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The Optimal Use of Comparative Law

Keywords

Comparative Law, States, Legal Analysis and Writing, State and Local Government Law

THE OPTIMAL USE OF COMPARATIVE LAW

SHAI DOTHAN*

I. INTRODUCTION

One of the arguments for the use of comparative law by national courts is that learning from the experience of other nations can improve the quality of the legal decisions made by national courts. This argument has been advanced by Eric Posner and Cass Sunstein¹ using the Condorcet Jury Theorem, which proposes that if a decision is made by a number of independent “jurors,” that decision is likely to be a correct decision—and, therefore, a decision worth following.² Applied to comparative law, the theorem suggests that if a number of individual states reach the same legal decision, that decision is probably a correct decision and, therefore, a decision worth following.

Yet there is a problem with this argument, as Posner and Sunstein themselves acknowledge: if states learn from each other’s law, their decisions are no longer independent and therefore the theorem’s condition of independent “jurors” is no longer met.³ In fact, in learning from states in other parts of the world, states may fall prey to information cascades in which they harmfully follow each other’s lead without analyzing any new information. With that risk in mind, Posner and Sunstein argue that states who want to support the global interest and provide new information on how to improve the law should not imitate others.⁴ But while Posner and Sunstein’s framework answers the problem of information cascades, it

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1. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136 (2006).

2. *Id.*

3. *Id.* at 163.

4. *Id.* at 163-164.

does so at the expense of maximizing the benefits to be gained from comparative law—namely, allowing all states to learn from each other's experiences.⁵

This paper suggests an alternative framework, one which recovers the benefits of comparative law without risking the development of information cascades. At the heart of this alternative framework is the doctrine of Emerging Consensus, currently used by the European Court of Human Rights ("ECHR"). Under this doctrine, the ECHR examines whether a particular practice has been outlawed by a critical number of states; if so, the ECHR declares that practice to have violated the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").⁶ In other words, the ECHR aggregates the preferences of a wide range of states, each of which has already made an independent decision. The resulting rule allows for the benefits of comparative law—because all states can then adopt the ECHR's rule—without the risk of information cascades, since the rule was based on the "emerging consensus" of states who had already made their decisions independently.

The remainder of this paper examines the benefits of the Emerging Consensus framework and proposes solutions for the obstacles facing international and regional courts who might wish to apply it—namely, that strategic behavior by states may prevent these courts from reaching good decisions and that these courts may have other motivations, which prevent them from directly applying Emerging Consensus.

To set up this examination, Part II introduces the argument for the use of comparative law by national courts, noting both the position advanced by Posner and Sunstein as well as the problem of information cascades. Part III then outlines the doctrine of Emerging Consensus and Part IV explains why implementing the doctrine may facilitate better decision-making than simply relying on national courts to use comparative law. Part V suggests doctrinal tools that can ensure the successful use of Emerging Consensus. Part VI addresses the problem of states engaging in strategic behavior that can hinder the effective use of Emerging Consensus and offers some solutions to this problem. Part VII addresses the problem of regional and international courts like the ECHR possibly having motivations other than applying Emerging Consensus correctly. Part VIII concludes by highlighting some of the institutional advantages of international courts over national courts.

II. THE ARGUMENT FOR THE USE OF COMPARATIVE LAW BY NATIONAL COURTS

A. *Posner and Sunstein's Argument*

Posner and Sunstein start from the intuition that states can learn from each other's experience and use the decisions of other nations to improve their own.⁷

5. *Id.*

6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

7. Posner & Sunstein, *supra* note 1, at 136.

They use the Jury Theorem, originally invented by the 18th century French philosopher Nicolas de Condorcet, to discipline this intuition.⁸ The Jury Theorem is a simple mathematical model that suggests that if a series of jurors decide by majority vote between two answers—one of which is false and the other true—and every juror has a probability of more than 50% to reach the correct result, then the greater the number of jurors, the more likely it is that the decision of the group will be correct.⁹ As the size of the group increases, the chances of reaching the correct result approaches 100%.¹⁰

Posner and Sunstein synthesize three conditions that are necessary for the practice of comparative law to lead to good results under the Jury Theorem.¹¹ First, the decisions of the foreign states must sincerely reflect their choices, which are based on private information.¹² Second, the foreign states must be sufficiently similar to make learning from them useful.¹³ Third, the foreign states must have decided independently, rather than mimicking the decisions of other states.¹⁴ Posner and Sunstein indicate when these conditions are likely to hold and when they are unlikely to hold.¹⁵ They argue that following the Jury Theorem can often lead to superior results on factual questions, such as which penalty system would prevent crime more effectively, as well as on moral questions, such as which penalty system is morally justified.¹⁶ This paper will focus on the third condition for the applicability of the theory—the requirement that the decisions of different nations must be independent from each other.

B. *The Limitations of National Courts*

Under the framework presented by Posner and Sunstein, national courts should learn from the experiences of other national courts because these other courts made their decisions based on valuable information.¹⁷ But if national courts mimic each other and do not decide independently, their decisions do not reveal any new information as to what is the correct result.¹⁸ Courts that follow each

8. *Id.*

9. *Id.* at 141.

10. *Id.*

11. *Id.* at 144.

12. *Id.*

13. *Id.*

14. *Id.* at 144-45.

15. *Id.* at pts. II-IV.

16. *Id.* at 149-54.

17. National courts may follow the decisions of other legal bodies, besides courts, within foreign states, such as the parliament's statutes or even the executive's decisions and regulations. Similarly parliaments or executives may choose to follow the judgments of foreign national courts as they set policy. Because in many of the situations discussed by the ECHR, which deals with the interpretation of the limits of protection of human rights, national courts are the ultimate arbitrator within the state and in the interest of simplicity, the paper refers interchangeably to the decision of national courts and of states.

18. This problem may be less severe if courts do not just follow each other but instead try to learn from the arguments used by other courts. But this is a different use of comparative law than the one studied by Posner and Sunstein. See *infra* note 255 and accompanying text. Any reference to

other's decision may form a "cascade." Posner and Sunstein distinguish between two kinds of cascades—reputational and informational.¹⁹ A reputational cascade is formed when decision makers follow each other not because they think this will lead to a better result, but because they are afraid that their reputation will be damaged if they decide differently from the others.²⁰ An informational cascade is formed when decision makers try to learn from the decisions of others in an attempt to improve their own decisions, but because each decision maker followed other decision makers, no individual decision provides any new information.²¹ Reputational cascades may or may not occur depending on states' interests. Informational cascades, however, pose a much greater challenge to Posner and Sunstein's argument, which they clearly acknowledge. Posner and Sunstein's normative claim is that courts should learn from each other in order to reach better results; but if all courts learn from each other, their decisions are not independent and other courts should not learn from them.²² This framework, therefore, fails to provide a universal rule that can guide courts on how to make good decisions.

If courts in different states tend to behave differently from each other, Posner and Sunstein's framework can still lead to some valuable normative suggestions. For instance, if some courts are known to decide independently, other courts can learn from these independent choices in order to improve their own decisions. On the other hand, the more courts that follow this suggestion, the lower the quality of information other courts can obtain from looking to comparative law, since fewer courts would decide independently. Therefore, courts who want to help other courts make good decisions should not follow the decisions of other courts—but if all courts were not to follow others, no one will gain the benefits of relying on comparative law.²³ If states clearly diverge in their use of comparative law, a stable equilibrium may theoretically be reached in which some states decide independently and other states learn from their experience. But, if states differ from each other in their propensity to apply comparative law, they may be different in other respects as well. If states are fundamentally different, they should not learn from each other since they are not sufficiently similar to comply with the conditions of the Jury Theorem.²⁴

comparative law in this paper is only to the act of following the law adopted by a majority of foreign states or national courts, even though there are many other potential uses of comparative law (for example, courts can learn from the decision of a minority of courts because it is based on valid arguments or use comparative law only as an inspiration to find ways to improve their doctrine).

19. Posner & Sunstein, *supra* note 1, at 161.

20. *Id.* at 162-63.

21. *Id.* at 161-62.

22. *Id.* at 163.

23. *Id.* at 164.

24. The decision to apply comparative law is a second-degree doctrinal choice—it chooses a method on how to choose what law will apply in certain conditions. Nevertheless it is still a doctrinal choice and therefore the logic presented by Posner and Sunstein applies to it, namely, states can learn from the decisions of other states on the question whether to use comparative law. If states will imitate each other's decision on whether to apply comparative law, all states will either apply comparative law—leading to an information cascade, or decide not to apply comparative law, in which case its

If national courts do not just follow the final decisions reached by other states, but instead try to evaluate the ultimate reasons that led to those states' decisions, then national courts may be able to discern whether the states' decisions reflect new information or whether they are simply an imitation of the decisions of other states. If the court can expose all the relevant arguments on the subject, however, there is no real need for it to follow the majority of states—the court can simply assess the arguments according to their own merits. The problem is that often the real grounds for the decisions of other courts or states and the information that guided it are hidden or unclear.²⁵

To a certain extent, many states probably exercise some measure of independent discretion when they decide to adopt a legal regime, or at least when they decide to adhere to it after it was adopted. Because informational cascades do not occur immediately, states may have time to test legal regimes independently and render learning from their experience a fruitful exercise. Under these conditions, national courts can gain some informational advantage from comparative law. International courts, however, can sometimes exceed these benefits. They can set a doctrine that, if followed by all states, will prevent informational cascades altogether. This paper argues that this is one way to account for the doctrine of Emerging Consensus applied by the ECHR.

III. THE DOCTRINE OF EMERGING CONSENSUS

The Emerging Consensus doctrine directs the ECHR to consider current views on human rights protection as it interprets the Convention.²⁶ There are three common interpretations of the doctrine: (1) as a direction to the ECHR to follow the laws of European states, (2) as a direction to the ECHR to follow the views of experts, (3) and as a direction to the ECHR to consider the views of the European public.²⁷ According to recent empirical evidence, the ECHR in fact applies a version of the first interpretation of the doctrine—if the majority of European states protect a certain human right, the ECHR will read the Convention as ensuring protection of this right and will find states that infringe this right in violation of the Convention.²⁸

Emerging Consensus allows the ECHR to learn from the experience of European states and follow what seems to be the norm among the majority of these

benefits will not be realized. States can be different from each other in their propensity to use comparative law, for instance some national courts will not have the facilities to conduct comparative research and will therefore make independent decisions. Other states may learn from these decisions, but only if they are sufficiently similar to the condition of that state. If a state is unable to conduct comparative research it may also be poor or underdeveloped, for instance, lowering the benefit of any attempt of more developed states to learn from its decisions.

25. Posner & Sunstein, *supra* note 1, at 146, 164.

26. See Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 139-140 (1993).

27. *Id.* at 139.

28. Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 106 (2014).

states. This norm will then be applied to all states, which then must adhere to the new standard of human rights protection discovered by the ECHR. The doctrine is a key tool that allows the ECHR to interpret the Convention in an evolutionary manner, which improves human rights protection over time, because it allows the ECHR to follow progressive tendencies within European States.²⁹

Emerging Consensus implies that the ECHR should strive to harmonize how human rights are protected in different states in Europe. The doctrine is balanced, however, by an underlying principle of the convention system—the principle of subsidiarity. This principle implies that states should be given leeway to decide the degree of protection they grant to different human rights.³⁰ This leeway is reflected in another doctrine adopted by the ECHR—the Margin of Appreciation. The Margin of Appreciation directs the ECHR to defer to the state's decision and not to find it in violation of the Convention, unless the violation of the right exceeds a certain latitude of choice granted to the states.³¹ The greater the degree of European consensus that a certain right should be protected, however, the narrower will be the willingness of the ECHR to defer to the state, and the narrower the latitude of choice it will be granted under the Margin of Appreciation doctrine.³²

IV. THE BENEFIT OF EMERGING CONSENSUS—PREVENTING CASCADES

Emerging Consensus allows the ECHR to learn from the experience of all European states. The ECHR can use this doctrine to find out what the majority of states in Europe choose to set as their laws. According to the Jury Theorem, this majority approach is likely to be a good legal solution.³³ After the ECHR discovers this legal solution, it can set it as a standard that all European states must follow; otherwise, the ECHR will find them in violation of the Convention. In order for the ECHR to gain the most information from the laws of different European states, these states should decide independently from each other and only conform to the ECHR's judgment after it was given.³⁴

29. See Helfer, *supra* note 26, at 134; *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. 31, ¶ 31 (1978) (stating the ECHR should interpret the Convention according to present conditions including the current laws in European states).

30. See Tomer Broude & Yuval Shany, *Introduction to THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* 1, 6 (Tomer Broude & Yuval Shany, eds., 2008), available at xa.yimg.com/kq/groups/23157333/794364126/name/shifting.

31. See *Dickson v. United Kingdom*, 2007-V Eur. Ct. H.R. 99, ¶ 77.

32. See Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 NYU J. INT'L L. & POL. 843, 851 (1999); Helfer, *supra* note 26, at 140.

33. See Posner & Sunstein, *supra* note 1, at 136.

34. If each of the states chooses between more than two options the majority's decision may lack transitivity. This problem and ways to resolve it are discussed in Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 107-110 (1986). It will not be discussed further here. See Shai Dothan, *Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement*, in *COMPARATIVE INTERNATIONAL LAW* (Anthea Roberts et al. eds, Forthcoming

States may not want to decide independently for their own reasons, some of which are discussed in Part VI. Similarly, the ECHR may fail to apply Emerging Consensus correctly for its own reasons, some of which are discussed in Part VII. These parts also suggest ways to counter these problems. Emerging Consensus has a key advantage over the use of comparative law by national courts, however. It provides a universal rule that can lead to optimal results if followed by the ECHR and the states—that is, if states decide independently and the ECHR applies Emerging Consensus correctly. Because under Emerging Consensus as it is presented here states should decide independently, an informational cascade is prevented. Because the ECHR learns from the experience of the states and applies the majority's decision across Europe, the benefits of the Jury Theorem are fully realized.

In contrast, no universal rule can guide national courts that apply comparative law themselves. If they learn from each other, they will create an informational cascade; if they do not learn from each other, they will not realize the benefits of the Jury Theorem. Because only a universal rule can be applied by courts without them bearing prohibitive costs to uncover the decision-making processes of every other foreign court, the doctrine of Emerging Consensus is better than the application of comparative law by national courts. It guides all states in a way that can lead to optimal results if followed by those states.³⁵

V. MECHANISMS TO ENSURE THE SUCCESS OF EMERGING CONSENSUS

If all the states in Europe have the same propensity to adopt good laws and if the ECHR is able to survey all of their national laws, the best results under the Jury Theorem will be achieved by following the majority of states. Yet, these two conditions will often not apply. Some states may be more likely to make good law than others and the ECHR may be able to study only the laws of a limited number of states because of its limited resources. Under these constraints, the ECHR should try to survey only the laws of states that are likely to make better law, or at least try to give their laws greater weight.

Oxford Univ. Press 2015) (analyzing situations in which this problem should limit the use of the Emerging Consensus Doctrine).

35. Posner and Sunstein address the issue of decisions by international courts and even speak specifically about the ECHR but without discussing Emerging Consensus. Their paper views the decision of the international court as reflecting the agreement of states that ratified the treaty which formed the court. If many states ratified the treaty they argue that this should count as a vote of many states which is likely to be correct under the Jury Theorem. If states joined the treaty for ulterior reasons that have nothing to do with a mutual choice to adopt a specific rule and if the ECHR decides based on the views of the judges instead of the prescriptions in the treaty then the decision of the ECHR should count for less than a vote of all the states in Europe. See Posner & Sunstein, *supra* note 1, at 165-166. The theory presented here, however, does not focus on the agreement of states to join the treaty, but on the ability of the ECHR to learn from the individual decisions of all European states under Emerging Consensus. It therefore does not suffer from the shortcomings presented by Posner and Sunstein.

If the ECHR judges choose which states to learn from, they may manipulate this choice according to the result they want to reach.³⁶ However, to the extent that the ECHR judges do not manipulate their choice, but rather try to learn as much as they can from the states, choosing to survey the laws of only a few states may be very efficient, because under the Jury Theorem the informational value added from each new state surveyed declines steeply as the number of surveyed states increases.³⁷ If the ECHR already surveyed a substantial number of states for a particular case, it can gain very little from looking at the laws of even more states. If the ECHR wants to make as many good choices as possible under a resource constraint, it should survey a few states in as many cases as possible, instead of surveying all states in only a few cases.

Posner and Sunstein argue that national courts that cannot survey the laws of all states should focus on states that provide their populations with the highest standards of living, as those states are more likely to make better laws.³⁸ The ECHR can similarly rely on the relative success of states when it decides which states should count more for the purpose of identifying an Emerging Consensus. It may be very problematic, however, to decide what factors are the most relevant to judge the success of states. Should the happiness of the population be more important than the strength of the economy? Should the protection of political rights matter more than the protection of social rights? Furthermore, the position of the ECHR is especially difficult compared to that of national courts that apply comparative law. National courts make decisions that affect their own states and are under no obligation not to discriminate between the states that they learn from. The ECHR judgments set human rights standards for all of Europe³⁹ and if the ECHR appears biased in favor or against learning from the laws of certain states, this can seriously damage its legitimacy. Therefore, the ECHR may have to hide the fact that it gives greater weight to the laws of certain states and use its legal reasoning to give the impression that the laws of all states are treated equally.

Bearing in mind that the ECHR may have to conceal the fact that it gives different weights to the laws of different states, it may want to consider other factors when it decides on these relative weights. One important factor is the nature of the state's political system. Democracies, for example, often make decisions by majority rule and involve a large group of decision makers, either directly or through representative organizations. Therefore, according to the logic that underlies the Jury Theorem, their decisions are more likely to be correct than those of non-democracies.⁴⁰ A similar conclusion can be reached without the Jury Theorem, as many consider democracy the best system of government because of its ability to restrain corruption by checks and balances.⁴¹ Another important factor is the size of the state. Democracies with bigger populations integrate the

36. See *infra* Part VII.

37. See Posner & Sunstein, *supra* note 1, at 169.

38. See *id.* at 174-75.

39. See *Kamer v. Austria*, 2003-IX Eur. Ct. H.R. 199, ¶26.

40. See Posner & Sunstein, *supra* note 1, at 159.

41. See THE FEDERALIST NO. 51 (James Madison).

wisdom of more people than less populous democracies. Their decisions should therefore usually be better according to the Jury Theorem. More populous states face greater legal coordination challenges and may be able to invest more resources in improving their laws. These are additional reasons why their laws should be given a greater weight.

The ECHR can distinguish between the laws of different states not only by the different qualities of the state itself but also by the quality of the process that led to a specific legal rule. If a law was adopted after a long and serious deliberation, the ECHR may want to pay special attention to it when it discovers an Emerging Consensus, as it is more likely to be a good law. If a law seems to gain the approval of a substantial majority of the population within a state, it is more likely to be correct than a law that was accepted by a narrow margin. Certain laws and certain legal issues may be very salient in some states, but considered unimportant in other states.⁴² States that view a certain law as especially important should be given more weight. A more problematic situation arises when one state recently changed its laws to deal with a certain issue while another state deals with the same issue based on an old legal provision. It may be beneficial to give the more veteran law a greater weight because the state that uses it probably applied it successfully for a long time without a need for a revision. On the other hand, the new law, even if it was not actually tested, was adopted after a recent deliberation that took current conditions into account. The relative merits of the test of time and of fresh deliberation probably differ across different issues.

Emerging Consensus retreats when the state's practices are given a Margin of Appreciation.⁴³ The boundaries of the Margin of Appreciation allotted to the state exceed the realms of this paper.⁴⁴ Nevertheless, the considerations mentioned above for giving a greater weight to the state's decisions when finding an Emerging Consensus support the conclusion that the state made good law and therefore also militate in favor of granting it a larger Margin of Appreciation. As a result, the ECHR should be more careful not to find violations in states that are democratic and populous, that reach a decision based on a careful deliberation and by a substantial majority, and that view the relevant issue as especially salient.

If a certain state in Europe is fundamentally different from the others in a way that is relevant to the legal issue at stake, its legal choices provide the ECHR with

42. See Frederick Schauer, *Forward: The Court's Agenda and the Nation's*, 120 HARV. L. REV. 4, 14-20 (2006) (suggesting empirical methods to establish what are the most salient issues on a nation's agenda—the issues discussed on the first page of major newspapers and public opinion polls).

43. See *supra*, Part III.

44. See generally Benvenisti, *supra* note 32 (arguing that states should be granted a narrower margin of appreciation when they suffer from democratic failures and do not properly represent their citizens); Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State*, 10 INT'L J. CONST. L. 1023, 1042 (2012) (arguing that the ECHR actually does grant a larger margin of appreciation to states with well-functioning democratic mechanisms); Shai Dothan, *Three Interpretive Constraints on the European Court of Human Rights*, in *THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE* (Machiko Kanetake & André Nollkaemper, eds.) (forthcoming 2014) (explaining when the ECHR should follow Margin of Appreciation, the text of the Convention, and Emerging Consensus).

little information about the appropriate legal rule for the rest of Europe. Such a state violates the similarity condition that underlies the Jury Theorem's logic. The ECHR should give less weight to the choices of this state when it shapes Emerging Consensus. At the same time, however, the experience gained from other European states may not be relevant for the unique conditions this state faces—it should therefore be granted a larger Margin of Appreciation.

For example, in the *Sahin* case,⁴⁵ a female Muslim student, who viewed it as her religious duty to wear a headscarf, argued that the regulations in a Turkish university that forbade her from wearing the headscarf violated her freedom of religion protected by the Convention.⁴⁶ She argued that no single other European country forbids the wearing of headscarves at universities, and, therefore, an overwhelming consensus against Turkey's practices exists in Europe.⁴⁷ Yet the ECHR decided that Turkey is too different from the other states to merit requiring it to conform to the European consensus.⁴⁸ Turkey is inhabited predominantly by Muslims, it has a unique history of secularism, and it fears the rise of Islamic extremists.⁴⁹ All these facts set Turkey apart from the rest of Europe. Thus, because Turkey is different than the other states in Europe, it was granted a Margin of Appreciation and was not found in violation.⁵⁰

By the same logic, one can also argue that the practices of Turkey should not be considered when determining European consensus on issues that pertain to religious rights. Turkey's problems regarding issues that deal with religion are simply too different from the ones faced by the rest of Europe, which renders learning from Turkey in these matters a useless exercise. In fact, the ECHR noted in the *Sahin* case that attitudes towards religious symbols are diverse across all of Europe, implying that this is an issue in which differences between all European states are relatively large.⁵¹ In such issues, where European states are dissimilar, the adoption of the same policy by the majority of the states in Europe does not necessarily indicate that it is a good policy. States may fare better under different policies due to the large differences between them.

VI. HOW STRATEGIC BEHAVIOR BY STATES CAN INTERFERE

For all European states to gain the maximum benefit from Emerging Consensus, each of the states must decide independently. Under certain conditions, however, states may not decide independently and choose to serve a different, conflicting interest.

One reason that states may fail to decide independently is that the laws adopted in one state can create externalities on other states. If the laws adopted by

45. *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 178.

46. *Id.* ¶ 70.

47. *Id.* ¶ 100.

48. *Id.* ¶¶ 114-16.

49. *Id.* ¶ 115.

50. *Id.* ¶¶ 114-23. *See also Id.* ¶ 3 (Judge Tulkens, dissenting) (rejecting the use of the Margin of Appreciation).

51. *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 178, ¶ 109.

one state damage the interests of another state, the second state may respond by adopting legal regimes that prevent this damage, even if the laws do not promote the state's interest when considered in isolation. Alternatively, if states can gain by conforming to the laws adopted by other states, they may change their laws from what suits their isolated interests in order to coordinate with other states. These types of problems may prevent states from deciding independently. Such problems are relevant to many areas of the law, but they are usually less acute in regards to issues that relate to human rights where positive and negative externalities between states are rarer.⁵²

Yet in issues of human rights another problem may arise—the decisions of a state may not represent the interests of all the state's citizens, but instead cater to the interests of certain segments of society that possess greater political power.⁵³ In these situations, the decisions of states may not be optimal, either in terms of morality or in terms of efficiency. However, for the Jury Theorem logic to work, the states' decisions do not have to reach perfect results. As long as the decision of the state is better than a coin toss, when deciding between two options, following the decisions of a majority of states will lead to better results the larger the group of states surveyed. While states often suffer from democratic failures that lead to sub-optimal decision-making, their decisions are probably better than random in most cases. States' decisions may be worse than random if they are all consistently discriminating against a certain group. But even if one state discriminates against a certain group, other states may not discriminate against the same group. Therefore, the laws chosen by the majority of the states will not be systematically biased against a certain group and the laws of each state will usually be better than a random choice.

This part explores two other possible interests that can lead states to not decide independently: states can try to learn from each other in order to adopt the correct law even before the ECHR intervenes or states can try to conform in advance to what they predict will be the Emerging Consensus discovered by the ECHR in order to prevent the ECHR from finding them in violation of the Convention. This part will also investigate ways that can allow the ECHR to shape states' incentives so that they will be more likely to decide independently.

A. *If States Want to Reach Correct Decisions Fast*

If all states decide independently, the ECHR can apply Emerging Consensus to reach the best legal rules. These rules can then be followed by all the states in

52. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 920 (2005).

53. See Benvenisti, *supra* note 32 (arguing that states may misrepresent minorities and prevent them from having real political power); Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999) (arguing states can be captured by small and powerful interest groups); Shai Dothan, *In Defence of Expansive Interpretation in the ECHR*, 3 CAMBRIDGE J. INT'L. & COMP. L 508 (2014) (arguing the ECHR is normatively justified in expansively interpreting the obligations of states under the Convention, because the states' convention obligations do not necessarily reflect the views of their citizens due to democratic failures).

Europe. This process takes time, however, and may not be completed until several years have passed. States take time to develop their legal systems and address new issues and the ECHR takes time to issue its judgments and to discover an Emerging Consensus. In the meantime, states may be faced with legal problems that require an immediate solution. States can make the laws to address these problems independently. If they do so, this will serve the European interest of allowing the ECHR to learn from the independent choices of all European states. If states decide independently, however, they will not learn from the experience of other states and may reach inferior choices compared to the choices they would have made if they used comparative law to learn from other European States. States that decide independently may therefore be left with inferior legal regimes; at least until the ECHR discovers an Emerging Consensus on this issue and the states follow its judgment. If states care more about making the right legal choices in the short term than about serving the long-term European interest, they will use comparative law to learn from the states around them and will not decide independently. If many states do not decide independently, the ECHR would not be able to use Emerging Consensus to reach good legal rules. Furthermore, states that use comparative law to learn from each other may be learning from states that did not decide independently themselves and were subject to informational cascades.

The ECHR can try to mitigate this problem by giving states an incentive to decide independently and wait for its implementation of Emerging Consensus. One way to do that is by accelerating the decision-making process within the ECHR. If states know that the ECHR is likely to set the new doctrine by Emerging Consensus very quickly, they may be more willing to settle for the inferior solutions they can reach independently in the interim, since these solutions can soon be replaced by the superior doctrine set by the ECHR. Yet this solution may be practically difficult because the ECHR needs to handle a very large number of cases⁵⁴ and because it may require time to conduct a careful comparative research. Another problem which may arise is that new legal problems may not be resolved by all states at the same time, which means the ECHR may need to wait until enough states have made their own choice regarding the issue before it can set a clear, consensual doctrine.

Another practical way to increase the willingness of states to decide independently is to show the states that the ability of the ECHR to use comparative law is vastly superior to their own. If states are convinced that when the ECHR finds Emerging Consensus, it uses comparative law in a professional manner that ensures the best legal rule will be adopted, they may be more willing to decide independently, knowing that their legal solutions will be replaced by the best possible legal rule once the ECHR makes its decision. National courts that apply

54. Despite the fact that the ECHR accelerated its disposal of cases, which allowed it to decrease its backlog of pending cases in 2013, the backlog still remained close to a hundred thousand cases at the end of that year. See EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2013, at 4 (2014) available at http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf.

comparative law need to conduct expensive research. If they are convinced that the ECHR can undertake this research better than they can, and that they will eventually be able to learn from its superior decisions, they may make an independent decision and avoid the costs of comparative research.

The ECHR may be concerned that if it finds a state in violation of the Convention that state would fail to comply with the judgment or severely criticize the court. In extreme situations, the state may even attempt to change the Convention or to leave the court's jurisdiction.⁵⁵ Similarly, the court may be concerned that deciding against the current of public opinion would damage its public support within European states, which, in turn, would make future state actions against the court easier.⁵⁶ These fears may lead the ECHR to delay a violation finding against the state for years, until the issue becomes less salient or until the relevant state and the public within it view such a decision more favorably.⁵⁷ In the meantime, states that do not use comparative law may be stuck with an inferior regime and thereby incentivized not to decide independently.

The formal rules of the Convention do not allow the ECHR to avoid deciding cases, except under certain technical conditions that usually assure the case does not concern a severe violation of human rights.⁵⁸ But the ECHR can still decide not to decide a case by determining that it lacks jurisdiction over it.⁵⁹ By strategically manipulating the rules of jurisdiction, the ECHR can avoid dealing with sensitive issues until it feels it can do so with little fear of backlash. For example, in the 2001 *Bankovic* case,⁶⁰ the applicants argued that seventeen

55. See Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 656-68 (2005); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 420-26 (2008); see also SHAI DOTHAN, *REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS*, 87-102 (2015) (discussing harmful responses that states can use against international courts when they disagree with their judgments).

56. See Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES L. 411, 418-19 (2013) (showing how public support for the ECHR in the United Kingdom has declined in response to controversial judgments it issued, facilitating actions against the court).

57. See Shai Dothan, *How International Courts Enhance their Legitimacy*, 14 THEORETICAL INQUIRIES L. 455, 475 (2013).

58. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(3), Nov. 4, 1950, E.T.S. No. 005 [hereinafter Convention] ("The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: a. the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.").

59. See Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 3, 4 (Helen Keller & Alec Stone Sweet eds., 2008) (stressing that the ECHR decides the scope of its own jurisdiction, a power referred to as *Kompetenz-Kompetenz*).

60. *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

European states that were members of NATO⁶¹ violated the Convention by killing civilians in a NATO airstrike in Yugoslavia.⁶² The ECHR decided that it did not have jurisdiction to decide the case because the attack took place outside of the territories of states that were members of the Convention.⁶³

This decision was severely criticized as digressing from the court's previous judgments on the issue of jurisdiction.⁶⁴ Only ten years after *Bankovic*, in the *Al-Skeini*⁶⁵ and *Al-Jedda*⁶⁶ judgments, the ECHR reverted to its old doctrine on extraterritorial jurisdiction and decided that states which exercise control over territories that do not belong to any Convention state are nonetheless subject to the ECHR's jurisdiction.⁶⁷ *Al-Skeini* and *Al-Jedda* dealt with violations of human rights committed by British forces in occupied Iraq.⁶⁸ The ECHR may have reasoned that criticizing military actions in Iraq in 2011 would lead to much less resistance than criticizing the actions of NATO in Yugoslavia in 2001, both because in 2011 public opinion shifted strongly against the war in Iraq, and because in 2001 public opinion supported the use of military force due to the beginning of the War on Terror.⁶⁹ However, the result of this strategy, besides the harmful ambiguity that it added to the ECHR's doctrines on jurisdiction, is that the states were deprived of the guidance of the ECHR on extra-territorial military actions for a whole decade. This gave states an incentive to look around them and to try to learn from the other states how to shape their policy on the issue instead of deciding independently.

Another possibility available for the ECHR in such sensitive cases is to tweak its decision and digress from the true Emerging Consensus so as not to find states in violation and not to provoke them into harming the court. However, this may lead the ECHR to adopt doctrines that are inferior to the genuine application of Emerging Consensus, thereby giving states an incentive not to wait for its decision and to use comparative law to adopt good policies by themselves.

The Margin of Appreciation doctrine applied by the ECHR can sometimes mitigate these problems. According to this doctrine, the ECHR allows the states

61. These states were Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. *Id.* ¶ 3.

62. *Id.* ¶ 28.

63. *Id.* ¶¶ 54-82.

64. See Alexandra Ruth & Mirja Trilsch, *Bankovic v. Belgium (Admissibility)*, 97 AM. J. INT'L L. 168, 172 (2003); Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 545 (2003). Previous ECHR judgments on extraterritorial jurisdiction include: *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. 23-24 (1995); *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2234-35; *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 25.

65. *Al-Skeini v. United Kingdom*, 53 Eur. Ct. H.R. 18 (2011).

66. *Al-Jedda v. United Kingdom*, 53 Eur. Ct. H.R. 789 (2011).

67. See *Al-Skeini*, 53 Eur. Ct. H.R. ¶¶ 130-50; *Al-Jedda*, 53 Eur. Ct. H.R. ¶¶ 74-86.

68. *Al-Skeini*, 53 Eur. Ct. H.R. ¶¶ 33-71; *Al-Jedda*, 53 Eur. Ct. H.R. ¶¶ 8-15.

69. See *How International Courts Enhance their Legitimacy*, *supra* note 57, at 475-76.

some leeway in making their own policies without finding them in violation.⁷⁰ This doctrine allows the ECHR to indicate that a European consensus has emerged and to offer to the states a rule that they can follow, while at the same time avoiding a direct finding of violation against the state whose conduct is in question. Because the ECHR avoids finding the state in violation when it grants the states a Margin of Appreciation, it is less likely to provoke the state into undertaking harmful responses against it. This increases the willingness of the ECHR to give its judgment, indicating what is the Emerging Consensus, earlier. Consequently, states that expect the ECHR to decide quickly and provide them with guidance would be more willing to make their policies independently. Similarly, the ability to avoid harmful responses by states by granting them a Margin of Appreciation allows the ECHR to identify the true European consensus without manipulating it, thereby reaching the optimal rule and giving states a greater incentive to wait for its decision and not to use comparative law themselves.⁷¹

While a quick and high-quality decision by the ECHR applying Emerging Consensus may incentivize states to decide independently, it may also damage states' incentives to invest in adopting good legal rules. Since the states know that the ECHR will soon provide them with good legal solutions, they may rationally decide not to invest resources in finding the best legal solutions on their own. States may decide to cut the budgets of national courts and transfer the resources they need to make good laws elsewhere. If all states make this rational calculation and do not invest the necessary resources to adopt good laws, the ECHR will follow a majority of states, each of which has a relatively low probability of reaching the correct result. Yet as long as the states' decision is better than a random decision, the majority of a substantial group of states, such as the forty-seven states of the Council of Europe, will still reach the correct result with a high probability.

If the analysis undertaken here is widely accepted, then national courts that use comparative law instead of making independent decisions will be branded as damaging the general European interest. This can damage the legitimacy of these national courts in the eyes of other courts. In order to avoid this damage to their international legitimacy, national courts may stop using comparative law, even if this means they will adopt inferior laws.

In a recent empirical study, Laurence Helfer and Erik Voeten find evidence that the ECHR tracks the policy of the majority of states in Europe regarding the protection of people with minority sexual orientations.⁷² Their research suggests that states often change their policies by following the judgments of the ECHR

70. See *Dickson v. United Kingdom*, 2007-V Eur. Ct. H.R. 99, ¶¶ 41, 77-78.

71. See Shai Dothan, *Why Granting States a Margin of Appreciation Supports the Formation of a Genuine European Consensus* (unpublished draft) (on file with the author) (suggesting that granting states a Margin of Appreciation, even when doing so would lead to bad policy outcomes in specific cases, can help create the appropriate preconditions for the formation of a genuine European consensus).

72. Helfer & Voeten, *supra* note 28, at 106.

instead of following what seems to be the majority of the other states in Europe prior to the ECHR's judgment.⁷³ This study provides some evidence that the ECHR applies emerging consensus properly by following the majority of states. It also supports the conclusion that states acknowledge this fact and are consequently willing to decide independently until the ECHR makes its judgment, exposes the emerging consensus, and allows the states to follow it.

B. If States Fear Overruling by the ECHR

When the ECHR finds that a state violated the Convention, this state suffers a reputational damage. When the reputation of a state is damaged, other states view it as more willing to disregard its international commitments. The state may partly rebuild its reputation by complying with the judgment of the ECHR but some damage to its reputation may remain.⁷⁴ States may want to avoid this reputational damage and try to prevent a decision that they violated the Convention. The states can expect that the ECHR will use Emerging Consensus to determine which states do not conform to the European consensus and find these states in violation of the Convention. In order to prevent a finding of violation against them, states may try to predict what doctrine the ECHR will discover by Emerging Consensus and conform to it in advance, before the ECHR has a chance to make its decision. In that case, states will not make law independently. Instead, they will try to foresee what the majority of European states will set as the law and conform to this standard.

States that try to foresee the emergence of a consensus will not make the law which they think is best; instead, they may try to foresee what the majority of states will think is the best law. However, all states are expected to make the same calculation and conform to what they think the majority think is the best law. As a result, the states would try to predict not what the majority of states think is the best law, but instead what the majority of states think that the majority of states think is the best law. This attempt to foresee what other states that behave strategically will do, which was termed "Beauty Contest" after a similar metaphor used by Keynes, can be extended infinitely.⁷⁵ The majority of states may end up coordinating in this process of prediction around certain legal solutions that most of the states would deem inferior if they made an independent decision.

73. *Id.*

74. See REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS, *supra* note 55 (analyzing the reputational incentives of the states facing judgments by international courts); Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L L. 115, 118-19 (2011).

75. See JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 156 (1936) (describing a contest in which readers of a newspaper must vote for the six prettiest photographs from a group of a hundred photographs of women and win a prize if they choose the photographs chosen by the majority of readers; in such a situation readers do not decide according to their own perceptions of beauty but rather according to what the majority thinks that the majority thinks is beautiful).

In such a scenario, it is possible that states would choose legal solutions because they appear unique in a certain sense and therefore can serve as focal points for coordination.⁷⁶ As an example, if one state significantly improves the status of transsexuals, this decision may appear very salient precisely because it cuts against the laws of most European states. This salience makes it likely that each state will expect all the others to conform to this new law, which will lead, in turn, to a decision by the ECHR that this is the Emerging Consensus. States may therefore change their laws and grant the same rights to transsexuals to avoid a finding of violation against them. Absurdly, states adopted this legal solution precisely because it is salient and it gained its salience by cutting against what the majority of states would prefer if they made an independent decision.

If states behave in this manner, the ECHR will not be able to find the best legal solution by following the majority of the states. The ECHR must therefore attempt to alleviate the fear of states that it will find them in violation of the Convention if they fail to discern and to conform in advance to an Emerging Consensus. One way the ECHR can accomplish that is by not finding a state in violation before issuing a warning in a judgment that an Emerging Consensus has formed and future deviations from it would lead to a ruling against the states. If states know they will not be subject to a severe reputational sanction if they fail to predict the elusive European consensus, and they will receive a fair warning in case their conduct does not conform to it before finding a violation, they will be more likely to stick to their sincere choices of the best legal rules. Sincere and independent choices by the states will allow the ECHR to learn profitably from the states' decision-making when it uses Emerging Consensus. After the ECHR issued a warning and gave states enough time to change their laws accordingly, it may start to find states that do not conform to its rulings in violation of the Convention.

The series of ECHR judgments that indicated disagreement with the United Kingdom's practices regarding transsexuals many years before the United Kingdom was found in violation may have served as such a mechanism of warning. In the *Rees* case,⁷⁷ decided in 1986, the ECHR decided that the practice of issuing transsexuals a birth certificate which includes their sex at birth and preventing them from marrying a person of their opposite current sex does not violate the Convention.⁷⁸ Yet already in this judgment the ECHR indicated that it was aware of the suffering of transsexuals and called for a review of the legal provisions in light of scientific and societal changes.⁷⁹ Over the next fifteen years, the ECHR issued increasingly severe criticism of the United Kingdom that warned an Emerging Consensus was forming against its practices. In the *Cossey* case⁸⁰ the ECHR pointed again to the seriousness of the problems faced by transsexuals and to the need to keep the issue under review;⁸¹ in the *Sheffield and Horsham* case⁸²

76. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 94 (1963).

77. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser.A) ¶¶ 44-47 (1986).

78. *Id.* ¶ 46.

79. *Id.* ¶ 47.

80. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) ¶ 42 (1990).

81. *Id.*

the ECHR indicated a growing displeasure with the United Kingdom's practices.⁸³ Furthermore, the court stressed in this judgment that only four out of thirty-seven European states studied prevented the reassignment of sex in birth certificates, indicating a clear Emerging Consensus against the United Kingdom, but still not finding it in violation of the Convention.⁸⁴ Finally, after warning the United Kingdom for about fifteen years that its practices digressed from the Emerging Consensus, the ECHR decided that the United Kingdom's system of birth certificates and marriage regulation violated the Convention in the *Goodwin* case,⁸⁵ decided in 2002.⁸⁶

The Margin of Appreciation doctrine can help the ECHR to issue a warning to the state that its practices contradict the European Consensus without finding it in violation. If the court rules that the state's behavior contradicts the European Consensus, but its actions should be granted deference based on the Margin of Appreciation doctrine, it does not brand the state as a violator of its commitments. Therefore, the state would not suffer significant reputational damage and it would receive a fair warning that in the future, similar conduct may lead to a finding of violation.

This suggests that the boundaries of the Margin of Appreciation should be broadened compared to the boundaries that should be set if states are considered not to respond strategically to the ECHR's judgments. Even if the ECHR is convinced that the European consensus reflects a superior policy to the policy adopted by the state it should sometimes grant states a Margin of Appreciation, as a way to alleviate their fear of being found in violation in case they do not conform to the European consensus prior to the court's ruling and to give states an incentive to decide independently.⁸⁷

VII. HOW STRATEGIC BEHAVIOR BY THE ECHR CAN INTERFERE

National courts that apply comparative law are often accused of not really attempting to discover the laws of the majority of states on which to base their decisions, but rather making their decision for their own reasons and afterwards using states with similar laws to support that decision.⁸⁸ Similar accusations can easily be lodged against an international court such as the ECHR. If the judges look only at a biased sample of the states, their decision will not enjoy the informational benefits of the Jury Theorem.

82. *Sheffield v. United Kingdom*, 1998-V Eur. Ct. H.R. 84.

83. *Id.* ¶ 60.

84. *See id.* ¶¶ 20-37.

85. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 26, ¶104.

86. *See* Beate Rudolf, *Constitutional Developments—European Court of Human Rights: Legal Status of Postoperative Transsexuals*, 1 INT'L J. CON. L. 716 (2003) (providing more information on this development).

87. *See Why Granting States a Margin of Appreciation Supports the Formation of a Genuine European Consensus*, *supra* note 71.

88. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 598 (2003). *See also* Posner & Sunstein, *supra* note 1, at 138-39.

One way to address this problem is to try to limit the discretion the ECHR judges have when they choose the states from which they learn under Emerging Consensus. If judges cannot choose the states to which they refer and if they study the laws of these states correctly, then their judgments will accurately reflect the collective wisdom of the states instead of their own discretion. A simple way to limit the judges' discretion is to direct them to survey the laws of all the states in Europe when they engage in Emerging Consensus. This may be practically difficult, however. There are currently forty-seven states in the European Council and studying all of their laws carefully may prove too much of a burden for the ECHR, which operates under a severe resource constraint.⁸⁹ As Part V argued, the ECHR can make good decisions with limited resources if it will ignore the laws of some states or give them only a lower weight compared to the weight it gives to other states.

ECHR judges can be prevented from cherry-picking the laws of states that suit their own wishes even if they do not have to survey all states, but only a certain predetermined group of states. Part V suggested several characteristics of states to whose practices the ECHR should give greater weight in its decision—namely, states that are especially successful, democratic and populous. If a group of states with these attributes is identified, the ECHR can gain a great amount of information at a comparatively low cost by looking only to the laws of these states. States that are excluded from this group, however, will view the ECHR as biased against them and may fiercely resist this policy. This policy may therefore be impossible because the ECHR is concerned with preserving the support of all the states in Europe. The ECHR may want to stress that the group of states that it looks to is diversified and includes states from different systems, which accurately represent all the states in Europe. To the extent that the ECHR can do this credibly, it may thwart some accusations of bias, but choosing these representative states may be very difficult. There is also another problem—the successful states to which the ECHR looks may simply be too different from the other states to render learning from them a useful exercise. The Jury Theorem only supports Emerging Consensus when states are similar. When states are different, even if they possess excellent decision-making skills, their policies should not be followed by the rest of Europe.

An alternative way to address this problem may try to identify the true reasons behind the ECHR decision-making. If the real motivations that make the ECHR decide in a certain way are discovered, doctrinal mechanisms can try to counter these motivations to the extent that they make the ECHR abandon the correct application of Emerging Consensus. The literature regarding judicial behavior distinguishes between three types of theories:

1. *Legal Models*—judges try to uphold the law in their judgments;
2. *Attitudinal Models*—judges follow their own policy preferences;

89. See ANALYSIS OF STATISTICS 2013, *supra* note 54 and accompanying text.

3. *Strategic Models*—judges try to promote their policy preferences strategically, by changing their behavior to counter the expected responses of other actors.⁹⁰

This paper will briefly address each of these theories and try to suggest methods to prevent the ECHR, if it acts under each of these theories, from subverting the informational benefits gained from Emerging Consensus.

A. *Legal Models*

According to legal models, judges apply the law as accurately as they can without serving any policy preferences.⁹¹ The main challenge that the proponents of this model face is defining the law that judges apply in their judgments. The ECHR is tasked with applying the Convention. Yet, the ECHR has often indicated that it will apply the rules of the Convention in an evolutionary manner⁹² and try to effectively protect the rights enshrined in it.⁹³ The ECHR also applies a teleological interpretation that looks to the object and purpose of the Convention and not only to its text.⁹⁴ Although these doctrines give the ECHR substantial discretion, the text of the Convention guides the ECHR in its judgment, and this guidance may sometimes contradict the European consensus on certain issues. Consequently, if the ECHR follows the legal model, it may follow the text of the Convention instead of the views of the majority of states at the time of the judgment. The text of the Convention may only reflect the views of the states in the past, when they joined the convention system. In the meantime, the views of the majority of the states may have changed or adapted to changing circumstances, but due to the requirement that every amendment of the Convention (as opposed to additions to it, which can be accomplished by an additional protocol) requires the unanimous support of the states, the text of the Convention may remain the same.⁹⁵ Moreover, states may have ratified the Convention for ulterior reasons or agreed to certain provisions only as a compromise in return for other benefits.⁹⁶ In these

90. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 44-114 (2002).

91. See Howard Gillman, *What's Law Got to Do with It?: Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 485-86 (2001) (presenting two views of legal models: the first views the law as an effective constraint on judges that makes their judgments accurately conform to the law, the second views judges as trying to honestly apply the law as they perceive it to be). My focus here is on the first interpretation since my paper is focused on the actual content of judgments and not on the perceptions of judges.

92. See *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. 31, ¶ 15-16 (1978).

93. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. 34, ¶ 88 (1989).

94. See François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in *THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS* 283, 292 (Mireille Delmas-Marty ed., 1992)

95. See *Defence of Expansive Interpretation in the ECHR*, *supra* note 53, at 519.

96. See Posner & Sunstein, *supra* note 1, at 168. See also ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS—FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* 92-93, 95, 100 (2010) (arguing states concerned with maintaining their sovereignty, primarily the United Kingdom, used the attempt to reach unanimity in

situations, the judges who follow the legal model and apply the text of the Convention instead of learning from the current choices of states will not gain the decisional benefits of the Jury Theorem.

However, the behavior of judges who apply the legal model can easily be corrected by changing the Convention. If the Convention is amended to include a specific requirement that judges apply Emerging Consensus, then legalist judges will follow this requirement and reap the benefits of the Jury Theorem. While the ECHR is not formally bound to its previous judgments, it has often indicated that it will not digress from them without good reason.⁹⁷ If judges follow this accepted doctrine, even a series of judgments that indicates the importance of applying Emerging Consensus can improve the chances of its use by legalist judges.

B. *Attitudinal Models*

According to attitudinal models, judges have certain policy preferences that they follow in their judgments.⁹⁸ While, according to attitudinal models, the law itself can have an effect on the result, these models claim that judges make some choices based on considerations of policy.⁹⁹ These choices cannot be easily manipulated by changing the Convention or the content of the court's judgments. However, those who select the judges may select them based on the policies they will promote on the bench. Therefore, the rules that determine the selection of judges to the ECHR and to the panels on the court can shape the court's judgments in a direction that supports the Jury Theorem logic.

According to the current rules on the selection of judges to the ECHR, each state in the European Council submits a list of three candidates to become ECHR judges to the European Parliamentary Assembly, which selects one judge from the list.¹⁰⁰ If states only select candidates whose policy preferences fully concur with their own,¹⁰¹ then the judges on the ECHR should accurately represent the views of the states in Europe. In that case, the majority of the judges on the court shall enjoy the same decision-making benefit as the majority of the states. However, since judges make decisions in panels which are supposedly random, besides one judge who sits in respect to the state whose conduct is in question,¹⁰² there is some

the negotiations prior to the first signing of the Convention to impose a relatively weak and partial version of the Convention on the majority of the states).

97. See *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 26, ¶ 74.

98. See SEGAL & SPAETH, *supra* note 90 at 86.

99. See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998).

100. See European Convention on Human Rights art. 20, 22, Nov. 4, 1950, 213 U.N.T.S. 221..

101. See Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 431 (2008) (providing evidence ECHR judges sometimes act as policy seekers and their policy views may be foreseeable by the selecting states). Realistically speaking, states probably cannot select judges that concur with their policy views on every possible issue. The issues under the ECHR's jurisdiction are simply too numerous and complex to expect that a qualified candidate would correspond to her state's views on every point. Yet states may certainly foresee the candidates' policy views on some key issues and select them accordingly.

102. See European Convention on Human Rights art. 26(4), Nov. 4, 1950, 213 U.N.T.S. 221.

uncertainty whether the result reached by the panel will reflect the views of the majority of judges on the court. As the size of the panel increases this uncertainty would decrease since the majority of judges on the panel would be more likely to reflect the majority of judges on the court.¹⁰³ Therefore, to the extent that judges make decisions based on policy preferences and to the extent that the states select judges that concur with their preferences, the ECHR should prefer to decide as many cases as possible in the Grand Chamber, consisting of seventeen judges, instead of in smaller panels, such as Chambers of seven judges, three judges Committees and single judges Formations. However, the more judges who sit on the panel, the greater the costs in judicial time of each judgment. This policy recommendation can therefore put another strain on the ECHR's resources. The limited resources of the ECHR are the reason that Protocol 14, which went into force in 2010, amended the Convention furthering precisely the opposite policy—shifting greater responsibilities to smaller panels.¹⁰⁴

C. *Strategic Models*

Strategic models include every theory that claims courts change their decisions strategically in order to counter the expected responses of other actors.¹⁰⁵ The final result that the court wants to achieve by its strategic behavior may vary from one theory to another.¹⁰⁶ It is possible, for instance, that the ECHR wants all states to follow the Emerging Consensus in Europe, but is afraid that if it issues a judgment based on Emerging Consensus some states may fail to comply. In that case, the ECHR may conclude that states' actions would come as close as possible to following Emerging Consensus if its judgment would reflect a compromise. The ECHR may issue a judgment that does not follow Emerging Consensus fully but comes close to its prescriptions if it is more likely to be complied with than a judgment that follows exactly the doctrine.

Under these conditions, the best way to ensure that the ECHR decides based on Emerging Consensus is to remove the fear of noncompliance that motivates its strategic behavior. For example, if the Committee of Ministers of the Council of Europe, which is tasked with enforcing the ECHR's judgments,¹⁰⁷ would grow in efficiency and power, it could reduce the fear that states would fail to comply with ECHR judgments. This would give the strategic court a reason to decide based on Emerging Consensus alone without any strategic compromise. Similarly, if states expect a substantial reputational sanction for noncompliance, they would be more likely to comply and a strategic ECHR would, in turn, be more likely to adhere to

103. See Menachem Mautner, *Luck in Courts*, 9 THEORETICAL INQUIRIES L. 217, 224 (2007).

104. See European Convention on Human Rights Protocol 14, May 13, 2004, C.E.T.S. 194. (Protocol 14 allowed Committees of three judges to declare admissible and decide on the merits cases that are clearly well founded; it also allowed single-judge formations to reject clearly inadmissible cases).

105. See Lee Epstein, Jack Knight & Andrew D. Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L. J. 783, 798 (2003).

106. See *id.*

107. See European Convention on Human Rights art. 46(2), Nov. 4, 1950, 213 U.N.T.S. 221.

Emerging Consensus without strategically deviating from it.¹⁰⁸ Furthermore, improving the chances of compliance would also serve the ultimate end of making states behave according to Emerging Consensus.

It is possible that the ECHR serves other goals besides promoting the adherence of states to Emerging Consensus and does so strategically. In that case, different systems to constrain the ECHR's decision-making may theoretically be used to increase the chances that it would conform to Emerging Consensus.

VIII. CONCLUSION

This paper argues that if Emerging Consensus is applied correctly by the ECHR, it can lead to better legal results than the application of comparative law by national courts. Emerging Consensus allows the ECHR to learn from the experience gained by national legal systems. As long as national courts that set the law in European states decide independently, they can enjoy the benefit of an informed decision by the ECHR without falling prey to information cascades that plague the use of comparative law by national courts. If states—or the ECHR itself—follow their own interests and digress from the prescriptions of the theory described here, doctrinal and practical solutions can be devised to counter these tendencies and increase the chances that states and the ECHR would follow the prescriptions of the theory.

The ECHR's unique institutional position allows the formulation of rules for judicial decision-making that can be followed equally by all national courts and still lead to the adoption of good laws. The paper argues that national courts should decide independently from each other, but should follow the ECHR's judgments if they either find certain practices in violation of the Convention or warn that such a finding is imminent in the future. This may be just one example of a situation in which international courts can help to overcome problems of decision-making by national courts. International courts may draw information from other sources besides national courts, such as from Non-Governmental Organizations or their own professional research. After consulting information from multiple sources, some of which are inaccessible to national courts, these international courts can make an informed decision that the states under their jurisdiction and their courts should follow.

Just as the ECHR's position as a supranational court gives it advantages in decision-making over national courts, federal courts may have a similar advantage over state courts. The analysis in the paper suggests that when federal courts, such as the United States Supreme Court, learn from the laws of the states within the federation they can provide the entire federal system with the decisional benefits of the Jury Theorem. Federal courts can do that without requiring the states within

108. See *Judicial Tactics in the European Court of Human Rights*, *supra* note 74 (arguing if the ECHR would have a high judicial reputation this would improve the chances of compliance by states and would, in turn, allow the ECHR a greater ability to pursue its preferences).

the federation to learn from each other's laws and to inevitably cascade one after the other.¹⁰⁹

The paper also demonstrates the benefits that international courts generally can gain by learning from national courts and their collective experience. Other international courts, such as the International Court of Justice or the International Criminal Court may also gain these benefits if they use comparative law and learn from the vast experience of national courts across the world. This paper therefore joins the international law theorists who argue that using comparative law is beneficial, yet it suggests that it is international, regional, or federal courts that can optimally use comparative law, not national courts.

109. See *State Law as "Other Law" Our Fifty Sovereigns In the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1671 (2007) (showing the United States Supreme Court learns from state laws as it develops its doctrines).