,"[76] this category denotes cases where the component state's protection of a given right can go below the central floor or, *less frequently*, above the ceiling. This derogation/leak could be either 1) authorized, 2) non-authorized yet subtle, or 3) openly defiant.

1. Authorized Leaks or Derogations

These are derogations which the center *explicitly* acknowledges and permits. This category usually involves derogation below-central floor. It can be illustrated by the US Sixth Amendment's jury requirement. Until very recently and for almost half a century, the US Supreme Court used to ordain unanimous jury in federal convictions but held that states, if they wished, could provide for "less-than-unanimous" jury convictions.[77] Another is the sovereign immunity doctrine. With some exceptions, the doctrine is understood to bar private action before federal courts against state governments for monetary redress.[78] This often leads to constitutionally authorized situations of a right without remedy. This, for instance, was the fate of Patricia Garrett who was fired by the University of Alabama for undergoing cancer treatment; while the state action violated the federal disability law, she still could not sue the state to remedy the violation of her rights.[79]

[72]Amer. Ins. Ass'n v. Garamend, 539 U.S. 396 (2003).

[73] WILLIAMS, *supra* note 71, at 102, referring to the preemption of New Jersey's constitutional right to collective bargaining); *see also* Erwin Chemerinsky, *Empowering States When It Matters-a Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2003).

[74]Case C–399/11, Melloni v. Ministerio Fiscal, EU:C: 2013:107.

[75]I added the three subcategories of authorized, subtle, and defiant leaks in addition to including ceiling to the leaky floor term which I borrowed from Miller & Wright, *supra* note 4.

[76]Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism (S)*, JUS POLITICUM, REVUE DE DROIT POLITIQUE 218 (2017).

[77]In April 2020, the Supreme Court fully centralized the right and now states must adhere to unanimity. *See* Ramos v. Louisiana, 590 U.S. (2020) (departing from its earlier ruling in Apodaca v. Or., 406 U.S. 404 (1972)).

[78]CHEMERINSKY, *supra* note 15, at 195–246. The Court often justifies the doctrine on grounds of "state dignity." *See* Alden v. Maine, 527 U.S. 706, 715 (1999). Some earlier cases used an even stronger language. *See, e.g.*, Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends").

[79]Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); *see also* Figueroa v. State, 604 P.2d 1198 (Haw. 1979).

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In the EU, certain instruments often authorize Member States to go below the floor of certain rights. A fitting example is the E-Privacy Directive which in Article 15(1) authorizes Member States to "restrict the rights in that Directive relating to the confidentiality of communications, location and other traffic data and caller identification."[80] This authorized derogation is conditioned on being "a necessary, appropriate and proportionate measure within a democratic society to safeguard national security defense [and] public security."[81]

The center could also authorize a margin of derogation above the central ceiling which is often termed a "leaky virtue."[82] This occurs less frequently, and it is often less clear. An example from the US comes from the field of so-called "environmental federalism" or "environmental rights." The Clean Air Act empowers the U.S Environmental Protection Agency (EPA) to set a "ceiling" standard which pre-empts states from adopting their own.[83] Still, the act allows California to apply for a waiver of this pre-emption whereby it could adopt more environmentally protective standards than that of the EPA.[84]

2. Subtle Leaks or Underenforcement

This refers to "modest" yet sometimes consistent "deviations" which are *neither expressly authorized nor openly defiant*. They originate from a loose reading or often misinterpretation of the central law, or the central court's multifactorial formulas by state courts which, intentionally or unintentionally, lead to "below-the floor" or less often above-the-ceiling protection.[85] A main reason behind this category is the difficulty of policing the central interpretation due to legal and logistical limits of appeal, as in the US[86] or the lack of it altogether in the EU. This leaves room for deviations that do not amount to "*extreme malfunctions*" or overt defiance to the central authority.[87]

In the US, the rights of criminal defendants represent a ripe field of these sorts of leaks.[88] A stark example is the right to counsel. In *Gideon* and its progeny cases, The US Supreme Court held the Sixth Amendment to require state-funded counsel for indigent criminal defendants facing jail or prison.[89] In practice, consistent leaks at state level made this right "diluted"[90] and varied across

[80]Art 15(1) Directive 2002/58/EC.

[81]*Id.*; for commentary, see Steve Peers, *Are National Data Retention Laws Within the Scope of the Charter?*, EU law Blog (April 2014), http://eulawanalysis.blogspot.com/2014/04/are-national-data-retention-laws-within.html.

[82]Miller & Wright, *supra* note 4, at 253.

[83]Clean Air Act, 42 U.S.C. §7543(a), § 209(a).

[84]*Id.* For brief yet excellent introduction, see Richard K. Lattanzio, James E. McCarthy, Larry B. Parker, Linda-Jo Schierow, Claudia Copeland & Kate C. Shouse., CONG RSCH. SERV. CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS (2011). *See also* Joseph Goffman & Laura Bloomer, *Disempowering the EPA: How Statutory Interpretation of the Clean Air Act Serves the Trump Administration's Deregulatory Agenda* 70 CASE W. RESERVE L. REV. 929 (2020) ("Trump's EPA withdrew the waiver it previously granted to California regarding greenhouse-gas emissions.").

[85]Miller & Wright, *supra* note 4; Resnick notes that one definition of federal discounts is "simultaneously erratic failures of norm enforcement and responses to complex problems of norm implementation." Resnik, *supra* note 76, at 400.

[86]Yearly over 30 million new cases (excluding traffic cases) are filed in state courts which include matters of both federal and state law. The Supreme Court, on the other hand, decides fewer than one hundred cases each year (roughly less than 2% of the petitions it receives) which includes reviews of both state and lower federal courts. Within these one hundred cases, review of state court decisions makes up an average of 14.4% of the Court's docket. Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. F. 167, 178 (2017).

[87]The term is borrowed from Harrington v. Richter, 562 U.S. 86 (2011).

[88]Miller & Wright, *supra* note 4; *see also* F. WILLIAMS ROBERT & FRIEDMAN LAWRENCE, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS FIFTH EDITION 203 (5th ed. 2015). referring to examples of state courts acknowledging that state constitutions are less protective than federal floor; *e.g.* Serna v. Superior Court (1985) 40 Cal.3d 239, 219 Cal. Rptr. 420; 707 P.2d 793 ruled that the speedy trial standards mandated by the federal Constitution were more exacting than those required by the California Constitution as interpreted by the state court.

[89]*Gideon*, 372 U.S. at 344 (establishing the right for felony defendants which was extended to criminal defendants facing jail in Argersinger v. Hamlin, 407 U.S. 25, 40 (1972)).

[90]Resnik, *supra* note 76, at 389.

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jurisdictions well below the constitutional floor.[91] Thousands of Americans every year are jailed either with "no lawyer at all" or with a lawyer who does not have "the time, resources, or . . . the inclination to provide effective representation."[92] A host of practical factors contribute to this outcome. Chief among these is the difficulty of meeting the test to establish allegations of inadequate counselling which are usually reviewed "with deep deference."[93] Another factor of the de facto lower protection unexamined derogations is the limited post-conviction habeas corpus review, which in the Supreme Court's words is limited to "extreme malfunctions in the state criminal justice systems" rather than "ordinary" errors.[94]

In the EU, subtle leaks are bound to occur. One reason is that after referral, national courts enjoy a wide discretion in applying the CJEU test with no review, except indirectly and infrequently through state liability or even less through infringement procedures. Thus, as many have noted, while overall compliance with CJEU's rulings is high,[95] the interpretation of national courts do not always uniformly align with the CJEU's.[96] Another factor is the lack of monitoring mechanisms of the well-known *"acte clair"* doctrine. According to which national courts of last instance are not obliged to refer questions to the CJEU where the correct application of EU law is clear and leaves no room for "reasonable doubt."[97] The subjective nature of interpreting "reasonable doubt" often leads to "faithful" cross-national divergence in applying the relevant EU norm, be it floor or ceiling.[98] To guard against this and given the prohibitive political cost of the infringement procedure against judicial errors, the main available alternative is state liability in damages which extends to breaches of EU law by national courts. Yet, state liability is a rather "uncertain mechanism"[99] as it is confined to – in the CJEU's words – "the exceptional case where national court has manifestly infringed the applicable law."[100] This formulation seems reminiscent to that of the US Supreme Court on "extreme malfunctions" rather than "ordinary errors."[101]

A classic example is offered by Sweet on "discrepancies between the CJEU's requirements and how the national judges actually decide cases."[102] When the CJEU, through a famous line of cases, established a multi-step framework on indirect discrimination, cross-national variation existed in its application.[103] In 2018, the EU Commission published a thematic report on cross-national protection against dismissal and unfavorable treatment in relation to the take-up of family-related leave. The report showed that despite the existence of "clear formal statutory rights implementing at domestic level the rights laid out in EU law," there was often "variation" and "gaps" in

[91]Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon V. Wainwright*, 122 YALE L.J. 2150 (2012).

[92]*Id.* at 2161.

[93]Resnik, *supra* note 76, at 252.

[94]*Harrington*, 562 U.S. at 86.

[95]Alec Stone Sweet & Thomas L. Brunell, *The European Court of Justice, State Noncompliance, and the Politics of Override*, 106 AMER. POL. SCI. REV. (2012).

[96]SWEET, *supra* note 7; Tobias Lock, *Is Private Enforcement of EU Law through State Liability a Myth: An Assessment 20 Years after Francovich*, 49 COMMON MKT. L. REV. 1675 (2012) (remarking that "the interpretation of EU law by national courts is not always uniform, a situation for which the ECJ is itself partly to blame"). For a discussion on the abuse of the acte clair doctrine, see Alexander Kornezov, *The New Format of the Acte Clair Doctrine and Its Consequences,* 53 COMMON MKT. L. REV. 1317 (2016).

[97]Case 283/81, CILFIT [1982], E.C.R. 3415, ¶ 14. *Cf* Joined Cases C-72 & 197/14, X and Van Dijk, EU:C:2015:564; Case C-160/14, Ferreira da Silva e Brito and Others, EU:C:2015:565.

[98]Albertina Albors-Llorens, *Judicial Protection before the Court of Justice of the European Union*, *in* EUROPEAN UNION LAW 323–24 (2020).

[99]*Id.*; Kornezov, *supra* note 96, at 1339; *see also* Zsófia Varga, *National Remedies in the Case of Violation of EU Law by Member State Courts* (2017) COMMON MKT. L. REV. 51 (showing that only a dozen states applied the doctrine in their systems and among these compensations were awarded on very few occasions).

[100]Case C-224/01, Köbler v. Österreich, EU:C:2003:513, ¶ 53.

[101]E.g., Harrington, 562 U.S. at 86.

[102]SWEET, *supra* note 7, at 169.

[103]*Id.*

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enforcement at national levels.[104] Another example is the discrepancy across jurisdictions in defining the "duty" of reasonable accommodation for disability in the workplace underlying the relevant EU directive.[105] What is notable here is that national courts do not defy or call into question the particular EU right. Rather, they diverge – often faithfully – due to what Resnik terms "erratic failure" in interpretation or the complexity of "norm implementation."[106] Other examples abound.[107] Succinctly put, what distinguishes these types of leaks is that they are neither explicitly authorized by the center as those of the former type, nor purport to openly challenge the central rules as in the type discussed next.

3. Defiant Leaks

As the name suggests, they represent derogation which is done openly in resistance to the supposedly supreme central norm or judicial precedent. Given the conflicting views on supremacy in the EU, defiant leaks are predominantly judicial in nature. Examples include the Danish Supreme Court's "*Ajos*" judgement refusing to follow the CJEU's decision on the horizontal application of age discrimination.[108] Similarly, the Hungarian Supreme Court refused to follow CJEU's judgement on the relocation of asylum seekers.[109] The vast literature on the European courts' defiance is well-known and needs no further explanation here.[110]

Defiance in the US, conversely, is usually initiated by state legislators and succeeds only under certain conditions.[111] An example is the medical use of marijuana. The Congress enacted across-the-board criminalization of all uses of marijuana including its medical consumption. Whilst, in *Gonzales*, the US Supreme Court upheld the constitutionality of the federal ban, this did not stop the majority of states from resisting the federal authority and legalizing medical and often recreational uses of marijuana.[112] Some states even bestowed a statutory "right" to the reasonable

[104]Annick Masselot, *Family Leave: Enforcement of The Protection Against Dismissal and Unfavorable Treatment* 60–64, 131 (Directorate-General for Just. and Consumers, 2018).

[105]Chopin & Germaine, *supra* note 49, at 25. In an earlier report, they referred to how the division of competence between different regions and levels of government in Belgium causes discrepancies regarding the implementation of the material scope of racial and employment equality directives. *See* Isabelle Chopin & Catharina Germaine-Sahl, *Developing Anti-Discrimination Law in Europe* 59 (2013), https://op.europa.eu/en/publication-detail/-/publication/afcabe48-707e-40c8-92ca-16ad0eaf49a6/language-en.

[106]Resnik, *supra* note 76, at 400.

[107]Mulder, for instance, shows national legal infrastructure leads to divergence in enforcing EU norms regarding pregnancy discrimination, see Jule Mulder, *Pregnancy Discrimination in the National Courts: Is There a Common EU Framework?* 31 Int'l J. Compar. Lab. L. & Indus. Relat.'s (2015).

[108]For commentary see, Mikael Rask Madsen, Henrik Palmer Olsen & Urška Šadl, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation*, 23 Eur. L. J. (2017).

[109]AB [Constitutional Court] (Dec. 5, 2016) Decision 22/2016 (Hung.). For commentary, see Gábor Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law,* 43 R. Cent. E. Eur. L. 23 (2018). More troubling is the Polish constitutional tribunal in October 2021 which questioned many foundational aspects of EU law and set aside CJEU ruling on art 47 Charter and art 19 TEU on judicial independence. Trybunał Konstytucyjny [Polish Constitutional Tribunal] (October 21, 2021).

[110]For a survey, see Paul Craig & Gráinne De Búrca, Eu Law: Text, Cases, and Materials 314-362(7th Ed., 2020).

[111]For an excellent discussion of the conditions of a successful defiance of federal supremacy, see Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1419, 1466 (2009); Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 Case W. Res. L. Rev. 769, 770 (2014). On the advantages of these forms of defiance, *see* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256 (2008).

[112]Gonzales v. Raich, 545 U.S. 1 (2005).

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accommodation of employees' prescribed marijuana consumption.[113] Another example is the ongoing saga of the so-called "sanctuary" states and cities which are providing safe havens bulwarking and expanding the rights of undocumented immigrants in defiance of restrictive federal regulation.[114]

With this, the article has covered the two types of centrality with their sub-categories of floor, ceiling and three sorts of leaks. The following table summarizes the discussion thus far. The article proceeds next to illustrate the remainder category of "plurality" and its sub-categories.

Full centrality	Partial centrality
Ceiling: Pre-empted states' more protective rights in the US (e.g., employee drug testing)	***Ceiling***: Arrest warrant cases in the EU *Melloni*
Floor: Most rights in the US Free speech, privacy, property	***Floor***: Most rights in the EU Sex discrimination
Leaky floors (and ceilings) **i) Authorized** - E-Privacy directive in the EU - 6th amendment's unanimous jury *until recently* - Violations shielded by sovereign immunity **ii) Subtle** - Faithful divergence in applying CJEU precedents or misuse of "*Acte Clair*" doctrine - State courts misapplying the US Supreme Court's tests on criminal procedure **iii) Defiant** - Danish, Hungarian, and Polish courts setting aside CJEU's judgements - Legalizing medical use of marijuana in the US	

C. Plurality and its sub-categories

Plurality refers to cases where the definition of fundamental rights originates in state constitutions, laws, or jurisprudence. Given the multiplicity of component states, the same question often yields a plurality of authoritative answers. Free healthcare, education, or religious accommodation each can be a constitutional right in one of the component states but not in the other. What distinguishes the nature of these rights and those existing in traditional nation-states is, first, the potential role of the center which can be either an embodiment of a specter of centralizing the pluralized right—threatened plurality—or, have *no direct role* in cases when plurality on this particular issue is grounded in the central constitution or in long-established practice—settled plurality. A second difference is cross-fertilization among sister-states where rights can converge and migrate both horizontally and bottom-up—converging plurality. The three types are explained below with relevant examples.

[113]E.g., Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 41 (Mass. 2017); for a commentary on this case, see: Molly Carroll, *Civil Rights—Medical Marijuana Recognized as Facially Reasonable Accommodation under Handicap Discrimination Claim in Massachusetts* - Barbuto v. Advantage Sales and Mktg., LLC*, 78 N.E.3d 40 (Mass. 2017), Case Comments*, 24 Suffolk J. Trial & App. Advoc. 288 (2018).

[114]For a summary, see Sarah Peck, "Sanctuary" Jurisdictions: Federal, State, and Local Policies and Related Litigation, Cong. Rsch. Serv., R44795 (2019). For a comparative perspective, see Mohamed Moussa, On Sovereign Bonds and Marijuana: Comparing Supremacy Limits in the US and the EU, 28 Maastricht J. Eur. & Compar. L. 834 (2021).

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I. Settled Plurality

This refers to rights falling under the state jurisdiction which are insulated from the risk of "competence creep" by the center. The settled nature may be owed to either a constitutional provision, drafting history, settled judicial or political practice. A suitable EU example is the right against the establishment of church-state relationship which is undisputedly well beyond the EU's reach. Member States vary from the strict French *laïcité* to states with constitutional reference to the "Holy Trinity"[115] or even with established state churches.[116] The insulation from EU's intervention in this realm can be inferred from, among other things, the fierce drafting debates regarding the reference to "God" or "Christianity" in the Lisbon Treaty or the ill-fated Constitutional Treaty[117] as well as the contemporary Art 17(1) TFEU which reads, "[t]he Union respects and does not prejudice the status under national law of churches . . . in the Member States."[118] It is simply unimaginable that the CJEU would, as its American counterpart did, incorporate a non-establishment right on its Member States forcing them to adhere to a minimum level of separation and to restructure their institutions accordingly.

As per the US, examples include positive or state-peculiar rights protected under state constitutions with no federal equivalence. These include the right to revolution,[119] the right to hunt and fish,[120] the protection from private discrimination based on political views,[121] and many social and economic rights.[122] The US constitution is a product of an era preceding the emergence of social rights or the so-called "second generation rights" which are, thus, absent from its text.[123] The US Supreme Court's approach[124] and the "common wisdom" among scholars largely suggest that it is highly unlikely that the Court will venture into centralizing any of these rights.[125]

II. Threatened/Mediated Plurality

In this category the competence over a certain right lies within the component states whose courts and legislators are free to vary as to the existence and scope of the given right. Their freedom, however, is neither indefinite nor unqualified, rather there is a potential that the center could extend its reach through the inescapable federal phenomena of "competence creep." Fundamental rights are particularly prone to serving as a "federalizing force" due to the openness of their provisions as well as their underlying claims to universalism.[126] While the center may not intervene to impose a definition of the right, it can enact certain procedural checks to ensure the proportionality and coherence of the regulatory scheme of states.

In the US, threatened plurality covers many fundamental rights which have not yet been recognized by the US Supreme Court. In some areas, it is still possible that the Court, at any moment, could intervene to recognize the right in question, thus rendering it centrally binding on all states. Consider, for instance, state divergence for decades over the right against excessive fines until the

[115]Constitution of Ireland 1937 art. 6(1).

[116]For a comparative survey, see Ronan McCrea, Religion and the Public Order of the European Union 22 (2010).

[117]*Id.* at 54–63.

[118]Art 17(1) TFEU.

[119]*E.g.,* N.H. Const. art. I, § 10.

[120]Tenn. Const. art. XI, § 13.

[121]Mont. Const. art. II § 4.

[122]*See generally*, Robert & Lawrence, *supra* note 88, at ch. 6; John J Dinan, The American State Constitutional Tradition 185–221 (2006).

[123]Mark Tushnet, Weak Courts, Strong Rights, Judicial Review and Social Welfare Rights in Comparative Constitutional Law 227 (2009).

[124]*E.g.*, DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989).

[125]Tushnet, *supra* note 123, at 227; C. R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, 56 Syracuse L. Rev. 1 (2005).

[126]Aida Torres Pérez, *The Federalizing Force of the EU Charter of Fundamental Rights*, 15 Int'l J. Const. L. 1080 (2017).

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US Supreme Court incorporated the right in 2019.[127] Capital punishment is a continuing example. After the Supreme Court's "four-years moratorium" from 1972 to 1976,[128] it affirmed that the death penalty is not "categorically impressible" and, with some conditions, states are free to abolish it, as a few did, or retain it as did the majority.[129] Nevertheless, the Supreme Court occasionally intervenes and invalidates the punishment for certain types of crimes—rape of an adult[130] or a child[131]—or for certain offenders—juveniles,[132] the insane[133] and the intellectually disabled.[134]

In the EU, for instance, abortion was, and remains, one of the areas where the EU does not exercise jurisdiction. Yet, the issue made its way to the CJEU in *Grogan*. Due to the then-Irish constitutional ban on abortion, an injunction was sought against an Irish student union to restrain the distribution of handbooks containing information about the legality of abortion in the UK and available clinics therein. The student union, in their defense, argued that the injunction constituted an obstacle to the EU's freedom to provide services. The CJEU dismissed the case on formality without pronouncing on the right to abortion leaving it to the plurality of states. At the same time, however, it sent a credible threat to induce cooperation from Irish courts by classifying abortion as "*a service within the meaning of the EECT*"[135] which threatened future extension of it within the CJEU's reach. The threat might have been heeded in Ireland which after a long-time legalized abortion.[136]

The peculiarity of the EU having what Schütze terms an "external" bill of rights,[137] namely, the European Convention of Human Rights (ECHR) must be acknowledged. It also behooves the inquiry of how a decision on fundamental rights by the European Court of Human Rights (ECtHR) affects the structure of rights within the EU and the proposed typology. It might be of value to discuss this matter further. One caveat is that the comparison concerns the constitutional rather than the international effect of ECtHR rights. Namely, it is limited only to EU member states and in the cases where ECtHR jurisprudence enjoys direct effect and supremacy vis-à-vis national law.

As is well-known, the ECHR is an international human rights treaty predating the EU which has its own international court, the ECtHR.[138] While all EU Member States are signatories thereto, the EU itself is (still) not a member.[139] Therefore, the convention is not EU law nor is its court's jurisprudence formally binding on the CJEU as it has consistently affirmed,[140] notwithstanding the fact that ECtHR exercises an indirect review of EU acts through Member States.[141] As an international agreement, ECHR only binds its members under classic international law.[142]

[127]Timbs v. Indiana, 586 U.S., (2019).

[128]Michael J. Perry, Constitutional Rights, Moral Controversy, and the Supreme Court 80 (2008); the moratorium started by Furman v. Georgia, 408 U.S. 238 (1972) and ended in Gregg v. Georgia, 428 U.S. 153 (1976).

[129]*Id.*

[130]Coker v. Georgia, 433 U.S. 584 (1977).

[131]Kennedy v. Louisiana, 554 U.S. 407 (2008).

[132]Roper v. Simmons, 543 U.S. 551 (2005).

[133]Ford V. Wainwright, 477 U.S. 399 (1986).

[134]Atkins v. Virginia, 536 U.S. 304 (2002).

[135]Case C–159/90, SPUC v. Grogan, 1991 E.C.R. I–4685.

[136]*See generally*, Federico Fabbrini, *The Last Holdout: Ireland, the Right to Abortion and the European Federal Human Rights System* (iCourts Working Paper Series, No. 142, Sept. 13, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249400; Paulette Kurzer, Markets and Moral Regulation: Cultural Change in the European Union (2001).

[137]Robert Schütze, European Constitutional Law 450 (2nd ed. 2016).

[138]For its history, see William A Schabas, The European Convention on Human Rights: A Commentary ch. 1 (2015).

[139]Opinion 2/13, ECLI:EU:C:2014:2454 (Dec. 18, 2014).

[140]The Court on the contrary has drawn attention to the fact that the ECHR is not formally incorporated into EU law: e.g., Case C-501/11 P, Schindler v Comm'n, EU:C:2013:522, para. 32 (July 18, 2013); Case C-617/10, Åklagaren v. Fransson, EU:C:2013:105 (Feb. 26, 2013).

[141]Bosphorus v. Ir., App No 45036/98, 30 Eur. Ct. H.R. (2005).

[142]Schütze, *supra* note 137, at 467.

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Therefore, states remain free as to "which domestic legal status" to bestow upon this international convention.[143] In fact, as Krisch showed, a majority of member states' supreme courts have declared themselves not constitutionally bound by ECtHR rulings.[144]

Whilst it is true that Article 6(3) of the TEU affirmed that the ECHR may serve as a source for the discovery of general principles of EU law, it does not follow that the ECHR may prevail over conflicting national law or produce direct effect,[145] unless state constitutions have so chosen.[146] Nor does Article 52(3) of the Charter read as an obligation by the CJEU to follow the jurisprudence of the ECtHR. Rather, the article encourages "a constructive dialogue" between the two courts.[147] Accordingly, ECtHR's decision on a given right would be duly considered by the CJEU but would not be part of the EU law unless the CJEU decided to borrow it in a given case. As case law shows, however, on the one hand the CJEU often converges with ECtHR in a time-honored fashion.[148] This is seen in the belated recognition of the right to silence for example.[149] On the other hand, the CJEU conflicts[150] and diverges from ECtHR in other instances. A recent example of divergence is seen in the case of surrogacy.[151]

Simply put, an ECtHR decision that recognizes a certain right within an area of threatened plurality may have a "catalyst effect"[152] by strengthening the prospects of centralization through its recognition by the CJEU. This could consequently change the right's structural location from state plurality (afforded varying positions of ECHR under different national laws) to central floor

[143]*Id.*

[144]Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183, 197 (2008) ("[A]sked about their relationship to Strasbourg, 21 out of 32 responding European constitutional courts declared themselves not bound by ECtHR rulings.").

[145]Koen Lenaerts & José Antonio Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1559–1594 (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward eds., 2014).

[146]C-571/10 Kamberaj v. IPES, ECLI:EU:C:2012:233, para 62 (April 24, 2012): holding that 'Article 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law.'

[147]Lenaerts & Gutiérrez-Fons, *supra* note 145, at 1560.

[148]The CJEU relied on the ruling of the ECtHR in MSS v Belgium in reaching its conclusion in Joined Cases C-411/10 and C-493/10, N.S. v. Sec'y of State for the Home Dep't, EU:C:2011:865 paras 119–120 (Dec. 21, 2011); *see generally*, Síofra O'Leary, *A Tale of Two Cities: Fundamental Rights Protection in Strasbourg and Luxembourg*, 20 CAMBRIDGE YEARBOOK OF L. STUD. 1, 3 (2018).

[149]C-481/19 ,DB v Consob, ECLI:EU:C:2021:84 (Apr. 24, 2012). For the first time, the CJEU recognizes that the Charter contains a right to remain silent for natural persons. There, the court referred to and chose to align with the long-established jurisprudence of ECtHR on the issue since Murray v. U.K, App. 14310/88, CE:ECHR:1996:0208JUD001873191 para. 45 (Feb. 8, 1996). *See* Anna Sakellaraki, *You have the right to remain silent' during punitive administrative proceedings, CJEU confirms* – Case C 481/19 DB v. Consob, EUROPEAN LAW BLOG (2021), https://europeanlawblog.eu/2021/02/25/you-have-the-right-to-remain-silent-during-punitive-administrative-proceedings-cjeu-confirms-case-c%E2%80%91481-19-db-v-consob/.

[150]*E.g.*, Cases T–347/94 ,Mayr-Melnhof Kartongesellschaft mbH v Commission [1998], ECR II–1751, [311]; T–112/98 Mannesmannröhren-Werke v Commission [2001] ECR II–729, [59] (May 14, 1998), in which the General Court ruled that it had no jurisdiction to "apply" the ECHR and that it was not part of EU law.

[151]Surrogacy is a recent example of divergence between the two courts' approach. In Mennesson v France App no. 65192/11 2014-III ECHR 255; Labassee v France, App no. 65941/11 (June 26, 2014), the ECtHR unanimously held that the children's right to respect their private life had been infringed, in breach of Article 8 for refusal to recognize the parent-child relationship that was granted to the child in the US. The ECtHR saw the French approach as undermining children's identity within society. By contrast, the CJEU took a more "timid" stance on the issue in Z and CD. There, it held that, as a matter of EU law, a commissioning mother refused paid leave of absence in order to care for her child could not establish a right to such leave under existing EU Directives on Pregnant Workers. C-363/12, Z v. A Gov. Dep't, EU:C:2014:159 (March 18, 2014). and C-167/12, C.D. v S.T., EU:C:2014:169 (March 18, 2014). The CJEU also has not yet reached a similar conclusion on the right of the child to privacy as that of the ECtHR. For a comparison, *see: see* O'Leary, *supra* note 148, at 14–20.

[152]ARMIN VON BOGDANDY & JÜRGEN BAST, PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 486 (2009) (remarking that ECHR has a "catalyst effect, but not legally binding").

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or ceiling, enjoying the direct effect and primacy of EU law.[153] Still, centralization is not necessary and remains a threat subject to the CJEU's discretion and keenness on its "ultimate authority" and the "unconditional primacy" of EU law. [154] This zeal for autonomy is evident in the CJEU's recent *Opinion 2/13* blocking accession to the ECHR; as well as the recent study of the EU parliament which shows CJEU's tendency towards increasing reliance on the autonomous interpretation of the charter as the source of fundamental rights with lesser reference to the ECHR.[155] In short, a right pronounced by the ECtHR remains within the realm of threatened plurality across Member States based on their varying regulation of the domestic effect of convention rights, but if the CJEU decides to incorporate it, then it travels to the centrality and primacy of EU law.[156]

The catalyst effect of ECtHR becomes clearer by harkening back to *abortion*. Whilst abortion is not an active area of CJEU jurisprudence and the EU demands neither conformity nor harmonization thereof, the ECtHR has developed several procedural checks without fully acknowledging a right to abortion. The ECtHR conceded that courts are not "the appropriate *fora* for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State" because "it would be wrong to turn the Court into a 'licensing authority' for abortions."[157] Nonetheless, it developed a set of checks once a state opted for a certain regulatory choice, be it more oriented towards pre-natal life or decisional autonomy. Through this, the Court's jurisprudence ensures that a state's pursuit of the professed legal and policy aim is coherent, proportionate and clear to the pregnant women.[158] *Locating abortion in the binary categories* of "centralization" and "decentralization" would be difficult. The right is neither defined by the center, nor is the authority of the state absolute. Rather, state authority is qualified by the threat of the CJEU's intervention either by classifying abortion as a service, or by constitutionalizing the procedural checks developed by ECtHR. This may classify the right within a mezzanine level between full centralization or full decentralization.

The existence and the importance of this category has been overlooked particularly in the American debate on abortion which oscillates between the dichotomy of either centralization or decentralization. In *Roe* the US had centralized abortion, making the federal government/judiciary as the ultimate umpire.[159] Whereas *in Dobbs, the* Court has shifted to the other extreme of full decentralization and judicial retreat.[160] As seen from *Dobbs*'s judicial opinions[161] and commentary,[162] the two sides of the abortion debate entertain either full federal intervention or leave the matter entirely to states, thus placing the mezzanine level of mediated plurality outside their sight. Mediated plurality can be achieved in the US without having an external court such as the

[153]Tridimas remarks that ECtHR renders the dialogue a trialogue taking place between CJEU and the national courts in a background contoured by Strasbourg, Panagiotis Takis Tridimas, *The ECJ and the National Courts: Dialogue, Co-Operation, and Instability*, *in* Oxford Handbook of European Union Law 403 (Damian Chalmers & Antony Arnull eds., 2015).

[154]Aida Torres Pérez, *The Federalizing Force of the EU Charter of Fundamental Rights*, 15 Int'l J. Const. L. 1097 (2017).

[155]*Main Trends in the Recent Case Law of the EU Court of Justice and the European Court of Human Rights in the Fields of Fundamental Rights*, Directorate Gen. For Internal Pol'y (2012), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462446/IPOL-LIBE_ET%282012%29462446_EN.pdf.

[156]The fact that some member states give ECtHR judgements direct domestic effect does not alter this conclusion because it varies from one state to another and will be tantamount to some member states recognizing a constitutional right that others do not. *See* Krisch, *supra* note 144.

[157]A., B. & C. v. Ir., App. No. 25579/05, para. 258, Eur. Ct. H.R. 2032 (2010).

[158]*Id.;* Tysiąc v. Poland, App No. 5410/03, Eur. Ct. H.R. § 116 (2007); R.R. v. Poland, no. 27617/04, Eur. Ct. H.R. § 184, (2011). For a Summary on the Courts' approach see Schabas, *supra* note 138, at 81, & at 373.

[159]Roe v. Wade, 410 U.S. 113, 147 (1973).

[160]Dobbs v. Jackson Women's Health Org., 597 U.S (2022).

[161]For the debate on neutrality and the dichotomy of centralizing/decentralizing of Justice Kavanaugh and the dissent, see Dobbs v. Jackson Women's Health Org., 597 U.S. (2022) (Kavanaugh J., concurring); Dobbs v. Jackson Women's Health Org., 597 U.S. (2022) (Breyer, Sotomayor, And Kagan, JJ., dissenting).

[162]*See e.g*, Cass Sunstein, *Dobbs* and the Travails of Due Process Traditionalism (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4145922.

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ECtHR. Rather, through developing similar procedural checks that the US Supreme Court may invoke to assess the proportionality, coherence, arbitrariness, and transparency of states' regulatory choices without dictating a certain direction upon states – akin, to some extent, to the Supreme Court's approach to capital punishment.[163]

In fact, mediated plurality seems to have fared well in the case of abortion in the EU. When *Roe* was decided in 1973, recognizing the right to abortion across the US, the abortion map in most EU member states was fairly restrictive. Whereas polarization continues in America until today, twenty-five EU states allow abortion upon request, with some divergent details. Notably, there are no major significant attempts to reverse established constitutional principles as is common in American states, neither is the debate fraught with the "fierce" polarization and violence that define the American tale of abortion.[164]

As many have noted,[165] without imposing a centralized definition, the EU has played an indirectly crucial role in depolarizing abortion and shifting popular opinion. Even in Ireland – one of the more traditionally conservative EU states – being a member of a multilevel constitutional space has made its constitutional abortion banning amendment produce a "cluster"[166] of litigation not only domestically but also transnationally. The free movement and the continued circulation of women, as many have argued, have improved public deliberation by providing comparison of existing practices of other members in the EU system and accentuated the contradiction and "understated assumption" of national standards and prompted its reconsideration.[167] Gradually, over a few decades, Irish people have shifted from approving a referendum banning abortion to endorsing the opposite amendment with the same sweeping two thirds vote. More importantly, a balance seems to be struck between the underlying competing values. EU state courts often invoked grounds of social and financial protection to mothers and "student-parents," measures to encourage motherhood, or to reduce the risk of unintended pregnancies while "also [being] consistent with women's autonomy."[168]

Evidence of migration of abortion norms across EU member states abound, be it at the legislative[169] or judicial level.[170] It is true that Poland, as the EU's outlier, has witnessed restriction on abortion recently, but this is part of its unfolding "constitutional breakdown."[171] Even there, Polish women are better off than many of their American counterparts. Mothers in Poland are not liable to criminal punishment and the conservative parliament has recently rejected proposals that are easily adopted in American conservative states such as Alabama's ninety-nine years

[163]James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 7, 90–91 (2007); On proportionality in the US, see E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS (2008).

[164]ZIEGLER, *supra* note 19, at 209.

[165]Fabbrini, *supra* note 136, at 14; KURZER, *supra* note 136, at 180.

[166]Fabbrini, *supra* note 136, at 14.

[167]KURZER, *supra* note 136, at 180.

[168]BVerfG [BVerfG] [Federal Constitutional Court], 1993 88 BVERFGE 203, para 36–37 (FCC Abortion II case) (official court translation). http://www.bverfg.de/entscheidungen/fs19930528_2bvf000290en.html.

[169]The liberal Dutch abortion law and abortion tourism to the Netherlands were raised in abortion debates in Germany in the 1990s as well as in the recent reforms in Belgium. More formally, the preamble of the Spanish 2010 law refers to *"the legislative trend prevailing among [European] state."* *See* Mark Levels, Roderick Sluiter & Ariana Need, *A Review of Abortion Laws in Western-European Countries. A Cross-National Comparison of Legal Developments between 1960 and 2010*, 118 HEALTH POL'Y 103 (2014).

[170]In addition to the influential German FCC decision which has migrated to many EU States, the Croatian and Slovak constitutional court judgements quoted at length and passionately compared abortion regulations of other Member States. *See* Adriana Lamačková, *Women's Rights in the Abortion Decision of the Slovak Constitutional Court*, *in* ABORTION LAW IN TRANSNATIONAL PERSPECTIVE 56, 60 (Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens eds., 2014).

[171]PIOTR MIKULI, POLAND'S CONSTITUTIONAL BREAKDOWN (2020).

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imprisonment for abortion, or Texas's recent deputization of private citizens to prosecute abortion providers.[172]

Space precludes a full comparison and analysis of the causes of the starkly different trajectories of abortion in the EU and US. The takeaway here is that the reliance on incomplete categorization unduly reduces federalism's rich "menu" choices of possible structural options to binary solutions. As in the American examples, discussion is focused on either "centralization" or "decentralization" without entertaining the possibility of "mediated plurality" which in the case of EU states have better harnessed the potentials of federalism in largely diffusing tension over a socially divisive issue.

Differently put, this category illustrates integrative federalism's capacity to expand the "menu of policy options"[173] by creating choices that simply cannot be available in federalism's "unitary cousin."[174] Monistic states must opt for and thus impose a top-down ideological choice, which is either liberal or conservatively oriented with their varying versions. Conversely, integrative federalism provides the center, in many issues, with a third option—settled plurality—which is to choose neither, i.e., not to inhibit nor establish a top-down imposed view, leaving each state free to diverge on the issue across the spectrum.[175] Further, polycentricism offers mediated plurality as an additional *fourth option.* Instead of federal do-nothingness and relegating the matter fully to states, it keeps the center as a co-mediator to apply procedurals checks examining the states' regulatory choice without dictating certain substantive outcomes.[176]

III. Converging Plurality

Occasionally, but not necessarily, when the "core" of a right falling under threatened plurality converge horizontally across many states, it can travel *bottom-up* and get imported by the central court leading to "reverse centralization."[177] This not a distinct sub-category of plurality but rather one form which mediated plurality may morph into.

Lenaerts, President of the CJEU, writing extrajudicially has remarked, among others, that when most Member States tend to "converge" on a certain conception of rights, the CJEU is more likely to "follow their footsteps."[178] A typical case is *Johnston* which involved the refusal to renew Mrs. Johnston's contract as a police officer and to train her on firearms largely on grounds of sex.[179] The CJEU was asked by the British tribunal to assess the compatibility of the EU directive—Directive 76/207/EEC—with the national provision excluding judicial review over sex equality when a certificate justifying derogation is produced by national administrative authorities. The convergence

[172]*See Amnesty International, Poland: Attempt to equate abortion with killing must be rejected*, Amnesty Int'l (Nov. 30, 2021) https://www.amnesty.org/en/latest/news/2021/11/poland-attempt-to-equate-abortion-with-killing-must-be-rejected/; *contrast with* Alabama in PAUL B. LINTON, ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS 31–33 (3rd ed., 2020); *see also* Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021).

[173]SWEET, *supra* note 7, at 135.

[174]JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 2 (2008).

[175]While the Centre may not play a direct role in this third option it plays another role in providing the free movement of persons, ideals and legal norms horizontally which may harness federalism's explorative potential as a knowledge-creating tool.

[176]Rodriquez argues for cases where the federal government "will play a robust role without dictating outcome and in other cases true national norms eventually will emerge as the result of what has happened within and among states and localities, supplemented by the assertion of federal power." Cristina Rodríguez, *Federalism and National Consensus*, 5 (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433768

[177]An expression inspired from Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2010).

[178]Koen Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 INT'L & COMPAR. L. Q. 884–893 (2003); *see also* Advocate General Kokott's reference to rights that represent a "growing trend" among Member States, Opinion of Advocate General Kokott, Case C-550/07, P Akzo Nobel Chemicals and Akcros Chemicals v. Comm'n 2010 E.C.R. I-08301, para. 95.

[179]Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 ECR 01651, para 18–21.

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among many national courts over the rights of effective judicial protection encouraged CJEU to guide the national tribunal to set aside the conflicting national provision.[180] In another incident, the CJEU filled a lacuna in its jurisprudence through "transposing" a right recognized in a few national legal systems as "lawyer-client confidentiality" declared in *AM & S.*[181]

Similarly, in the US, Robert Cover identified this convergence pattern a long time ago,[182] building on Justice Brandies' conceptualization of federalism as a "laboratory."[183] He noted that when a variety of state jurisdictions "independently arrived at a given conclusion . . . [this] reduces the likelihood that the conclusion is a product of local error or prejudice" and this converging redundancy "*establishes clarity* through *iteration.*"[184] An example is *Batson v. Kentucky*. There, the US Supreme Court overruled its precedent in *Swain v. Alabama* barring a defendant from proving racial discrimination in jury selection solely on the ground of the prosecutor's conduct in the case. The Court's reasoning noted that five state courts had departed in interpreting their constitutions from *Swain* and thus inspired the Court to change its jurisprudence.[185] Dean Sager, among others, identified recurring instances of initiating change in a handful of states, growing acceptance by others and finally, extension through the federal government to the remaining states, though often with some resistance.[186]

In fact, the convergence highlights a distinctive feature of dual systems. Some categories might seem unitary in the sense of being defined by one authority, the center—in full ceiling—or the state—in plurality. Yet, horizontal interaction and "redundancy" across sister states enables cross-fertilization where solutions travel "horizontally" from one jurisdiction to the other and "vertically" through reverse centralization, which reshapes the federal ceiling.[187] A similar point could be made regarding ceiling "leaks" which introduce a layer to an otherwise seemingly mono-layered right, as shown from the discussed cases on leaks.

D. Conclusion

The article proposed a typology of rights in multilevel constitutional structures which distinguished three broad categories: Plurality, partial and full centrality. Within these overarching categories, both partial and full centrality are subdivided into a trichotomy of floor, ceiling, and "leaky" floors/ceilings; with the latter having three forms of leaks. In contrast, plurality is subdivided into settled, mediated, and converging plurality. Each subcategory is demonstrated by examples from both the EU and the US jurisdictions summarized in the table below.

From a structural lens, the typology illustrates the possible interaction between the central constitution and state constitutions in the EU and US. While the two systems diverge in many of their institutional details, they share a "normative" commonality.[188] Their multiplicity of

[180]Similarly, in Hauer, the ECJ relied on convergence of many national constitutions along with ECHR against the assertion of the German Federal administrative court on the incompatibility of the directive with German property rights Case 44/79, Hauer v Land Rheinland-Pfalz, 1979 ECR 3727. Given that converging plurality is a branch within threatened plurality, it is also possible to see how ECtHR could play a role as what Tridimas terms a "convergence force" by facilitating migration of interpretation horizontally and cross-fertilization between member states; Tridimas, *supra* note 153, at 403.

[181]Case 155/79 AM & S Europe Ltd v Comm'n, 1982 E.C.R. 01575. *See also*, Craig & De Búrca *supra* note 110, at 389.

[182]Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639 (1980).

[183]Justice Brandeis famously noted that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, *serve as a laboratory*, and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 311 (1932).

[184]*Id. at* 675.

[185]Batson v. Kentucky 476 U.S. 79 (1986); *see* Liu *supra* note 63, at 1332; for other examples see Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L. J. 1035 (1977).

[186]Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 Wm. & Mary L. Rev. (2004) 1389; Robert A. Schapiro, Polyphonic Federalism: Toward the Protection of Fundamental Rights ch. 4 (2009).

[187]Cover, *supra* note 182, at 675.

[188]Fabbrini, Fundamental Rights in Europe, *supra* note 2, at 33.

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Full centrality	Partial centrality	Plurality
Ceiling: Pre-empted states' more protective rights in the US (e.g., employee drug testing)	*Ceiling*: Arrest warrant cases in the EU *Melloni*	*Settled*: Establishment of religion in the EU States Some positive rights in the US
Floor: Most rights in the US Free speech, privacy, property	*Floor*: Most rights in the EU Sex discrimination	*Mediated*: Abortion rights in the EU Rights recognized by the ECtHR but not (yet) incorporated by the CJEU Capital punishment in the US and other yet to be incorporated rights Converging plurality Leading to "reverse centralization"
Leaky floors (and ceilings) i) Authorized - E-Privacy directive in the EU - 6th amendment's unanimous jury *until recently* - Violations shielded by sovereign immunity ii) Subtle - Faithful divergence in applying CJEU precedents or misuse of '*Acte Clair*' doctrine - State courts misapplying the US Supreme Court's tests on criminal procedure iii) Defiant - Danish, Hungarian, and Polish courts setting aside CJEU's judgements - Legalizing medical use of marijuana in the US		

sovereign actors concomitantly brings an inescapable "tension" between "dispersion and fragmentation" within a "unified" constitutional order.[189] In such settings, the categorization may prove useful in navigating the often-labyrinthine regulation of rights within two composite constitutional systems. By identifying "lower common denominators" it makes comparison "easy," whereby "fundamental similarity [and divergence] may be discovered."[190]

Beyond comparative utility, delineating clear structural categories helps crystallize federalism's ability to expand the "menu choice" beyond the capacity of unitary states. Rather than inhibiting or establishing one view, federalism allows the center to exercise a third option of "settled plurality" allowing conflicting regulations to exist at state level. It also offers a fourth option of "mediated plurality" where the center applies procedurals check examining Member States' regulatory choice without dictating certain substantive outcomes. Attention to these additional options eludes many commentators discussing the role of the center in socially divisive rights as seen in America's abortion debate. Moreover, the descriptive accuracy of a comprehensive taxonomy promises utility as a preliminary step towards more effective engagement with federalism's "old" boundary question and its quest to normatively examine the interlinkage of rights protection and division of powers in composite multi-level constitutional structures. Finally, as Birks noted, "[a] sound taxonomy, together with a keen sense of its importance, constant suspicion of its possible inaccuracy and vigorous debate on its improvement, is an essential precondition of [legal] rationality."[191]

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[189]M Delmas-Marty, *Ordering Pluralism, (*EUI Max Weber Program Lectures: Published Papers no 2009/06*) available at* https://cadmus.eui.eu/handle/1814/14274.

[190]Hohfeld, *supra* note 9, at 58.

[191]Birks, *supra* note 8, at 4.

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