

THE TYRANNY OF CHOICE AND THE INTERPRETATION OF STANDARDS: WHY THE EUROPEAN COURT OF HUMAN RIGHTS USES CONSENSUS

DANIEL PEAT*

I. INTRODUCTION 382 R
II. THE TYRANNY OF CHOICE 386 R
A. The Effects of Choice Overload 387 R
B. The Tyranny of Standards 390 R
III. THE CONSENSUS DOCTRINE 399 R
A. Interpretation Step Zero 402 R
B. Consensus as Consent 406 R
C. Consensus as Legitimacy 407 R
D. Consensus as Epistemology 413 R
IV. CHOICE OVERLOAD AND TREATY INTERPRETATION 416 R
A. Methodology 416 R
B. Results 422 R
C. Analysis 426 R
V. AVENUES FOR FUTURE RESEARCH 429 R
VI. CONCLUSION 430 R

Recent studies in social psychology have consistently shown that individuals are inherently averse to choice overload. Faced with complex choice sets, people are unhappier with the choices they make, more likely to regret their decision, and more prone to reverse their initial choice. This article tests the hypothesis that individuals' innate aversion to choice overload might explain how courts and tribunals interpret standards such as fairness, necessity, and proportionality. Drawing on the findings of an empirical study of 461 judgments of the Grand Chamber of the European Court of Human Rights, the article suggests that the Court's consensus doctrine must be understood partially as a reaction to the tyranny of choice.

* Grotius Centre for International Legal Studies, Leiden University. I would like to thank Andrea Bianchi, Tomer Broude, Veronika Fikfak, Nina Grange, Anne van Aaken, and Eric Voeten for their useful comments on previous versions of this paper. Many thanks to Cécile Ballorain for her research assistance. Earlier drafts of this paper were presented at the "Engaging with Domestic Law in International Adjudication" workshop at the University of Amsterdam and the Grotius Dialogues seminar at Leiden University. I thank the participants in those workshops for their useful comments.

I. INTRODUCTION

Modern life is filled with choices. Whether it be the 360 types of shampoo stocked by a local supermarket,¹ the 100,000 different styles of jeans available on Amazon,² or the 295 law schools with LL.M. programs specialized in public international law,³ selecting from among different options requires attention, time, and energy. But more choices are not necessarily better. Recent studies in social psychology and neurology have shown that humans are innately averse to “choice overload”: they are unhappier with the choices they make, more likely to regret those choices in the future, and more likely to reverse their initial decision.⁴ However, studies also suggest that individuals may avoid this anguish by using cognitive heuristics to limit the choices available to them.⁵ By con-

1. BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* 10 (2016).

2. Search for Jeans in Clothing, Shoes & Jewelry, AMAZON, https://www.amazon.com/s?k=jeans&i=fashion&ref=nb_sb_noss_2 [<https://perma.cc/V2R7-L4PX>] (choose Clothing, Shoes & Jewelry from drop down menu; then enter Jeans).

3. Search for Public International Law LL.M. Programs, LL.M. GUIDE, <https://llm-guide.com/search/result?keyword=public+international+law> [<https://perma.cc/V6AH-PENF>] (enter Public International Law in the Keywords field of the Advanced LL.M. Program Search).

4. Alexander Chernev et al., *Choice Overload: A Conceptual Review and Meta-Analysis*, 25 J. CONSUMER PSYCHOL. 333, 335 (2015). See also Elena Reutskaja et al., *Choice Overload Reduces Neural Signatures of Choice Set Value in Dorsal Striatum and Anterior Cingulate Cortex*, 2 NATURE HUM. BEHAV. 925, 925 (2018) (“The increased value of having more choice of course ignores costs that can likewise increase with choice set size, such as . . . the fear of regret from mistakenly passing up an ideal choice . . .”); Yoel Inbar et al., *Decision Speed and Choice Regret: When Haste Feels like Waste*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 533, 533 (2011) (noting that research into choice overload has demonstrated such effects as increased regret and reduced satisfaction with one’s choices); Simona Botti & Sheena S. Iyengar, *The Psychological Pleasure and Pain of Choosing: When People Prefer Choosing at the Cost of Subsequent Outcome Satisfaction*, 87 J. PERSONALITY & SOC. PSYCHOL. 312, 312–13 (2004) (observing that studies have demonstrated that choice overload induces dissatisfaction with outcomes and causes individuals to experience anxiety and depression). Most recent work in this field is based on Sheena S. Iyengar & Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995 (2000).

5. Benjamin Scheibehenne et al., *Can There Ever Be Too Many Options? A Meta-Analytic Review of Choice Overload*, 37 J. CONSUMER RES. 409, 420 (2010). See also Shlomo Benartzi & Richard H. Thaler, *How Much is Investor Autonomy Worth?*, 57 J. FIN. 1593, 1610 (2002) (finding that people use heuristics that

straining otherwise boundless options, people act to avoid what has been termed the “tyranny of choice.”⁶

This article explores whether the innate aversion to choice overload may help explain why international judges and arbitrators interpret standards differently from the way they interpret rules. Rules provide clear, rigid directives that require judges to decide a certain way in the presence of pre-determined facts. Standards—legal norms such as necessity, reasonableness, or fairness—require consideration and balancing of several factors to arrive at a result. These legal norms present similar cognitive challenges as those posed by choice overload in other walks of life, requiring the judge or arbitrator to choose between multiple different interpretive possibilities. Is it proportionate to put restrictions on the dual nationality of members of a legislature?⁷ Does a fair trial encompass the right of the accused to know the identity of witnesses?⁸ When is the action of a government in violation of the obligation to accord fair and equitable treatment to foreign investors?⁹

eliminate extreme options when choosing among different retirement portfolios); Jacob Jacoby, *Perspectives on Information Overload*, 10 J. CONSUMER RES. 432, 434–35 (1984) (arguing that consumers use a variety of strategies to limit the amount of information that they consider and avoid choice overload when making decisions).

6. Barry Schwartz, *The Tyranny of Choice*, SCI. AM., Apr. 2004, at 70.

7. See *Tănase v. Moldova*, 2010-III Eur. Ct. H.R. 361 (concluding that a Moldovan law prohibiting elected legislators with multiple nationalities from participating in Parliament was disproportionate and violated the European Convention on Human Rights).

8. See *Prosecutor v. Tadić*, Case No. IT-94-I-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 83–84 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995) (deciding that identifying the “general locality” of witnesses who were mere bystanders to the events in question was sufficient to assure a fair trial).

9. See MARTINS PAPANINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* 112–15 (2013) (arguing that the obligation of fair and equitable treatment should be understood broadly); ROLAND KLÄGER, “FAIR AND EQUITABLE TREATMENT” IN *INTERNATIONAL INVESTMENT LAW* 9–47 (2011) (noting the different approaches to fair and equitable treatment in international investment agreements); Roland Kläger, *Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness*, 11 J. WORLD INV. & TRADE 435, 439–43 (2010) (describing how “arbitral tribunals avoid dealing with the abstract concept of fair and equitable treatment” and instead focus on “the fact-specific nature of the norm” and the “facts of the specific case.”); see also *Suez v. Argentine Republic*, ICSID

The “uncomfortable vagueness”¹⁰ of standards leaves the interpreter with a substantial degree of discretion, the exercise of which is scarcely aided by reference to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).¹¹ As a result, interpreters and adjudicators may voluntarily limit their discretion by referring to extraneous materials, such as previous case law or domestic law, relieving them of the burden of making a novel interpretation and application of the standard to the case at hand. In this way, the interpretation of standards is guided by the desire to avoid the tyranny of choice.

In order to develop and test this hypothesis, this article is divided into four sections. Section II describes the social psychology research on decision makers’ reactions to choice overload. It identifies the limits of the current state of the art and considers how those studies might apply to the practice of treaty interpretation. In order to demonstrate how and why this perspective is useful in the context of international law, Section III explores one of the most varied interpretive practices in international law: the consensus doctrine of the European Court of Human Rights (ECtHR). It argues that the existing literature fails to account convincingly for “interpretation step zero”¹²—that is, the interpreter’s initial decision to adopt a particular interpretive approach. Section IV examines whether the social psychology literature on the tyranny of choice may fill this gap, analyzing 461 judgments rendered by the Grand Chamber of the ECtHR between 1994 and 2019 in order to explore the relationship between standards and the use of consensus. The findings lend support to the tyranny of choice hypothesis that humans’ inherent aversion to choice

Case No. ARB/03/17, Decision on Liability, ¶ 202 (Jul. 30, 2010) (stating the “fundamental and practical question that every arbitral tribunal must answer: By what criteria, standard, or test is an arbitral tribunal to determine whether the specific treatment accorded to the investments of a particular foreign investor in a given context is or is not ‘fair and equitable?’”).

10. Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 315.

11. Vienna Convention on the Law of Treaties, arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. See Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 50–52 (2013) (“[a]s the Vienna Convention rules often provide little help in resolving interpretive difficulties, investment tribunals routinely draw analogies with and from other legal disciplines.”).

12. See *infra* Section III(i).

overload affects how courts and tribunals interpret standards. Section V outlines future research which may further develop the links between behavioral social sciences and treaty interpretation. Section VI concludes.

It is widely presumed that key actors in international law—whether they be states, international organizations, judges, arbitrators, or government officials—act rationally when making decisions.¹³ However, recent literature in cognate disciplines, such as international relations and political science, draws on insights from behavioral economics and cognitive psychology in order to construct more descriptively accurate models of decision-making.¹⁴ This article builds on the nascent literature integrating empirical insights regarding the bounded rationality of decision makers to the analysis of international law.¹⁵

13. For an overview of the literature adopting a rational choice approach to the analysis of international law, see Anne van Aaken, *Rational Choice Theory*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0051.xml> [<https://perma.cc/B53T-PNZY>] (last updated Nov. 30, 2015).

14. See, e.g., LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES 25 (2015) (using information about “how real people make actual decisions” to develop a theory as to why developing countries join investment treaties); Emilie M. Hafner-Burton et al., *Decision Maker Preferences for International Legal Cooperation*, 68 INT’L ORG. 845, 845–48 (2014) (taking data from cognitive psychology and behavioral economics to explain individuals’ preferences regarding treaty design); Jonathan Mercer, *Rationality and Psychology in International Politics*, 59 INT’L ORG. 77, 77–79 (2005) (arguing that in certain contexts like strategic choice, “an explicitly psychological approach to rationality may beat a rationalist one.”); James Goldgeier & Philip E. Tetlock, *Psychology and International Relations Theory*, 4 ANN. REV. POL. SCI. 67, 67–69 (2001) (“developments in psychology can inform . . . second-level and third-level arguments about interstate politics.”); Jack S. Levy, *Loss Aversion, Framing, and Bargaining: The Implications of Prospect Theory for International Conflict*, 17 INT’L POL. SCI. REV. 179, 179–80 (1996) (examining the “implications of prospect theory for international conflict and for bargaining and coercion in particular.”).

15. See, e.g., Anne van Aaken, *Behavioral Aspects of the International Law of Global Public Goods and Common Pool Resources*, 112 AM. J. INT’L L. 67, 67–69 (2018) (applying behavioral insights from public goods games to international legal regimes for global public goods); Susan D. Franck et al., *Inside the Arbitrator’s Mind*, 66 EMORY L.J. 1115, 1115–21 (2017) (using “original experimental research to explore how international arbitrators decide cases.”); Anne-Lise Sibony & Alberto Alemanno, *The Emergence of Behavioural Policy-Making: A European Perspective*, in NUDGE AND THE LAW: A EUROPEAN

II. THE TYRANNY OF CHOICE

In modern liberal democracies, choice is everything. Freedom of choice distinguishes liberal democracies from other forms of government,¹⁶ increases feelings of autonomy,¹⁷ and may strengthen individuals' satisfaction with their final choice.¹⁸ Social psychology experiments are unequivocal in showing that some choice is better than none.

But choices both liberate and constrain. Over the second-half of the twentieth century, available choices have increased exponentially: in 1975, the average number of products sold in a typical supermarket was 8,948; in 2008, that number was almost 47,000.¹⁹ Whether this increase is attributable to neo-classical economics or mere "mundane marketing practices,"²⁰ we might expect consumers to be happy with more choice, as it permits them to find a product or service that more closely matches their needs. However, studies conducted over the course of the past thirty years show that consumers do not respond to increased choice as economic theory predicts. In-

PERSPECTIVE 1–5 (Alberto Alemanno & Anne-Lise Sibony eds., 2015) (applying behavioral sciences to E.U. policy-making); Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421, 421–24 (2014) (exploring the "benefits and challenges of extending the behavioral law and economics approach to public international law."); Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT'L L. 309, 309–16 (2013) (arguing that behavioral economics help predict when states may submit treaty reservations or otherwise limit their commitments).

16. See Adam Przeworski, *Freedom to Choose and Democracy*, 19 ECON. & PHIL. 265, 278 (2003) ("Proportional systems, by allowing for more parties and candidates, offer more choice to voters than majoritarian systems.")

17. See Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 AM. PSYCHOL. 68, 70 (2000) (noting that choice enhances autonomy and motivation); Marylène Gagné et al., *Facilitating Acceptance of Organizational Change: The Importance of Self-Determination*, 30 J. APPLIED SOC. PSYCHOL. 1843 (2000) (finding that offering a choice about how to do a task supports autonomy).

18. Cassie Mogliner et al., *The Mere Categorization Effect: How the Presence of Categories Increases Choosers' Perceptions of Assortment Variety and Outcome Satisfaction*, 35 J. CONSUMER RES. 202, 202 (2008).

19. *What to Do When There Are Too Many Product Choices on the Store Shelves?*, CONSUMER REP. (Jan. 2014), <https://www.consumerreports.org/cro/magazine/2014/03/too-many-product-choices-in-supermarkets/index.htm> [<https://perma.cc/9U7Y-BRVT>].

20. Iyengar & Lepper, *supra* note 4, at 995.

stead, they face significant cognitive, decisional, and emotional difficulties managing complex choices.

A. *The Effects of Choice Overload*

While important empirical work on choice theory conducted in the 1990s laid the foundations for later research,²¹ the seminal article reporting the results of three studies challenging the conventional notion that more choice is better was published in 2000 by social psychologists Sheena Iyengar and Mark Lepper.²²

In the first experiment, consumers in an upscale grocery store in California were presented with different varieties of jam in a tasting booth. The experimenters set up the tasting booth on two consecutive Saturdays, each for a period of five hours, but changed the number of choices presented to shoppers for tasting. The first group of consumers encountered a limited selection of six jams to sample, whereas the second group were presented with a much larger selection of twenty-four options.²³ Shoppers were allowed to try as many different jams as they wished and were given a coupon for one dollar off any subsequent purchase of jam that they made. While more consumers stopped at the larger choice selection tasting booth than the limited choice booth (sixty percent versus forty percent of total consumers),²⁴ those that sampled jam from the limited selection were ultimately significantly more likely to purchase a product from the selection.²⁵ Although the design

21. E.g., Ravi Dhar, *Consumer Preference for a No-Choice Option*, 24 J. CONSUMER PSYCHOL. 215 (1997); Eldar Shafir et al., *Reason-Based Choice*, 49 COGNITION 11 (1993); Eldar Shafir & Amos Tversky, *Thinking Through Uncertainty: Non-Consequentialist Reasoning and Choice*, 24 COGNITIVE PSYCHOL. 449 (1992).

22. Iyengar & Lepper, *supra* note 4.

23. Over the two five-hour periods, Iyengar and Lepper observed the behavior of approximately 754 consumers, of which 502 encountered one of the tasting displays. *Id.* at 996.

24. Although more consumers stopped at the larger choice tasting booth, those that did stop ultimately ended up sampling roughly the same number of jams as those that stopped at the limited choice tasting booth (an average of 1.5 jams for the larger choice booth versus 1.38 for the limited choice booth). *Id.* at 997.

25. Thirty percent of consumers that sampled from the limited choice booth subsequently purchased jam, whereas only three percent of those that tasted from the larger choice selection subsequently purchased. *Id.*

of this experiment precludes drawing firm conclusions,²⁶ it does support the hypothesis that individuals react to extensive choice differently from how rationalist theories of utility-maximizing behavior predict.

Subsequent experiments bore out these initial findings²⁷ and demonstrated their applicability to more consequential decisions. In one study, researchers tested whether employees' decision to participate in their employers' 401(k) pension plans was affected by the number of pension plan options presented to them.²⁸ While the majority of employers offered between ten and thirty options, the study demonstrated that firms offering ten or fewer different 401(k) options were significantly more likely to attract employee enrollment.²⁹ Counterintuitively, the provision of more choices resulted in a decreased likelihood that employees would make a decision in the first place.

Since 2000, over fifty empirical studies have explored the effects of choice overload.³⁰ These experiments have consistently shown that individuals react to choice overload in predictable ways,³¹ regardless of the setting in which the decision

26. It is unclear, for example, whether the limited selection of six jams appealed more to consumers that had intentionally come to the grocery store to buy jam, or whether the consumers faced with the larger choice booth felt that they did not have adequate time to find a product that satisfied them. *Id.* at 997–98.

27. Avni M. Shah & George Wolford, *Buying Behavior as a Function of Parametric Variation of Number of Choices*, 18 *PSYCHOL. SCI.* 369 (2007); Elena Reutskaja & Robin M. Hogarth, *Satisfaction in Choice as a Function of Alternatives: When "Goods Sate"*, 26 *PSYCHOL. & MKTG.* 197 (2009).

28. Sheena S. Iyengar et al., *How Much Choice is Too Much? Contributions to 401(k) Retirement Plans*, in *PENSION DESIGN AND STRUCTURE: NEW LESSONS FROM BEHAVIORAL FINANCE* 83 (Olivia S. Mitchell & Steve Utkus eds., 2004). Similar findings were reported in Shlomo Benartzi & Richard H. Thaler, *How Much is Investor Autonomy Worth?*, 57 *J. FIN.* 1593 (2002) (reporting that investors who rejected automatic portfolios in favor of choosing their own were less satisfied with their choice).

29. The study demonstrated that for every ten funds added, participation rates dropped between 1.5 and 2%. Iyengar et al., *supra* note 28, at 88–91.

30. Scheibehenne et al., *supra* note 5, at 412; Chernev et al., *supra* note 4, at 340.

31. *But see, e.g.*, Carol Moser et al., *No Such Thing as Too Much Chocolate: Evidence Against Choice Overload in E-Commerce*, *PROC. 2017 CHI CONF. ON HUM. FACTORS COMPUTING SYS.* 4358 (May 2017) (finding that the number of product options available online does not affect choice satisfaction); Benjamin Scheibehenne, *The Effect of Having Too Much Choice* (Jan. 21, 2008)

is made: they are likely to be more uncertain about their decision, less satisfied with their final decision, and more prone to regret the choice they made.³² The general nature of these findings suggests that humans are innately averse to choosing from large sets.³³

However, despite the myriad choices offered in daily life, people rarely experience choice paralysis or subsequent regret. Selections of shampoo, toothpaste, chocolate, or even pension schemes may not be ideal, but they do not normally cause the effects described in the tyranny of choice literature. Most people do not spend hours in the cereal aisle of the supermarket carefully weighing the pros and cons of each variety; instead, they go straight to the brands they have tried before and know they like.³⁴

Drawing on studies in the neighboring field of cognitive heuristics, researchers have suggested that individuals use heuristics—intuitive mental shortcuts³⁵—to limit choice sets

(Ph.D. dissertation, Humboldt University of Berlin), <https://edoc.hu-berlin.de/bitstream/handle/18452/16392/scheibehenne.pdf?sequence=1> [<https://perma.cc/YL9C-23Q9>] (reporting the results of choice overload tests on 850 participants but finding no significant effect).

32. Chernev et al., *supra* note 4, at 335; Inbar et al., *supra* note 4 at 539; Graeme A. Haynes, *Testing the Boundaries of the Choice Overload Phenomenon: The Effect of Number of Options and Time Pressure on Decision Difficulty and Satisfaction*, 26 *PSYCHOL. & MARKETING* 204, 210 (2009).

33. A recent neurological study finding that subjects experienced higher neurological processing costs when making decisions from large sets supports this hypothesis. Reutskaja et al., *supra* note 4, at 931.

34. For one of the first scholars to analyze individuals' non-maximizing nature, see Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 *PSYCHOL. REV.* 129 (1956).

35. Daniel Kahneman defined the heuristic process as follows: "Judgment is said to be mediated by a heuristic when the individual assesses a specified *target attribute* of a judgment object by substituting another property of that object—the *heuristic attribute*—which comes more readily to mind." Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 *AM. ECON. REV.* 1449, 1460 (2003). Peter Todd and Gerd Gigerenzer take a slightly different approach, focusing on "fast and frugal heuristics": "heuristics [that] limit their search of objects or information using easily computable stopping rules, and [] make their choices with easily computable decision rules." Peter M. Todd & Gerd Gigerenzer, *Précis of Simple Heuristics That Make Us Smart*, 23 *BEHAV. & BRAIN SCI.* 727, 731 (2000). This latter formulation is most appropriate for the purpose of this article.

and render decision-making easier.³⁶ This explanation makes sense when applied to the experiments described above, which were conducted in controlled conditions, designed to avoid exactly those considerations that play a predominant role in daily life. For instance, the jams at the tasting booths in Iyengar and Lepper's experiment were specifically chosen to prevent consumers from reaching for the more familiar, traditional flavors of jam like strawberry and raspberry.³⁷ In real life, however, people tend to stick with products they know when faced with extensive choice sets.

Heuristics may explain how and why people select familiar products even if there may be a better choice out there. More importantly, these cognitive shortcuts may explain how humans are able to operate in a world of endless choice.

B. *The Tyranny of Standards*

Domestic law scholars have long recognized the relevance of insights from behavioral social sciences to the study of the law. Behavioral approaches help explain why decision makers, including judges and government officials, make choices that deviate from those predicted by rational choice theory and form the basis of normative recommendations for improvements in the law.³⁸ Behavioral perspectives have challenged both the descriptive accuracy and normative desirability of

36. Scheibehenne et al., *supra* note 5, at 420. See also Benartzi & Thaler, *supra* note 5, at 1610 ("When choice problems are hard, people often (sensibly) resort to simple rules of thumb to help them cope."); Jacoby, *supra* note 5, at 434 ("Consumers use a variety of information processing strategies to limit the amount of information they permit to enter into their decision making").

37. Iyengar & Lepper, *supra* note 4, at 997.

38. For an excellent overview of the state of the field, see Eyal Zamir & Doron Teichman, *Judicial Decision-Making: A Behavioral Perspective*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doron Teichman eds. 2014). See also Eyal Zamir & Doron Teichman, BEHAVIORAL LAW AND ECONOMICS 526 (2018) (taking a behavioral approach to judicial decision-making); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015) (arguing that judges' emotional reactions to litigants influence their decisions); Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829 (2012) (suggesting that human loss aversion results in law that "more readily and effectively rectifies unjustified losses than helps people recover gains that they failed to obtain."); Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349 (2011) (asserting that behavioral sciences "offer some suggestions

conventional law and economics analyses that fail to account for the “bounded rationality, bounded willpower, and bounded self-interest”³⁹ of actors across a broad range of subject-matter, from tort and criminal law⁴⁰ to antitrust and environmental regulation.⁴¹ Behavioral analysis of the law has had a profound influence both within and beyond academia,⁴²

about the appropriate design of effective, low-cost, choice-preserving approaches to regulatory problems”).

39. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1476 (1998).

40. See, e.g., Yoel Halbersberg & Ehud Guttel, *Behavioral Economics and Tort Law*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW, *supra* note 38 (discussing the contributions of behavioral studies to “three key elements of tort law: the choice between liability regimes; the choice between tort liability and regulation . . .; and damages”); Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Detering Crime*, 1 AM. L. & ECON. REV. 276 (1999) (invoking “insights from psychological experiments to examine the attitudes of criminals towards uncertainty”).

41. See, e.g., Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573 (2014) (“showing how antitrust law can and should account for systematic and predictable boundedly rational behavior that is neither constant nor uniform.”); Adrian Kuenzler & Douglas A. Kysar, *Environmental Law*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW, *supra* note 38 (assessing the behaviorist critique of and defending precautionary environmental regulation); David Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315 (2003) (discussing the role of cognitive bias in the precautionary principle of environmental regulation).

42. One of the seminal articles in the behavioral law and economics movement, Christine Jolls, Cass R. Sunstein, and Richard Thaler’s *A Behavioral Approach to Law and Economics*, was the most cited law review article in the 20-year period from 1990 to 2009. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1507 (2012). Sunstein subsequently served as the Administrator of the Office of Information and Regulatory Affairs in the Obama Administration, Cass R. Sunstein, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10871/Sunstein> [<https://perma.cc/TJU6-B9HL>] (last visited Nov. 18, 2020), and Richard Thaler won the 2017 Nobel Prize for Economics. Richard H. Thaler, U. CHI. BOOTH SCH., <https://www.chicagobooth.edu/faculty/directory/t/richard-h-thaler> [<https://perma.cc/NP6D-WA2Q>] (last visited Nov. 18, 2020). Thaler and Sunstein’s 2008 book, *Nudge*, brought their research to the wider public and has sold over 1.5 million copies. *Nudge*, PENGUIN RANDOM HOUSE, <https://www.penguinrandomhouse.com/books/304634/nudge-by-richard-h-thaler-and-cass-r-sunstein/> [<https://perma.cc/CPG8-K93H>] (last visited Nov. 18, 2020).

leading some to claim that it is “one of the most influential developments in legal scholarship in recent years.”⁴³

One area in which behavioral insights have played a particular role is statutory interpretation.⁴⁴ Frederick Schauer has drawn on the tyranny of choice literature to suggest that human aversion to choice overload and the consequent desire to limit choices with heuristics may be useful to explain certain interpretive practices.⁴⁵ Schauer’s claims involve the distinction between rules and standards, which, despite having “a wide currency”⁴⁶ in Anglo-American legal theory, is less familiar to international lawyers.⁴⁷

Although rules and standards have been distinguished on numerous grounds, the most commonly accepted differences are in terms of their form and allocation of decision-making power within the legal system.⁴⁸ Rules are well-defined legal norms that require “a decisionmaker to respond in a determinate way to the presence of delimited triggered facts,”⁴⁹ whilst

43. Eyal Zamir & Doron Teichman, *Introduction*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW, *supra* note 38.

44. See Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 806 (2005) (applying the psychology of choice to the interpretation of standards); Schauer, *supra* note 10, at 303 (arguing that the adaptive behavior of individuals and institutions blurs the line between rules and standards).

45. Schauer, *supra* note 10, at 315–16; Schauer, *supra* note 44, at 811–13.

46. Schauer, *supra* note 10, at 305–06.

47. For one of the only treatments of standards as a distinct concept in international law, albeit in a different context, see YANNICK RADI, LE STANDARDISATION ET LE DROIT INTERNATIONAL: CONTOURS D’UNE THÉORIE DIALECTIQUE DE LA FORMATION DU DROIT [STANDARDIZATION AND INTERNATIONAL LAW: OUTLINES OF A DIALECTICAL THEORY OF LAW FORMATION] (2013).

48. See Colin S. Diver, *The Optional Precision of Administrative Rules*, 93 YALE L.J. 65, 66 (1983) (identifying the following parameters to distinguish legal rules: “generality and clarity, comprehensibility, accuracy of prediction, determinacy, weight, value, and consistency with social purpose.”).

49. Kathleen M. Sullivan, *The Supreme Court 1991 Term, Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992). See also Pierre Schlag, *Rules and Standards*, 22 UCLA L. REV. 379, 382–83 (1985) (defining rules as having “a hard empirical trigger and a hard determinate response” and standards “a soft evaluative trigger and a soft modulated response”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976) (distinguishing rules, which require officials “to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way” from stan-

standards are vague legal directives that “collapse decision-making back in to the direct application of the background principle or policy to a fact situation.”⁵⁰ The classic example of a rule is a speed limit on a highway: driving faster than the speed limit, even if there is no other driver on the road, no pedestrian in sight, and perfect weather conditions, breaks the law. In contrast, the paradigmatic legal standard in domestic systems is the ubiquitous standard of reasonableness, such as the reasonable person standard of care in tort law,⁵¹ the actions of a reasonable public authority in administrative law,⁵² or the reasonable investor in federal securities law.⁵³ Fairness and necessity also fall squarely within the category of standards.⁵⁴

The distinction between rules and standards is admittedly one of degree: no rule is infinitely precise, and no standard is hopelessly vague.⁵⁵ Nevertheless, the rules versus standards distinction can be analytically useful, in particular to assess the

dards, which require “the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard”).

50. Sullivan, *supra* note 49, at 58. See also Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules Vs. Standards Revisited*, 79 OR. L. REV. 23, 25–26 (2000) (stating that standards “require adjudicators (usually judges, juries, or administrators) to incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule”).

51. *E.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 CMT. A (AM. L. INST. 2010); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *Brown v. Kendall*, 60 Mass. 292, 292 (Mass. 1850); JOHN GARDNER, *TORTS AND OTHER WRONGS* 271 (2018).

52. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223, 233.

53. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1319–20 (2015).

54. See Kennedy, *supra* note 49, at 1688 (“Some examples [of a standard] are “good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness.”); HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* 131 (2d ed. 1994) (identifying “fair rate” as an example of a standard); Jeremy Horder, *Can the Law Do Without the Reasonable Person?*, 55 U. TORONTO L.J. 253, 254 n.5 (2005) (identifying “negligent,” “reasonable,” and “fair” as standards); Sullivan, *supra* note 49, at 64 (framing F.A. Hayek’s criticism of “fair” and “reasonable” tests in law as a criticism of legal standards).

55. Korobkin, *supra* note 50, at 26–27.

allocation of decision-making authority between rule makers and rule appliers within a legal system. Standards allow those applying legal norms, such as judges or police officers, the flexibility to assess competing considerations relevant to a particular situation and make “best all-things-considered decisions.”⁵⁶ Rules, on the other hand, allow the rule maker to determine in advance the factors that are privileged by the legal system. In this respect, rules are characterized by the fact that lawmakers can conclusively state whether certain actions or omissions should or should not be legally condoned.⁵⁷ In other words, rules constrain the discretion of law appliers while standards preserve it.⁵⁸

Conventional law and economics analyses of rules versus standards emphasize this power-allocating function, identifying the respective costs and benefits of adopting each approach in particular contexts.⁵⁹ However, many of these analyses assume that the manner in which rules and standards are interpreted and applied does not affect their power-allocating function—an assumption which is not born out in practice. In reality, those that interpret and apply laws commonly adopt techniques to soften the otherwise sharp contours of a legal rule. Rule appliers might determine that an implicit exception applies to a rule,⁶⁰ or that a rule should be overridden in certain circumstances,⁶¹ or that a purposive interpretation trumps

56. Schauer, *supra* note 44, at 805. See also NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW 167 (2005) (stating that standards allow the applier “to strike a balance that takes account of [an] apparently irreducible plurality of values.”).

57. See HART, *supra* note 54, at 133 (explaining that certain areas of conduct “are successfully controlled *ab initio* by rule . . . instead of a variable standard” because “very few concomitant circumstances incline us to regard them differently.”).

58. Schauer, *supra* note 10, at 309.

59. Korobkin, *supra* note 50, at 42–43.

60. See *Ždanoka v. Latvia*, 2006-IV Eur. Ct. H.R. 71–72 (recognizing an implicit exception to Article 3 of Protocol 1 of the ECHR); Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 311 (1982) (noting that implied exceptions “recognize the coexistence of market and regulatory values within a regulatory framework.”).

61. See *Tănase v. Moldova*, 2010-III Eur. Ct. H.R. 405–06 (acknowledging that the “passive” right to stand for election under Article 3 of Protocol 1 of the ECHR may be overridden in certain circumstances); *Johnson v. California*, 543 U.S. 499, 505 (2005) (stating that the Equal Protection Clause of the

the ordinary meaning of the text of a provision.⁶² And, just as interpreters often resist the strictures of legal rules, they similarly resist the flexibility afforded them by standards, to almost the same degree.⁶³ Those applying standards create multi-stage tests to specify the considerations that must be taken into account,⁶⁴ use precedent to guide and limit their interpretations,⁶⁵ and import analogous norms from both inside and outside the legal system to constrain their otherwise broad discretion.⁶⁶

Fourteenth Amendment may be overridden when the measures are “narrowly tailored” to meet a “compelling government interest”).

62. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 189 (Sari Bashi trans., 2005) (“When the messages the judge receives about purpose conflict, he or she must achieve the subjective goal of the legislature while actualizing the system’s fundamental values. Under certain circumstances, the type of text . . . justifies disregarding legislative intent.”). For an example of an interpreter using purpose to trump text in the context of international dispute settlement, see *Maritime Delimitation in the Indian Ocean (Som./Kenya)*, Preliminary Objections, 2017 I.C.J. Rep. 3, ¶¶ 64–98 (Feb. 2).

63. Schauer, *supra* note 44, at 805.

64. See *Paradiso v. Italy*, App. No. 25358/12, ¶ 179–84 (Jan. 24, 2017), <http://hudoc.echr.coe.int/eng?i=001-170359> [<https://perma.cc/GFV4-MVJT>] (summarizing the Court’s two-step test to determine whether a measure is “necessary in a democratic society” under Article 8(2) of the ECHR); Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) (stating that a determination of whether a measure is “necessary” under Article XX(b) of the GATT requires consideration of three factors: “the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness.”).

65. See *Gold Reserve Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 568–74 (Sept. 22, 2014) (interpreting the obligation to accord investors “fair and equitable treatment” in accordance with prior arbitral awards); *Volga (Russ. v. Austl.)*, Case No. 11, Judgment of Dec. 23, 2002, 2002 ITLOS Rep. 10, ¶¶ 63–65 (assessing a “reasonable” bond for the release of a vessel and crew under UNCLOS article 292 in line with the previous judgments of ITLOS).

66. See *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 192–95 (Sept. 5, 2008) (drawing on jurisprudence of the World Trade Organization to interpret Article XI of the Argentina-U.S. Bilateral Investment Treaty); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 391–92 (Jul. 14, 2006) (drawing on the ICJ’s interpretation of “arbitrary” in the *ELSI* case to interpret Article II.2(b) of the Argentina-U.S. Bilateral Investment Treaty); see also Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 223, 228 (2013) (noting the role that case law plays in supplementing “deficient” treaty law).

At first glance, these interpretive practices seem somewhat counterintuitive. One might expect interpreters to be grateful for the flexibility and discretion that standards afford them and embrace the opportunity to make a decision based on all the relevant circumstances of the case at hand.⁶⁷ Indeed, this idea should be even more applicable in the context of international adjudication, where judges and arbitrators are at least formally unencumbered by a system of precedent.⁶⁸ So why do interpreters voluntarily constrain their discretion in this way? Although path dependence or desire to promote legal certainty might motivate interpreters' reasoning, Schauer suggests that another, more neglected reason might help explain the narrowing of standards: the psychological aversion to choice overload.⁶⁹

The idea is intuitively appealing. Just as individuals avoid the tyranny of choice by falling back on heuristics to limit their choices in daily life, standard interpreters draw on materials that guide their reasoning and limit possible interpretations, thus simplifying their decision. In doing so, interpreters avoid the responsibility of making a novel analysis of the standard in each case, decreasing the time and effort that they would otherwise spend trying to interpret and apply the standard to the case at hand. Although interpreters will inevitably be affected by the legal, historical, and political context in which they operate, it would overemphasize the determinacy of standards to

67. Schauer, *supra* note 44, at 805.

68. Despite the absence of a formal system of precedent, it is clear that something akin to a *de facto* system operates in many international dispute settlement regimes. See Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 5 (2011) ("In international law, the *stare decisis* rule has been excluded since 1922, but permanent jurisdictions constantly refer to their previous decisions."); Harlan Grant Cohen, *Theorizing Precedent in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 268, 288 (Andrea Bianchi et al. eds., 2015) ("Precedent is part of the spoken and unspoken strategies of international law interpretation."); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 357 (2007) ("[A]rbitrators increasingly appear to refer to, discuss and rely on earlier cases."); Patrick M. Norton, *The Role of Precedent in the Development of International Investment Law*, 33 ICSID REV. 280, 280 (2018) ("[A]rbitration tribunals rely on arbitral precedent as a principal source for rules of international law. Orthodox international legal doctrine, however, denies that the rulings of earlier tribunals may serve as a source of that law.")

69. Schauer, *supra* note 44, at 811–12; Schauer, *supra* note 10, at 315–16.

suggest that interpreters' discretion is wholly, or even largely, constrained by contextual factors. It is in relation to this discretion that the tyranny of choice may have an effect.

In international law, the distinction between rules and standards is relevant to the understanding of how Articles 31 and 32 of the VCLT—rules which are widely recognized to reflect customary international law—constrain and guide interpretation.⁷⁰ The interpretive elements listed in the general rule of interpretation in Article 31, such as ordinary meaning, context, and object and purpose, are scarcely helpful to the interpreter applying a standard in a given case.⁷¹ Looking to the ordinary meaning of fairness, for example, is unlikely to help an investment tribunal operationalize the obligation to accord investors fair and equitable treatment or assist an international criminal tribunal in upholding the guarantee that a defendant shall have a fair trial. As a result of this inherent vagueness, courts and tribunals frequently draw on interpretive materials that fall outside the bounds of Articles 31 and 32 of the VCLT, such as precedent,⁷² analogies to other international legal regimes,⁷³ or domestic law,⁷⁴ when interpreting

70. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, ¶ 83 (Mar. 31). Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 10–12, WTO Doc. WT/DS/8/AB/R (adopted Oct. 4, 1996); *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at ¶¶ 29–32 (1975); *Iron Rhine (“Ijzeren Rijn”) Railway (Belg. v. Neth.)*, 27 R.I.A.A. 35, ¶ 45 (May 24, 2005).

71. See KLÄGER, *supra* note 9, at 437–38 (stating that a literal interpretation would be “doomed to failure from the outset”); Daniel Peat, *International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method*, 9 J. INT’L DISP. SETTLEMENT 654, 659 (2018) (“Nor do Articles 31 and 32 of the VCLT provide interpreters with much assistance in interpreting [fair and equitable treatment].”); see also Roberts, *supra* note 11, at 51 (“[W]hen investment treaties and general investment law overlap, it is unclear to what extent the former codifies, ousts, or exists alongside the latter.”).

72. Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 LOY. L.A. INT’L & COMP. L. REV. 99, 122–27 (2011). See Niccolò Ridi, *The Shape and Structure of the ‘Useable Past’: An Empirical Analysis of the Use of Precedent in International Adjudication*, 19 J. INT’L DISP. SETTLEMENT 200, 233 (2019) (showing that nine of the seventeen most cited paragraphs from investment treaty arbitration awards relate to the fair and equitable treatment obligation).

73. See Roberts, *supra* note 11, at 50 (claiming that the investment treaty system is “forged in part by comparisons being drawn between it and other

standards. The tyranny of choice hypothesis may play a useful role in theorizing how and why such materials are used, particularly where other explanatory theories fall short.

In order to explore whether the tyranny of choice hypothesis has purchase in international law, the following sections of this article examine one of the most controversial yet prevalent interpretive practices of any international court or tribunal: the consensus doctrine of the ECtHR. There are practical and theoretical justifications behind this case study. From a practical perspective, ECtHR jurisprudence offers a publicly available, text-searchable, rich repository of interpretive practice. The Court's online database, HUDOC, contains tens of thousands of full-text searchable judgments, allowing a researcher to analyze the relationship between standards and the consensus doctrine over a large number of judgments with relative ease.⁷⁵ From a theoretical standpoint, there is still no convincing account of why the ECtHR adopts consensus analysis in any given case. The ECtHR's practice cannot be understood as a straightforward application of Articles 31 or 32 of the VCLT,⁷⁶ and the existing literature, which has largely fo-

legal disciplines."); Martins Paparinskis, *Analogies and Other Regimes of International Law*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* 73, 73 (Zachary Douglas et al. eds., 2014) ("All of the constituent elements of investment law flow from . . . law-making techniques of international law").

74. DANIEL PEAT, *COMPARATIVE REASONING IN INTERNATIONAL COURTS AND TRIBUNALS* 217–18 (2019). See *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 506 (Jan. 14, 2010) (stating that a measure "cannot be said to be unfair, inadequate, inequitable or discriminatory, when it has been adopted by many countries around the world."); LEENA GROVER, *INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 65 (2014) (stating that the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda's use of domestic law to interpret their Statutes is the "most varied and unexplained" interpretive aid); Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 33 (Stephan W. Schill ed., 2010) (suggesting that comparative domestic law may help to "concretize" investor rights).

75. Search for English language judgments, HUDOC, [https://hudoc.echr.coe.int/eng#{%22languageisocode%22:\[%22ENG%22\],%22documentcollectionid%22:\[%22JUDGMENTS%22\]}](https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22documentcollectionid%22:[%22JUDGMENTS%22]}) (Select "Case law," then "Judgments," the apply the English language filter).

76. Cf. Georg Nolte (Special Rapporteur), First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, ¶

cused on whether the consensus doctrine is normatively desirable or whether legitimacy considerations motivate the Court's use of consensus, does not provide a convincing alternative account of the Court's practice.

III. THE CONSENSUS DOCTRINE

Since its inception in 1959, the ECtHR has come to dominate the international human rights landscape. In sheer numeric terms, the activity of the Court is unsurpassed. To date, it has rendered over 21,600 judgments,⁷⁷ making it the most active international human rights court in the world. Whether measured in terms of caseload or its influence on domestic and international legal systems,⁷⁸ the work of the Court has had a profound impact, leading some to hail the European Convention on Human Rights (ECHR)⁷⁹ regime as the "most effective human rights regime in the world."⁸⁰

The consensus doctrine plays an important role in the Court's interpretive arsenal,⁸¹ often constituting "the primary determining factor as to whether a right is one protected by the Convention."⁸² Under the doctrine, the Court surveys the domestic law of the Contracting Parties to the ECHR, as well as

37, UN Doc A/CN.4/660 (Mar. 19, 2013) (framing the consensus doctrine as the subsequent practice of the Contracting Parties).

77. EUR. CT. HUM. RTS., ECHR OVERVIEW: 1959–2018 3 (2019), https://www.echr.coe.int/documents/overview_19592018_ENG.pdf [<https://perma.cc/F97V-DQML>].

78. See generally, e.g., Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014) (discussing impacts of Court rulings on LGBT issues on Council of Europe member states).

79. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

80. Alec Stone-Sweet & Helen Keller, *Introduction: The Reception of the ECHR in National Legal Orders*, in A EUROPEAN SYSTEM OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 11 (Helen Keller & Alec Stone-Sweet eds., 2008).

81. For background information as to the definition of consensus, see Paul Mahoney & Rachel Kondak, *Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?*, in COURTS AND COMPARATIVE LAW 121–22 (Mads Andenas & Duncan Fairgrieve eds., 2015).

82. John L. Murray, *Consensus: Concordance, or Hegemony of the Majority?*, in DIALOGUE BETWEEN JUDGES 17 (European Court of Human Rights ed., 2008).

international agreements to which those states subscribe,⁸³ in order to determine the existence of a common approach to a certain issue among States parties. Issues to which this doctrine has been applied include the legal recognition of the sexual identity of transsexual persons,⁸⁴ conscientious objection from military service,⁸⁵ and civil partnerships for same-sex couples.⁸⁶ Should the Court find that a consensus exists,⁸⁷ it will usually interpret the Convention provision at issue in line with that position.⁸⁸ Conversely, the absence of a consensus will normally result in deference to the respondent State.

The consensus doctrine has generated a considerable amount of academic interest over the past thirty years.⁸⁹ While

83. KANSTANTIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 39 (2015). The Court has also cited non-binding international norms to which Contracting Parties have subscribed, as well as treaties that had been concluded but not yet entered into force. *See, e.g.*, *V. v. United Kingdom*, 1999-IX Eur. Ct. H.R. 144–45 (noting an “international tendency in favour of the protection of the privacy of juvenile defendants”); *Demir v. Turkey*, 2008-V Eur. Ct. H.R. 425–27 (summarizing instances when the Court based its interpretation on treaties that had not yet been ratified).

84. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 10 (1986).

85. *Bayatyan v. Armenia*, 2011-IV Eur. Ct. H.R. 3–4.

86. *Vallianatos v. Greece*, 2013-VI Eur. Ct. H.R. 146.

87. The term “consensus” is a misnomer; the Court generally considers a consensus position to exist when fewer than six to ten States adopt an approach contrary to that of the majority. Luzius Wildhaber et al., *No Consensus on Consensus: The Practice of the European Court of Human Rights*, 33 HUM. RTS. L.J. 248, 259 (2013).

88. *But see, e.g.*, *A. v. Ireland*, 2010-VI Eur. Ct. H.R. 189 (“Although there was a consensus amongst a substantial majority of the Contracting States towards allowing abortion on broader grounds than those accorded under Irish law, that consensus did not decisively narrow the broad margin of appreciation of the State.”).

89. *See generally, e.g.*, BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND (Panos Kapotas & Vassilis P. Tzevelekos eds., 2019) (explaining and evaluating the ECtHR’s use of consensus); Ineta Ziemele, *European Consensus and International Law*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW 23–40 (Anne van Aaken & Iulia Motoc eds., 2018) (analogizing European Consensus to the sources of international law and rules of treaty interpretation); DZEHTSIAROU, *supra* note 83 (analyzing whether consensus can increase the ECtHR’s legitimacy); Kanstantin Dzehtsiarou, *Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights*, PUB. L. 534 (2011) (arguing that the ECtHR uses consensus as a legitimizing tool); GEORGE LETSAS, A THEORY OF

much of the scholarship has focused on the purported failings of the consensus doctrine, particularly the opacity of the Court's methodology,⁹⁰ a substantial amount of work has focused on justifying why the Court should refer to the domestic law and international agreements of the Contracting Parties when interpreting the Convention.⁹¹

This section examines three strands of the literature justifying the Court's use of the consensus doctrine and illuminates important elements of the Court's practice. Ultimately, it concludes that this literature does not answer the prior question of why the Court decides to use consensus analysis in any given case.

INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007) (providing a critical account of the ECtHR's use of consensus, margin of appreciation, and evolutive interpretation); Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 134 (1993) (positing that the ECtHR uses consensus as an expansive tool to "reach groups of individuals whom the drafters did not view as falling within the Convention's protective ambit.").

90. See, e.g., Jeffrey A. Brauch, *The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights*, 52 HOW. L.J. 277, 278 (2009) (arguing that "[d]espite hundreds of cases and over thirty years of experience, the ECHR has still not made clear what a European consensus is, or even how one would identify the consensus if it existed."); Paul Martens, *Perplexity of the Nationality Judge Faced with Vagaries of European Consensus?*, in DIALOGUE BETWEEN JUDGES, *supra* note 82, at 54 (stating that consensus is "sometimes positive, sometimes negative, sometimes descriptive, sometimes prescriptive"); Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1233 (1998) (calling the methodology of the ECtHR "conclusory superficiality" that is "fundamentally a misuse of comparative law"); Helfer, *supra* note 89, at 140 (noting the "lack of precision" of the Court's use of consensus). The Court's methodology has improved since the inception of a dedicated Research Division; Kanstantin Dzehtsiarou, *Consensus from Within the Palace Walls* 5–6 (U. Coll. Dublin Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 40/2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678424 [<https://perma.cc/9C6F-7MMS>].

91. See Kanstantin Dzehtsiarou, *European Consensus: New Horizons*, in BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND, *supra* note 89, at 32 ("The overarching question concerning [the consensus doctrine] is why the ECtHR deploys it.").

A. Interpretation Step Zero

Before examining the scholarship on consensus, it is worth thinking about why it is important to understand the ECtHR's reasons for using the consensus doctrine. Here, domestic law provides an instructive parallel.

In the United States, federal and state legislatures have passed numerous statutory rules to govern the interpretation of a wide range of subject matter,⁹² including general statute law,⁹³ criminal law,⁹⁴ and national security law.⁹⁵ Some of these rules direct judges to ignore the preparatory work of a statute unless ambiguous, while others order judges to do exactly the opposite.⁹⁶ Some rules codify textual canons of interpretation,⁹⁷ while still others enshrine the separation of powers between the legislature and the judiciary.⁹⁸ Yet despite this widespread practice, courts systematically and continually

92. For a list of codified interpretive rules, see Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 350 n.35 (2010).

93. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1785–1797 (2010) (discussing Texas' and Connecticut's statutory rules of interpretation).

94. See Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 289 n.8 (2012) (noting the twenty-four states that have adopted the interpretive rules prescribed in §2.02(3) and 2.02(4) of the American Law Institute's Model Penal Code); Jeffrey A. Love, *Fair Notice About Fair Notice*, 121 YALE L.J. 2395 (2012) (describing state statutes that attempt to override the interpretive rule that in case of ambiguity the crime shall be interpreted in favor of the defendant).

95. See Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National Security Law*, 43 GA. L. REV. 1059 (2009) (discussing "clear-statement" requirements that a statute not be interpreted as derogating from a certain position, e.g., from the prohibition on cruel, inhuman, or degrading treatment, unless such derogation is expressly and specifically made).

96. Gluck, *supra* note 93, at 1845 (noting that only the Oregon and Texas statutory rules of interpretation allow reference to legislative history without a prior finding of ambiguity).

97. See Scott, *supra* note 92, at 354 ("New Mexico has codified the *ejusdem generis* and *noscitur a sociis* canons"). For an explanation of these canon in the international context, see Freya Baetens, *Ejusdem Generis and Noscitur a Sociis, in BETWEEN THE LINES OF THE VIENNA CONVENTION? CANONS AND OTHER PRINCIPLES OF INTERPRETATION IN PUBLIC INTERNATIONAL LAW* (Joseph Klingler et al. eds., 2018).

98. See Scott, *supra* note 92, at 384 (discussing the codification of the "avoidance canon," according to which statutes should be interpreted to avoid unconstitutional results).

avoid the strictures placed on them by statutory rules of interpretation, preferring instead to adopt their own interpretive methodologies.⁹⁹

The key to understanding why codified rules of interpretation fail is not looking at the rule itself, but rather looking at the reasons that underpin a particular interpretive choice. As one commentator has noted:

To treat an interpretive methodology as law requires that, before applying the methodology, the judge first decide whether the methodology governs the interpretation of the particular statute in the particular case in which it is invoked. The judge cannot rely on the statute itself to determine whether to apply the statute because whether the statutory interpretation methodology in the statute should be applied is precisely what needs to be determined. The judge must instead, therefore, appeal to *some other* source of interpretive authority before applying the methodological framework.¹⁰⁰

There are important lessons here for international law. When discussing international legal interpretation, the shadow of codified rules of interpretation—Articles 31 and 32 of the VCLT—looms large. However, as is the case with legislated interpretive rules in domestic legal systems, those provisions are not the entire inquiry. They cannot explain why some tribunals adopt a different interpretive approach¹⁰¹ or have different conceptions of the VCLT rules themselves.¹⁰²

99. Andrew Tutt, *Interpretation Step Zero: A Limit on Methodology as "Law"*, 122 YALE L.J. 2055, 2056–57 (2013); Love, *supra* note 94, at 2397–98; Brown, *supra* note 94, at 293. See also Gluck, *supra* note 93, at 1783 (discussing Oregon courts' refusal to consider a statute purporting to overrule its statutory interpretation test).

100. Tutt, *supra* note 99, at 2058.

101. See, e.g., Prosecutor v. Erdemović, Case No. IT-96-22, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 3–5 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) (laying out a three-stage interpretive process in which the VCLT rules constitute only the initial step).

102. Compare Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, in THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 453, 459 (Giorgio Sacerdoti et al. eds., 2006) (describing the process of interpretation within the WTO as "a rigid sequence of autonomous or discrete steps, each of which has to be explicitly addressed and 'exhausted' before moving onto the next one."), with Maritime Delimitation in Indian Ocean

Importantly, the VCLT rules also fail to explain why tribunals use interpretive materials that are extraneous to the treaty, such as domestic law. Moreover, from an analytical perspective, they fail to provide a normative benchmark to evaluate that interpretive practice.¹⁰³

The answer to these questions lies in the reasons that underpin an interpreter's choice to adopt a particular interpretive approach.¹⁰⁴ Selection of an interpretive methodology cannot solely be understood in relation to the methodology itself. Understanding the reasons for that choice—whether policy concerns, educational background and professional training, psychological predispositions, or something else—allows for more constructive engagement with the interpretive methodology on three different levels.

On the micro-level, looking to the reason underlying a particular interpretive choice might provide a normative benchmark against which to evaluate the interpreter's use of that methodology. For example, if the interpretive approach adopted by the Appellate Body of the World Trade Organization—often characterized by its textuality—is motivated by the objective of ensuring the security and predictability of the in-

(Som./Kenya), Preliminary Objection, 2017 I.C.J. Rep. 3, ¶ 65 (Feb. 2) (stating that the text of the treaty cannot be interpreted “without a prior analysis of the text of the MOU as a whole, which provides the context in which any particular paragraph should be interpreted and gives insight into the object and purpose of the [treaty at issue]”).

103. The benchmarking character of rules is what Gerald Postema has called the “evaluative dimension” of law; Gerald Postema, *Positivism and the Separation of Realists from their Scepticism*, in *THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY: 50 YEARS ON* 259, 272 (Peter Cane ed., 2010). See also Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 745 (1982) (stating that codified interpretive rules “constrain the interpreter, thus transforming the interpretive process from a subjective one into an objective one, and they furnish the standards by which the correctness of the interpretation can be judged”).

104. Cf. Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 445, 445 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (identifying a gap in the literature in relation to theories that explain particular interpretive choices).

ternational trade regime, how successful is it in achieving that goal?¹⁰⁵

On the meso-level, identifying why an interpreter adopts a particular methodology enables one to ask whether that motivation or reason is one that the legal regime or institution should promote. For example, if the ECtHR's evolutive interpretation of the ECHR is motivated by a desire to maintain the relevance of the Convention's protections in light of contemporary conditions,¹⁰⁶ is it right for the Court—and not the Contracting Parties—to determine when and how to change the scope of Convention rights?

At the macro-level, examining the reason why an interpretive methodology is adopted might shed new light on problems with the institution in which the interpretation occurs. This might, in turn, lead to discussion of institutional or legal reform to attempt to remedy these problems. For example, if the diverse backgrounds of international investment treaty arbitrators result in fragmented and sometimes conflicting interpretations of the same provision in international investment agreements,¹⁰⁷ would institutional reform (such as the creation of a multilateral investment court) or treaty modification (such as more detailed provisions on investor protection)¹⁰⁸ best respond to those concerns?

105. See Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 31, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) (“WTO rules are reliable, comprehensible and enforceable . . . They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the ‘security and predictability’ sought for the multilateral trading system by the Members of the WTO . . .”). See also Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”).

106. *E.g.*, *Airey v. Ireland*, 31 Eur. Ct. H.R. (ser. A) at 11 (1979).

107. See Pauwelyn & Elsig, *supra* note 104, at 467 (identifying tribunal members' differing visions of the right role of the court, the mandate of the court, or the role of international law as “supply-side interpretation incentives” that affect interpretive outcomes); Roberts, *supra* note 11, at 53–57 (suggesting that the interests and backgrounds of arbitrators may influence the analogies they draw when interpreting investment treaties).

108. See, *e.g.*, Netherlands Model Investment Agreement art. 9(2), UNCTAD (Mar. 22, 2019), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> [<https://>

Scholarship on the consensus doctrine often blurs the line between what motivates the Court to use the doctrine and its potential beneficial or detrimental effects. The following subsections attempt to disentangle these issues and explore whether the current literature convincingly explains why the Court uses the consensus doctrine. These theories can be divided into three categories: those arguing that the Court does (or should) use consensus for reasons of consent; those arguing the Court uses consensus for legitimacy; and those arguing that the Court's use of consensus is for epistemology.¹⁰⁹

B. *Consensus as Consent*

Consent-based theories suggest that by invoking the consensus doctrine, the Court is seeking the tacit consent of the Contracting Parties to a particular meaning of the provision in question.¹¹⁰ Consistent with a traditional voluntarist conception of international law, some commentators consider that consensus provides a means by which the Court can ascertain the “implicit and up-to-date consent” of states regarding the

perma.cc/59NN-526X] (specifying the measures that constitute a breach of the fair and equitable treatment obligation); SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY 23 (2012), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2875/download> [https://perma.cc/2FYK-QH4C] (stating that the more detailed fair and equitable treatment provision contained in article 5 of the Model BIT “is the least likely to lead to mischief through expansive interpretations by arbitrators”).

109. See generally Andreas Føllesdal, *A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine*, in BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND, *supra* note 89, at 200–08 (discussing the use of consensus in relation consent, legitimacy, and epistemology).

110. See DZEHTSIAROU, *supra* note 83, at 152 (“European consensus can be conceptualised as an updated consent because it reflects the current state of law and practice in the Contracting Parties. It means that the majority of them agreed to and accepted a certain legal regulation.”); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 852 (1999) (arguing that from a theoretical perspective, consensus “can draw its justification only from nineteenth-century theories of State consent”); Thomas Kleinlein, *Constructive Consensus and Domestic Democracy*, in BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND, *supra* note 89, at 214 (“In a way, [consensus] functions as a renewal of consent and imparts substantive legitimation.”).

legal regulation of a particular issue.¹¹¹ They argue that this is necessary because the ECtHR has interpreted the Convention more expansively than originally envisaged, surpassing states' initial consent to be bound.¹¹² According to this theory, the Court uses the consensus doctrine to ensure that states are only bound by that to which they have implicitly consented. This in turn helps to ensure that states continue to accept and implement the Court's judgments.¹¹³

However, consent-based theories fail to convincingly explain why the Court uses the consensus doctrine. Most importantly, these theories are clearly at odds with the Court's actual practice. The Court has never stated that it must find a contemporary form of consent implicit in states' domestic practice, and the familiar refrain that often accompanies its use of consensus, that "the Convention [is] a 'living instrument' to be interpreted in the light of present-day conditions,"¹¹⁴ does not suggest as much. Indeed, the Court's evolutionary interpretation of the Convention gives the distinct impression that it does not feel bound by the strictures of an orthodox voluntarist conception of international law. The idea of state consent—whether to the legal regulation of certain subject matter or to a particular interpretation of the Convention—therefore fails to capture the reason why the Court uses the consensus doctrine.

C. *Consensus as Legitimacy*

Some authors have suggested that the Court uses consensus as a tool to gain legitimacy in the eyes of the Contracting

111. DZEHTSIAROU, *supra* note 83, at 152.

112. *Id.* at 152. *See also* Kleinlein, *supra* note 110, at 213 ("[T]he substantive legitimacy imparted by the Convention as a treaty ratified in the state parties' parliaments has, to a certain extent, faded over the years. The significance of initial consent has been weakened by the course of time.").

113. DZEHTSIAROU, *supra* note 83, at 154–55.

114. *A. v. Ireland*, 2010-VI Eur. Ct. H.R. 278. The Court first used this phrase in *Tyrer v. United Kingdom*: "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field." *Tyrer v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 12 (1978).

Parties or the general public.¹¹⁵ The often implicit premise of these theories is that the Court comprehends the weaknesses inherent in the Convention mechanism and acts to enhance its legitimacy with a view to the acceptance and implementation of its judgments, which it lacks the power to enforce. This is particularly relevant in the context of the growing discontent of Contracting Parties over the purported judicial activism of the Court.¹¹⁶

The first of these theories argues that consensus is deployed to demonstrate to the Contracting Parties that the Court's interpretation of the Convention is not based on mere judicial whim.¹¹⁷ In the words of Paul Mahoney, a former

115. On legitimacy as an analytical concept in international law, see Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729 (2014).

116. See Comm. of Ministers, Council of Eur., *Copenhagen Declaration*, ¶¶ 28, 31 (Apr. 13, 2018), https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf [<https://perma.cc/K6UY-RQJ7>] (emphasizing subsidiarity and the Court's doctrine of the margin of appreciation); Comm. of Ministers, Council of Eur., *Brussels Declaration*, ¶ 7 (Mar. 27, 2015), https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf [<https://perma.cc/8P8K-E474>] ("Invites the Court to remain vigilant in upholding the States Parties' margin of appreciation"); Comm. of Ministers, Council of Eur., *Brighton Declaration*, ¶¶ 3, 11, 12 (Apr. 20, 2012), https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf [<https://perma.cc/HD8Q-YBL4>] (emphasizing subsidiarity, sovereignty, and margin of appreciation). One result of this reform process was the conclusion of Protocol No. 15 in 2013, which will add the following preambular paragraph to the Convention: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention." Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms art. 1, June 24, 2013, 213 C.E.T.S. No. 213, https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf [<https://perma.cc/2NZF-6XD8>].

117. See Mahoney & Kondak, *supra* note 81, at 120 ("Convincing and reliable interpretative techniques, such as the search for common European ground, brings as much objectivity to the exercise as possible and serve to justify any law-making accomplished by the Court when filling interpretative gaps left in the Convention law. The comparative-law process thereby adds legitimacy to the judgments of the Court."); Wildhaber et al., *supra* note 87, at 251 ("The Court's judgments that can be traced to consensus – and thus to domestic legal systems – are likely to enjoy a higher degree of legitimacy and plausibility, to provoke less criticism and to be executed more readily");

Judge and Registrar of the ECtHR, “empirical evidence, namely the perceivable changes in the legislative patterns of the Contracting States, is a counter to the argument that the Strasbourg judges are trespassing into the Treaty-amendment domain of the Contracting States or are simply relying on their own personal sense of justice to make new law.”¹¹⁸ Under this theory, the Court is viewed as a rational and strategic actor whose interpretive reasoning is designed to speak to Contracting Parties to the ECHR for the particular purpose of demonstrating the absence of judicial activism.¹¹⁹ This message of judicial restraint augments the social legitimacy of the Court in the sense that the relevant interpretive community, i.e. the Contracting Parties, are more likely to consider a decision based on consensus to be within the bounds of acceptable judicial discretion.¹²⁰ Others have framed a similar idea in a slightly different way, suggesting that the Court uses consensus to send messages to Contracting Parties regarding future restrictions that, although not yet in effect, are likely to occur in the near future.¹²¹ This enables the Court to use consensus to

Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 76 (1990) (“the comparative consensus shows that the judge-made change in Convention law has not ‘come out of a blue sky.’”).

118. Paul Mahoney, *The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law*, in *COMPARATIVE LAW BEFORE THE COURTS* 147 (Guy Canivet et al. eds, 2005).

119. On epistemic and interpretive communities more generally, see Michael Waibel, *Interpretive Communities in International Law*, in *INTERPRETATION IN INTERNATIONAL LAW* (Andrea Bianchi et al. eds, 2015).

120. Legal legitimacy can be defined as “a property of an action, rule, actor or system which signifies a legal obligation to submit to or support that action, rule, actor or system.” Thomas, *supra* note 115, at 735. Social legitimacy is “the property projected onto an action, rule, actor or system by an actor’s *belief* that that action, rule, actor or system is morally or legally legitimate.” *Id.* at 741.

121. See Shai Dothan, *Judicial Deference Allows European Consensus to Emerge*, 18 CHI. J. INT’L L., 393, 411–12 (2018) (“the EC[t]HR can indicate the European Consensus to the countries without at the same time finding them in violation. This ruling gives countries a proper warning before they are found in violation. It allows countries to make their policies independently, knowing that they will not be found in violation unless the EC[t]HR warns them first, and indicates the consensus that they should follow in the future.”); Kanstantin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L.J. 1730 (2011) (arguing that the consensus doctrine helps mitigate the “surprise effect” of evolu-

convey the message that it does not go “‘too far too fast’ and potentially undermine its legitimacy in the eyes of the contracting parties.”¹²² In whichever form they are expressed, these theories understand consensus to be an important means by which the Court can create a dialogue with Contracting Parties, convey its understanding of its role within the ECHR regime, and respond to concerns of judicial overreach.

A second variant of the legitimacy thesis suggests that the Court uses consensus because it gives judgments a “democratic mandate.”¹²³ As the domestic laws of Contracting Parties have been passed by democratically-elected legislatures, the consensus doctrine allows the Court to integrate “democratic decisions into the decision-making of courts of constitutional review, thus improving their legitimacy.”¹²⁴ Although proponents of this theory fail to elaborate how they understand consensus to improve the legitimacy of judgments, the theory implies that consensus improves social legitimacy in the eyes of the general public, as judgments reference laws emanating from the democratic process.¹²⁵ While this argument is most often advanced in favor of reference to domestic law, it also supports the idea that the use of other interpretive materials, such as national referenda and public opinion polls, could improve the Court’s legitimacy.¹²⁶

tive interpretation); Helfer, *supra* note 89, at 141 (“When the tribunals articulate a rights-protective interpretation of the Convention based on the consensus inquiry, they put other less progressive states on notice that their laws may no longer be compatible with the Convention if their nationals were to challenge them.”); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 317 (1997) (“the ECHR is able to identify potentially problematic practices for the contracting states before they actually become violations, thereby permitting the states to anticipate that their laws may one day be called into question.”).

122. Fiona de Londras, *When the European Court of Human Rights Decides Not to Decide*, in *BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND*, *supra* note 89, at 316–17.

123. DZEHTSIAROU, *supra* note 83, at 176.

124. *Id.* at 144.

125. See Or Bassok, *The European Consensus Doctrine and the ECtHR Quest for Public Confidence*, in *BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND*, *supra* note 89, at 236 (“the ECtHR views its legitimacy as based on public confidence.”).

126. Føllesdal, *supra* note 109, at 200.

The idea that the consensus doctrine may help to avoid claims of judicial activism is intuitively appealing. However, it is not clear whether the desire to increase social legitimacy—whether in the eyes of the Contracting Parties or the general public—is the sole or even predominant motivation for the Court’s use of the consensus doctrine. Most importantly, there is a disconnect between the practice we would expect if the “consensus as legitimacy” hypothesis were correct and the actual practice of the Court, which suggests that other factors may play a role in the use of the consensus doctrine. If the Court’s underlying motivation was to prove it is not engaged in judicial activism, it would need a transparent, predictable methodology that clarifies that the Court is not just “look[ing] over the heads of the crowd and picking[ing] out [its] friends.”¹²⁷ Although the Court has improved its methodology since the advent of a dedicated Research Division,¹²⁸ in any given case it is still unclear whether the Court will apply the consensus doctrine, the number of States’ domestic laws it will survey, or the level of agreement necessary for consensus to exist.¹²⁹ Indeed, rather than shielding the Court from claims of judicial overreach by anchoring interpretation in purportedly objective indicia, the flexibility with which consensus is deployed and its persistent methodological opacity still imply that the doctrine is mere subterfuge for subjective decision-

127. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997).

128. *See* Wildhaber et al., *supra* note 87, at 257 (stating that the comparative surveys of the Court have become “visibly more professional and detailed” since the creation of the Research Division). The Research Division in its current form was created in 2002, initially with just one lawyer whose main role was to supervise the Court’s Library. The Research Division subsequently merged with the Library to become the Research and Library Division, and two additional lawyers joined the Division from the Registry. The Research and Library Division published its first report in 2003. Email correspondence from Alain Heisserer, Librarian, Eur. Ct. Hum. Rts., to author (Feb. 21, 2019) (on file with author).

129. *See* HANNEKE SENDEN, *INTERPRETATION OF FUNDAMENTAL RIGHTS IN A MULTILEVEL LEGAL SYSTEM: AN ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION* 395 (2011) (“the actual criterion [for consensus] remains a mystery”); Carozza, *supra* note 90, at 1233 (referring to the consensus doctrine as “fundamentally a misuse of comparative law”); Helfer, *supra* note 89, at 135 (arguing that the Court does not “articulate with precision the scope and function of the consensus inquiry”).

making.¹³⁰ This criticism was particularly applicable in the early days of the consensus doctrine. From the late 1970s and early 1980s, when ground-breaking cases like *Tyrer*,¹³¹ *Marckx*,¹³² and *Dudgeon* were decided,¹³³ until the late 1990s, the Court habitually referred to “common ground”¹³⁴ or “broad consensus”¹³⁵ among the Contracting Parties without giving any more detail about the underlying comparative survey. It would be a stretch to suggest that these vague references were intended to send a message of judicial restraint or that they would have been very effective in doing so. If the desire to increase legitimacy was the sole motivation for using the consensus doctrine, one would expect the Court to give the detail necessary to demonstrate that it was not engaged in judicial activism from the very inception of the doctrine.

The democratic legitimation thesis runs into similar problems. It is true that the Court has recently emphasized the quality of the democratic processes that led to the adoption of an impugned measure when examining whether that measure is proportionate to the legitimate aim pursued.¹³⁶ However, it has not yet, conducted similarly searching inquiries into the

130. See YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 192–93 (2002) (stating that the Court’s methodology undermines its credibility and invites suspicion of “unfounded judicial activism”); Alistair Mowbray, *The Creativity of the European Court of Human Rights*, 5 *HUM. RTS. L. REV.* 57, 71 (2005) (“A greater judicial willingness to elaborate upon the application of [consensus] in specific cases would help to alleviate potential fears that it is simply a cover for subjective ad-hockery.”).

131. *Tyrer v. United Kingdom*, 25 *Eur. Ct. H.R.* (ser. A) (1978).

132. *Marckx v. Belgium*, 31 *Eur. Ct. H.R.* (ser. A) (1979).

133. *Dudgeon v. United Kingdom*, 45 *Eur. Ct. H.R.* (ser. A) (1981).

134. *Rasmussen v. Denmark*, 87 *Eur. Ct. H.R.* (ser. A) at 11 (1984); *Rees v. United Kingdom*, 106 *Eur. Ct. H.R.* (ser. A) at 10 (1986); *Gasus Dosier- und Fördertechnik GmbH v. Netherlands*, 306-B *Eur. Ct. H.R.* (ser. A) at 28 (1995); *X. v. United Kingdom*, 1997-II *Eur. Ct. H.R.* at 11–12.

135. *B. v. France*, 232-C *Eur. Ct. H.R.* (ser. A) at 18 (1992).

136. See *Animal Defs. Int’l v. United Kingdom*, 2013-II *Eur. Ct. H.R.* 233 (“It emerges from the case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect”) (internal citations omitted). Cf. Matthew Saul, *The European Court of Human Rights’ Margin of Appreciation and the Processes of National Parliaments*, 15 *HUM. RTS. L. REV.* 745 (2015) (discussing the ECHR in relation to theories of democratic legitimation).

democratic pedigree of laws cited in the context of the consensus doctrine. One might expect to see these inquiries if the use of consensus were in fact designed and deployed to enhance the democratic legitimacy of the Court in the eyes of the general public. While it may be impractical to survey the legislative processes of forty-seven Council of Europe states, it is nevertheless notable that the Court has not made any attempt to show that the domestic laws on which it relies for consensus analysis were founded on democratic processes.

Legitimacy considerations may play some role in explaining why the Court uses the consensus doctrine. Consensus, at least in its modern form, may send messages of judicial restraint to states and improve the legitimacy of the Court in the eyes of the general public. However, the divergence between the practice one would expect if the use of the consensus doctrine was motivated solely by the desire to improve its perceived legitimacy (a stable and predictable methodology) and the actual practice of the Court (a persistently unclear methodology) suggests that the consensus as legitimacy hypothesis does not fully capture the reasons behind the use of consensus.

D. *Consensus as Epistemology*

A final explanation for the Court's use of consensus draws on social choice theory. According to Condorcet's Jury Theorem, if any given individual is more likely than not to make the correct judgment on a certain matter, a judgment that results from a decision-making process of a plurality of individuals is likely to be better than that of any single individual.¹³⁷ Drawing on this theory, some have suggested that the Court could use the consensus doctrine as a way of finding the optimal legal regulation of the issue at bar. According to this view, "[i]f all the states in Europe have the same propensity to adopt good laws and if the EC[t]HR is able to survey all of their na-

137. NICOLAS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITE DES DECISIONS RENDUE À LA PLURALITE DES VOIX* [ESSAY ON THE APPLICATION OF ANALYSIS TO THE PROBABILITY OF DECISIONS MADE BY A PLURALITY OF VOICES] (1785); Christian List, *Social Choice Theory*, STAN. ENCYCLOPEDIA PHIL. (Dec. 18, 2013), <https://plato.stanford.edu/entries/social-choice/> [<https://perma.cc/2V97-SUD9>].

tional laws, the best results under the Jury Theorem will be achieved by following the majority of states.”¹³⁸

This idea, although plausible, does not describe the current practice of the Court. Indeed, the argument that the Jury Theorem provides a basis for reference to domestic law is avowedly normative, not descriptive.¹³⁹ Nor does the Court give any indication that the reason for its use of consensus is in fact motivated by epistemological considerations. Even on a normative level, the applicability of Condorcet’s Theorem in the context of the ECHR is questionable. In particular, certain assumptions necessary for the Theorem to operate—that states are more likely than not to make good law, that the Court is able to survey the laws of all states, and that states adopt laws independently of each other—are rarely, if ever, realized.¹⁴⁰ Perhaps most problematic in the context of consensus is the “similarity condition.”¹⁴¹ In order to apply the Jury Theorem on the international plane, one must account for the fact that states do not make judgments based on the same inputs, unlike members of a jury assessing the same set of facts. Instead, states might choose to base their law on myriad factors particular to their situations. Some suggest that the way to account for these differences is to accord importance to the laws of other domestic jurisdictions only if they are similar to the respondent state “in the right way.”¹⁴² This, in turn, raises two issues.

First, deciding whether the similarity condition is met gives great discretion to the interpreter to judge similarity. Do the origins of the legal systems indicate similarity, or do the Contracting Parties need to state that their laws have the same purpose? Is it fair to assume that Contracting Parties have similar objectives when they enact laws, or must one determine or impute the existence of legislative goals that are similar in fact? The exercise of this discretion would prove anathema to those that criticize the ECtHR for judicial overreach.

138. Shai Dothan, *The Optimal Use of Comparative Law*, 43 *DENV. J. INT’L L. & POL’Y* 21, 27 (2014). Dothan draws heavily on Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 *STAN. L. REV.* 131 (2006).

139. Posner & Sunstein, *supra* note 138, at 138; Dothan, *supra* note 138, at 43 (arguing that consensus could lead to better results if the Court applies it correctly).

140. Dothan, *supra* note 138, at 27, 30.

141. Posner & Sunstein, *supra* note 138, at 148–60.

142. *Id.* at 148.

Second, from a practical perspective, it is not clear whether and when the similarity condition could in fact be fulfilled. The historical, political, and legal contexts of the forty-seven Contracting Parties are enormously different. Some have centuries-long histories of protecting human rights and civil liberties within the political framework of a liberal democracy, whereas for others this is a relatively recent phenomenon.¹⁴³ Some are structured around a religious faith while others are staunchly secular, and some have even expressly disavowed the individualism which the Convention was itself designed to protect.¹⁴⁴ Of course, these differences need not be prohibitive. A judge assessing the practices of a newer European democracy may conclude, for example, that only relatively young democracies (like former Soviet states) should be considered when determining the scope of the right to stand for election under Article 1 of Protocol 3 to the Convention because “historical considerations could provide justification for restrictions on rights intended to protect the integrity of the democratic process.”¹⁴⁵ But contextual differences do pose a significant challenge to the straightforward application of the Jury Theorem to the ECHR context.

Ultimately, like consent- and legitimacy-based theories, the idea that the Court uses consensus as a way to determine the optimal legal outcome does not convincingly describe why the Court adopts this interpretive methodology. The following section analyzes the practice of the Grand Chamber of the ECtHR to explore whether the tyranny of choice hypothesis might fill this gap and provide a plausible explanation for the Court’s use of consensus.

143. See Doriane Lambelet, *The Contradiction Between Soviet and American Human Rights Doctrine: Reconciliation Through Perestroika and Pragmatism*, 7 B.U. INT’L L.J. 61 (1989) (discussing the differences between Western and Soviet conceptions of human rights).

144. See *Full Text of Viktor Orbán’s Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014*, GOV’T OF HUNG. (Jul. 30, 2014), <https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp> [<https://perma.cc/RGZ5-BBJD>] (Quoting the Hungarian Prime Minister as saying “[t]he new state that we are constructing in Hungary is an illiberal state, a non-liberal state.”)

145. *Tănase v. Moldova*, 2010-III Eur. Ct. H.R. 406.

IV. CHOICE OVERLOAD AND TREATY INTERPRETATION

This section tests the hypothesis that the ECtHR uses consensus to structure and limit its discretion when interpreting standards, an interpretive method that can be understood in light of the social psychology research described in Section II. Accordingly, if the null hypothesis is rejected, there should be a statistically significant correlation between the Court's use of consensus (the dependent variable) and the presence of a standard (the independent variable). The author analyzed 461 judgments of the Grand Chamber of the ECtHR handed down between 1994 and 2019 to examine whether such a relationship between the use of the consensus doctrine and the character of the rule being interpreted exists. This section outlines the methodology of the study, describes the results, and considers whether this analysis provides lessons generalizable in the context of the ECtHR and the interpretive practice of international courts and tribunals more broadly.

A. Methodology

The author limited the dataset to the 461 Grand Chamber judgments in the twenty-five years from 1994 to 2019 available in English,¹⁴⁶ one of the two official languages of the Court. This number is significantly smaller than the 18,843 judgments rendered by Chambers of the Court over the same period, bringing the total number of judgments produced by the Court (Chambers and Grand Chamber) to 19,304. The author confined the dataset for two reasons. First, the study necessitated close textual analysis of judgments, including determining whether the Court cited comparative law in passing or if it had in fact relied on consensus analysis in its operative reasoning. Second cases that reach the Grand Chamber are those that relate to a "serious question affecting the interpretation of the Convention or the Protocols," "a serious issue of general

146. The dataset covers judgments rendered from 23 September 1994 to 8 July 2019, inclusive. A twenty-five-year period was chosen because the earliest Grand Chamber judgments on the Court's online database, HUDOC, date from September 1994. *European Court of Human Rights, HUDOC Database*, <https://hudoc.echr.coe.int/eng#%7B%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D%7D>. The number of Grand Chamber judgments available in the other official language of the Court, French, was also 461. *Id.*

importance,” or where “the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court.”¹⁴⁷ Accordingly, the special nature of the Grand Chamber’s jurisdiction means that questions of interpretation are less likely to be definitively settled in the Court’s case law, preserving the interpretive possibilities open to the Grand Chamber. Put another way, Grand Chamber cases cannot be decided by straightforward analogy to previous cases. One would therefore expect the tyranny of choice to play a larger role in the interpretive reasoning of the Grand Chamber when compared with the general Chambers.

The study uses a dummy variable to indicate the use of consensus analysis by the Grand Chamber, where 1 indicates the use of consensus analysis and 0 indicates the absence of consensus analysis. The ECtHR has, however, adopted notoriously inconsistent terminology to indicate its use of the consensus doctrine.¹⁴⁸ In order to correctly code all permutations of the consensus doctrine in the dataset, the study adopts a three-stage process.¹⁴⁹ First, the author identified seventeen different words or phrases the Court has used in conjunction with the consensus doctrine: “commonly accepted standards,”¹⁵⁰ “modern trends,”¹⁵¹ “common ground,”¹⁵² “evolution,”¹⁵³ “marked change,”¹⁵⁴ “uniform approach,”¹⁵⁵ “uni-

147. ECHR, *supra* note 79, arts. 30, 43.

148. See Wildhaber et al., *supra* note 87, at 257 (“The Court’s vocabulary garden grows lush – perhaps too lush; gardeners would be welcome.”); Føllesdal, *supra* note 109, at 191 (listing terminology the Court uses to refer to consensus); Sionaidh Douglas-Scott, *Borges’ Pierre Menard, Author of the Quixote and the Idea of a European Consensus*, in BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND, *supra* note 89, at 173–74 (noting that the main criticism of consensus is that “the term is not well defined.”).

149. All coding was peer-reviewed by a research assistant.

150. *Tyrer v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 12 (1978).

151. *Öztürk v. Germany*, 73 Eur. Ct. H.R. (ser. A) at 34 (1984).

152. *Rasmussen v. Denmark*, 87 Eur. Ct. H.R. (ser. A) at 11 (1984).

153. *F. v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) at 11 (1987); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 15 (1979).

154. *Norris v. Ireland*, 124 Eur. Ct. H.R. (ser. A) at 16 (1988); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 19 (1981).

155. *Fabris v. France*, 2013-I Eur. Ct. H.R. 449.

form conception,”¹⁵⁶ “great majority,”¹⁵⁷ “great number,”¹⁵⁸ “consensus,”¹⁵⁹ “common standard,”¹⁶⁰ “common European standard,”¹⁶¹ “general trend,”¹⁶² “emerging consensus,”¹⁶³ “trend,”¹⁶⁴ “majority,”¹⁶⁵ and “tendency.”¹⁶⁶ These search terms are used in many contexts other than the consensus doctrine: the term “majority,” for example, is often used in connection with the majority opinion of a prior judgment.¹⁶⁷ Indeed, one or more of the search terms appears in 399 of the dataset judgments, accounting for eighty-seven percent of cases. Accordingly, for each of these judgments, the second step was to analyze the context in which the term appeared and the reasoning of the judgment in order to determine whether the Court in fact used consensus analysis. Only judgments in which the Court referred to consensus in its reasoning were coded as 1. Judgments in which comparative law was referenced solely in the preliminary, descriptive sections of the judgment,¹⁶⁸ those in which one of the terms appeared to de-

156. *Garib v. Netherlands*, App. No. 43494/09, ¶ 26 (Nov. 6, 2017), <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-177406%22>] [<https://perma.cc/U9SM-B44K>].

157. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 16, 19 (1981).

158. *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) at 24 (1986).

159. *Lee v. United Kingdom*, App. No. 25289/94, ¶ 95 (Jan. 18, 2001), <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-59157%22>] [<https://perma.cc/T5TT-MTDX>]; *Evans v. United Kingdom*, 2007-I Eur. Ct. H.R. 376; *L. and V. v. Austria*, 2003-I Eur. Ct. H.R. 43.

160. *T. v. United Kingdom*, App. No. 4724/94, ¶ 72 (Dec. 16, 1999), <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-58593%22>] [<https://perma.cc/2K8M-FJ2Z>].

161. *X. v. United Kingdom*, 1997-II Eur. Ct. H.R. at 11–12.

162. *Tekeli v. Turkey*, 2004-X Eur. Ct. H.R. 255.

163. *Fabris v. France*, 2013-I Eur. Ct. H.R. 448; *S.H. v. Austria*, 2011-V Eur. Ct. H.R. 322; *Schalk v. Austria*, 2010-IV Eur. Ct. H.R. 438; *Tekeli v. Turkey*, 2004-X Eur. Ct. H.R. 255.

164. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 29–30.

165. *Sitaropoulos v. Greece*, 2012-II Eur. Ct. H.R. 330, 343; *Markin v. Russia*, 2012-III Eur. Ct. H.R. 103–04; *Bayatyan v. Armenia*, 2011-IV Eur. Ct. H.R. 36; *Demir v. Turkey*, 2008-V Eur. Ct. H.R. 418, 425; *Odièvre v. France*, 2003-III Eur. Ct. H.R. 80–81.

166. *Schalk v. Austria*, 2010-IV Eur. Ct. H.R. 436; *Mazurek v. France*, 2000-II Eur. Ct. H.R. 38–39.

167. *See, e.g., O’Keeffe v. Ireland*, 2014-I Eur. Ct. H.R. 169.

168. *Anheuser-Busch Inc. v. Portugal*, 2007-I Eur. Ct. H.R. 55–56.

scribe shifts within a particular Contracting Party,¹⁶⁹ and those in which state practice was invoked in relation to the existence of customary international law were not coded as consensus.¹⁷⁰ Third, recent judgments often contain sections in which the Court briefly describes the relevant practice of Contracting States. These sections are descriptive and indicate nothing about whether consensus was in fact used in the Court's reasoning. Where a descriptive section was included in the judgment, however, the author searched for cross-references to examine whether those paragraphs were cited to support the existence of consensus in the Court's reasoning and coded accordingly.

In order to code for the presence of a standard, the author focused on standards contained in the five substantive articles most commonly invoked before the Grand Chamber, according to the HUDOC database: Articles 6, 8, 10, and 14 of the ECHR, and Article 1 of Protocol 1 (PI-1).¹⁷¹ Each of these articles includes a prototypical standard: fairness,¹⁷² necessity,¹⁷³ or proportionality.¹⁷⁴ The dataset was expanded to ac-

169. *Stafford v. United Kingdom*, 2002-IV Eur. Ct. H.R. 138 –142.

170. *Cudak v. Lithuania*, 2010-III Eur. Ct. H.R. 176; *Medvedyev v. France*, 2010-III Eur. Ct. H.R. 98.

171. Articles 35 and 41 are omitted from this list. While they are frequently invoked before the Grand Chamber, they deal with procedural not substantive issues (admissibility and just satisfaction, respectively).

172. ECHR, *supra* note 79, art. 6 (providing for the right to a fair trial). See *Duncan Kennedy*, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976) (stating that some examples of a standard are “good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness.”); HART, *supra* note 54, at 131 (identifying “fair rate” as an illustrative example of a standard).

173. ECHR, *supra* note 79, arts. 8, 10. Necessity, like other standards, has no clear triggers that oblige the Court to find that the measure at issue was necessary. Instead, its inquiry can and often does weigh a plurality of factors, including historical and political considerations, public morals, and the factual context in which the limitation occurs. See, e.g., *Tănase v. Moldova*, 2010-III Eur. Ct. H.R. 411 (noting that “special historical or political considerations” could necessitate a stricter practice); *A. v. Ireland*, 2010-VI Eur. Ct. H.R. 259–60 (“State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the ‘exact content of the requirements of morals’ in their country, but also on the necessity of a restriction intended to meet them.”) (internal citations omitted); *Martínez v. Spain*, 2014-II Eur. Ct. H.R. 482 (“An interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’”).

count for certain closely-related standards that could not logically be omitted. Specifically, whether an infringement is necessary in a democratic society appears not just in the context of Articles 8 and 10 but also Articles 9 and 11 of the Convention. Similarly, examinations of the proportionality of an infringement of a right occur in the context of Article 3 of Protocol 1 (P1-3) and Article 1 of Protocol 3 (P3-1), as well as under P1-1. In order to code for the existence of one or more of these standards in a judgment, the study used a dummy variable where the presence of a standard is indicated by 1 and the absence of a standard by 0.

A number of other provisions that could qualify as standards, such as the entitlement to a trial within a “reasonable time,”¹⁷⁵ were excluded from the dataset because they are invoked less commonly. The study operates on the assumption that the five most commonly invoked substantive articles of the Convention should be sufficient to reveal the existence of any relationship between standards and the consensus doctrine which supports the tyranny of choice hypothesis. The results may therefore actually underreport the strength of any relationship found to exist.

To account for another factor that might affect the frequency of the consensus doctrine’s invocation, the dataset included two potentially confounding variables for the political sensitivity of a case. If the consensus as legitimacy hypothesis is correct, the Court would rely on the consensus doctrine in those cases which pose the greatest threat to its legitimacy. Politically sensitive cases are more likely to be contested after the judgment and consequently less likely to be implemented by the respondent State. By seeking to legitimize its judgments through the use of consensus, the Court increases the likeli-

174. ECHR, *supra* note 79, arts. 14, P1-1. See MACCORMICK, *supra* note 56, at 165 (recognizing proportionality as akin to reasonableness). The word “proportionality” itself does not appear in the text of Protocol 1. However, the Court has consistently held that implied limitations to article 1 is permissible if there is “a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State.” *Lekić v. Slovenia*, App. No. 36480/07, ¶ 110 (Dec. 11, 2018), <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-188268%22> [<https://perma.cc/U329-EN98>].

175. ECHR, *supra* note 79, art. 5(3).

hood that the State will implement, and other parties will accept, politically sensitive judgments.¹⁷⁶

Following Lupu and Voeten, the study uses two indicators of the political sensitivity of a case.¹⁷⁷ The first is whether the case relates to the right to life¹⁷⁸ or the prohibition on torture.¹⁷⁹ While other rights protected by the Convention, such as religious freedom,¹⁸⁰ LGBT rights,¹⁸¹ and free speech,¹⁸² often entail considerable opposition from the respondent government, the “distinctive feature of physical integrity rights (especially Articles 2 and 3 of the Convention) is that they do so almost by definition.”¹⁸³ Accordingly, if the Court does in fact deploy consensus to increase the legitimacy of its judgments, one would expect the Court to use consensus more frequently in Article 2 and Article 3 cases. The second indicator of political sensitivity is whether the Court rules against the respondent State on the merits or if it rejects the preliminary objections of the State.¹⁸⁴ The idea underpinning this indica-

176. See Ed Bates, *Consensus in the Legitimacy-Building Era of the European Court of Human Rights*, in BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND, *supra* note 89, at 61–62 (suggesting that “there was a pragmatic and legitimacy-enhancing aspect to the consensus principle: its employment entailed that sovereign respondent states were more likely to be persuaded to change their law (or less likely to take a stance of defiance . . .).” The *locus classicus* of this hypothesis is Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988). For a more elaborate treatment of the topic, see THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

177. Lupu and Voeten elaborate these two indicators to test the hypothesis that the ECtHR will cite precedent in politically sensitive judgments in relation to which domestic courts will face pressure from the executive not to comply. While this study is not concerned with the compliance of domestic courts, Lupu and Voeten’s indicators are fully transposable to the present study. Yonathan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. S. 413 (2011).

178. ECHR, *supra* note 79, art. 2.

179. *Id.* art. 3.

180. *Id.* art. 9.

181. See Edward Delman, *An Ambiguous Victory for Gay Rights in Europe*, ATLANTIC (July 24, 2015), <https://www.theatlantic.com/international/archive/2015/07/gay-rights-italy-europe/399572/> [https://perma.cc/EMM2-C862] (calling the Court a “judicial vanguard” in the field of LGBT rights).

182. ECHR, *supra* note 79, art. 9.

183. Lupu & Voeten, *supra* note 177, at 421.

184. *Id.*

tor is that judgments in which the Court rules against the respondent State are less likely to be readily accepted by the government at issue, which might put domestic institutions under pressure to not comply with the judgment.¹⁸⁵ Consequently, if the consensus as legitimacy hypothesis is correct, one would expect the Court to adopt consensus more frequently when it rules against the State.

B. Results

Of the 461 judgments included in the dataset, the Grand Chamber adopted consensus analysis in 105 judgments, 22.8% of the total.¹⁸⁶ The data show a general increase in the use of consensus analysis over time, measured as the proportion of total judgments rendered, with notable peaks in 2011 and 2013 (see Figure 1).

Over the twenty-five years covered in the dataset, the Grand Chamber used consensus in relation to a wide variety of articles, ranging from the supposedly absolute Articles 2 and 3¹⁸⁷ to articles related to procedural issues, such as the admis-

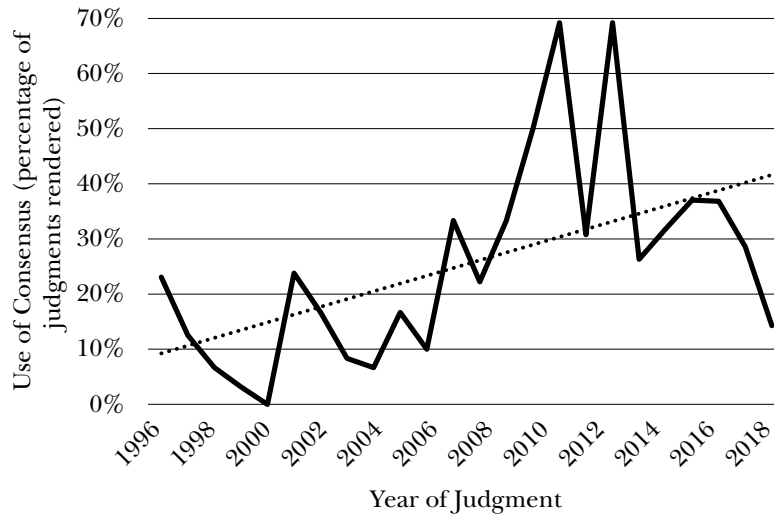
185. *Id.*

186. The full dataset for this study is available at <https://doi.org/10.17026/dans-zd8-v3j6>.

187. See *Vo v. France*, 2004-VIII Eur. Ct. H.R. 109 (“At European level, the Court observes that there is no consensus on the nature and status of the embryo”); *M.S.S. v. Belgium and Greece*, 2011-I Eur. Ct. H.R. 315 (noting the “broad consensus at the international and European level” on the need for special protection for asylum-seekers); *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R.348–50 (finding a commitment among Contracting States to the “rehabilitation of life sentenced prisoners and to the prospect of their eventual release”); *Svinarenko v. Russia*, 2014-V Eur. Ct. H.R. 207 (noting that even the few Contracting States that still place criminal defendants in metal cages when they appear in court are retreating from the practice); *Lambert v. France*, 2015-III Eur. Ct. H.R. 117 (finding consensus “as to the paramount importance of the patient’s wishes” in withdrawing life-sustaining treatment); *Da Silva v. United Kingdom*, App. No. 5878/08, ¶ 279 (Mar. 30, 2016), <http://hudoc.echr.coe.int/eng?i=001-161975> [<https://perma.cc/V5QW-YD2M>] (finding no consensus regarding the review of a prosecutor’s decision not to prosecute); *Güzelyurtlu v. Cyprus and Turkey*, App. No. 36924/07, ¶ 240 (Jan. 29, 2019), <http://hudoc.echr.coe.int/eng?i=001-189781> [<https://perma.cc/K7GC-PB97>] (noting that all the Council of Europe States had ratified the relevant extradition convention, indicating a “clear measure of common ground”).

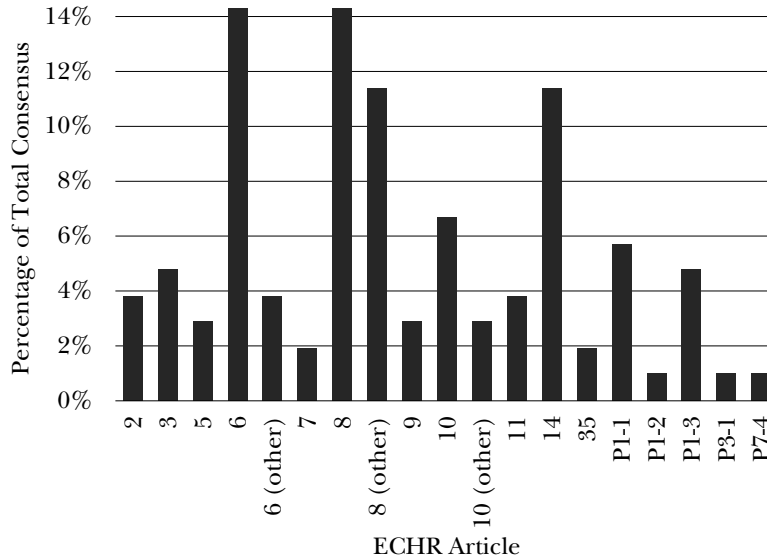
sibility of applications under Article 35.¹⁸⁸ Figure 2 shows the articles in relation to which the Grand Chamber most frequently used consensus analysis, calculated as a percentage of the total occurrence of consensus. The data show that the Grand Chamber used consensus most frequently in relation to Article 8, which accounts for 25.72% of the total incidences of consensus, followed closely by Article 6 (18.1%), Article 14 (11.43%), and Article 10 (9.53%).

FIGURE 1: ARTICLES IN RELATION TO WHICH CONSENSUS IS USED BY THE GRAND CHAMBER (1994–2019)



188. See *Varnava v. Turkey*, 2009-V Eur. Ct. H.R. 68 (noting the consensus allowing prosecution of enforced disappearances long after the act); *Gunes v. Turkey*, App. No. 27396/06, ¶ 58 (June 29, 2012), <http://hudoc.echr.coe.int/eng?i=001-111957> [<https://perma.cc/XLD5-Z49J>] (“it would be difficult to conclude that there is a general consensus between Council of Europe Member States as regards the calculation of time-limits”).

FIGURE 2: THE USE OF CONSENSUS BY THE GRAND CHAMBER (1994–2019)



The data show a positive correlation between the existence of a standard and the Grand Chamber’s use of consensus analysis.¹⁸⁹ The interpretation of one of the standards identified above was at issue in 202 judgments, or 43.8% of the total number of judgments rendered. The Court adopted consensus analysis in seventy of those judgments, or 34.6%. This accounts for 66.7% of the total instances in which the Grand Chamber used the consensus doctrine. In contrast, the Court used consensus analysis in only thirty-five of the 259 judgments not involving one of the abovementioned standards, or 13.5% of those judgments. In other words, the Court was significantly more likely to use the consensus doctrine in relation to a standard than a non-standard.

As for the two indicators of political sensitivity included in the dataset, only ruling against the respondent government had any impact on the use of consensus, and that impact was

189. A chi-square test for independence (with Yates’ Continuity Correction) indicated a modest association between standards and consensus, $\chi^2(1, n = 461) = 27.646, p < .001, phi = .250$.

notably smaller than that of a standard.¹⁹⁰ The existence of claims under Article 2 or 3 had no statistically significant impact on whether the Grand Chamber used consensus in a particular case.¹⁹¹

To test the robustness of the correlation between standards and the use of the consensus doctrine, the author carried out a univariate analysis of variance main effects test to show the effect of a standard, holding the two confounding variables (whether the case related to Articles 2 or 3 and whether the Grand Chamber ruled against the respondent State) constant. Under this test, the existence of a standard still produced a statistically significant impact on the Grand Chamber's use of consensus. The Court was around 22% more likely to adopt consensus analysis in the presence of a standard, regardless of whether the Grand Chamber ruled against the respondent State¹⁹² or whether the case involved Articles 2 or 3.¹⁹³

As may be expected, the combined effect of the presence of a standard and a ruling against a respondent State produced a statistically significant effect on the Court's use of consensus.¹⁹⁴ In addition to confirming the importance of standards for the Court's use of consensus analysis, this finding suggests that the Court's reasoning changes in relation to the overall outcome of the case, a result that finds support in other empirical analyses of the Court's judgments.¹⁹⁵

190. A chi-square test for independence (with Yates' Continuity Correction) indicated a small association between whether the Grand Chamber ruled against the respondent State and consensus, $\chi^2(1, n = 461) = 6.885$, $p = .009$, $\phi = .128$.

191. A chi-square test for independence (with Yates' Continuity Correction) indicated no association between whether the case related to Articles 2 and/or 3 and consensus, $\chi^2(1, n = 461) = .117$, $p = .733$, $\phi = .023$.

192. The existence of a standard on consensus showed a statistically significant effect, holding constant the effect of adverse decisions, $B = .222$, $t(457) = 5.848$; $p < .001$.

193. The existence of a standard on consensus showed a statistically significant effect, holding constant the effect of Article 2 and/or Article 3 cases, $B = .223$, $t(457) = 5.611$; $p < .001$.

194. The interaction of a standard and ruling against a respondent State had a small to modest effect on the use of consensus, holding the individual effects of the variables constant, $B = .209$; $t(457) = -2.538$; $p = .011$.

195. See Lupu & Voeten, *supra* note 177, at 433 (finding support for the hypothesis that the Court "chooses the precedents it cites based on the legal issues in the case").

C. *Analysis*

The results of this study are important for several reasons. First, they suggest that the tyranny of choice hypothesis is a useful tool to explain why the Grand Chamber adopts consensus analysis in any given case. While the results indicate that use of consensus doctrine is not inexorably applied to the interpretation of standards, they show that judges are significantly more likely to use consensus analysis when interpreting one of the standards identified above. This finding supports the hypothesis that interpreters' psychological aversion to choice overload may result in them drawing on extraneous materials, such as consensus analysis, in order to circumscribe their interpretive possibilities. This insight provides important lessons about the consensus doctrine on the micro-, meso-, and macro-levels of analysis.¹⁹⁶

On the micro-level, the findings contribute to the debate regarding the Court's methodology and use of consensus. Methodological criticisms of consensus argue that in order to serve its purpose usefully, the Court must base its judgment on a comprehensive survey of the domestic laws of Contracting Parties in their legal, historical, and political context. This argument is based on the "mechanical[] project[ion]" of "the aims of (scholarly) scientific research and corresponding precision required therein into the judicial use of comparative arguments,"¹⁹⁷ a projection that fails to consider the differences in the goals of the two comparative endeavors. This article does not examine the multifarious aims of comparative scholarly research. However, the finding that the Court uses the consensus doctrine to constrain its interpretive choices in relation to standards does suggest that the purpose of the interpretive methodology is at least partially different than that of comparative research. More elaborate methodological criticisms could account for these differences to explain how and why the Court should use, explain, and evidence consensus differently.

On the meso-level, the findings challenge the mainstream narrative that the practice of the ECtHR is characterized by judicial activism. One might expect interpreters faced with

196. *See supra* Section III(i).

197. MICHAL BOBEK, *COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS* 242 (2013).

standards to embrace their flexibility and welcome the opportunity to make a holistic analysis of the circumstances of the case. Yet the evidence presented in this study suggests exactly the opposite: judges of the ECtHR, when interpreting a treaty term allowing them a great deal of flexibility, act voluntarily to limit that discretion. In this respect, the consensus doctrine is used not as a tool of judicial activism but as a means of structuring broad discretion.

On the macro-level, the results of the study shed light on the structural factors that may cause the Court to adopt a particular interpretive approach. In particular, they show that the Court's use of consensus analysis is at least partially attributable to the character of the legal norms enshrined within the Convention. This has particular relevance for debates regarding the appropriate division of powers in the Convention mechanism and consequent institutional reforms. Insofar as criticisms of judicial activism are directed at the Court's use of consensus analysis,¹⁹⁸ they fail to account for the fact that the actions of the Court are to a certain extent dictated by the terms of the Convention; instead, they treat the actions of the Court as if they were divorced from the legal context in which it operates. Calls for structural reform of the Court must consider the fact that vague treaty terms such as standards inevitably and unavoidably bestow power on judges to make interpretive decisions.

The results of this study are also notable in other respects. They show a general increase in the use of the consensus doctrine over the period studied. The upward trend that started in 2004 and ended in 2016 coincides with a turbulent time during which the Court came under significant criticism from some Contracting Parties for purportedly overstepping its judicial remit.¹⁹⁹ From the mid-2000s, politicians in several Coun-

198. *E.g.*, ARAI-TAKAHASHI, *supra* note 130, at 192–93; Mowbray, *The Creativity of the ECtHR*, *supra* note 130, at 71.

199. For an excellent overview of the criticism from fifteen different Contracting Parties divided into “sparse,” “moderate,” “strong,” and “hostile” criticisms, see CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS: SHIFTING THE CONVENTION SYSTEM: COUNTER-DYNAMICS AT THE NATIONAL AND EU LEVEL (Patricia Popelier et al. eds., 2017). *See also* Ed Bates, *Activism and Self-Restraint: The Margin of Appreciation’ Strasbourg Career . . . its ‘Coming of Age’?*, 36 HUM. RTS. L.J. 261, 272–73 (2016) (suggesting the Court engaged in an unofficial dialogue with its critics calling for greater subsidiarity).

cil of Europe States, especially the United Kingdom,²⁰⁰ started to express their discontent with the operation of the Court, which intensified following a controversial 2005 judgment on prisoners' voting rights.²⁰¹ The Leader of the British Conservative Party at the time, Michael Howard, argued that the U.K. legislation giving effect to the ECHR, the Human Rights Act 1998, went too far in allowing judges to take decisions that properly fell within the prerogative of Parliament.²⁰² Similarly, in a parliamentary debate on the same topic five years later, Prime Minister David Cameron stated that it made him feel "physically ill even to contemplate having to give the vote to anyone who is in prison"²⁰³—the necessary corollary of complying with the ECtHR judgment. Although officials in several other Contracting Parties expressed similar sentiments, the United Kingdom took the opportunity to attempt to limit the purported activism of the ECtHR when it became chair of the Council of Europe in 2011. Supported by a "pervasive air of backlash" against the Court,²⁰⁴ the Contracting Parties adopted the Brighton Declaration in 2012, which reasserted the subsidiary nature of the ECtHR's jurisdiction,²⁰⁵ and Protocol No. 15 in 2013, which will enshrine the principles of subsidiarity and the margin of appreciation into a preambular

200. For a summary of the progression of the criticism of the ECtHR in the UK, see Øyvind Stiansen & Erik Voeten, *Backlash and Judicial Restraint: Evidence from the European Court of Human Rights*, 64 INT'L STUD. Q. 770 (2020).

201. *Hirst v. United Kingdom (No. 2)*, 2005-IX Eur. Ct. H.R. 187.

202. Michael Howard, *Judges Must Bow to the Will of Parliament*, TELEGRAPH (Aug. 10, 2005), <https://www.telegraph.co.uk/comment/personal-view/3618954/Judges-must-bow-to-the-will-of-Parliament.html> [<https://perma.cc/6M25-V2NZ>].

203. Andrew Hough, *Prisoner Vote: What MPs Said in Heated Debate*, TELEGRAPH (Feb. 11, 2011), <https://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in-heated-debate.html> [<https://perma.cc/F6WY-ED54>]. Members of the general public reportedly had similar sentiments. See Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES L. 411, 418 (2013) (reporting that the percentage of the British public that believed the ECtHR to be a "good thing" decreased from seventy-one percent in 1996 to nineteen percent in 2011).

204. Laurence R. Helfer, *The Benefits and Burdens of Brighton*, 1 ESIL REFLECTIONS 1, 2 (2012).

205. *Brighton Declaration*, *supra* note 116, ¶¶ 3, 11, 12.

paragraph of the Convention when it enters into force.²⁰⁶ Although the present study was not designed to examine the theoretical and empirical connections between the backlash against the Court and its use of consensus, the correlation between the increase in criticisms of the Court and its general increase in the use of consensus suggests that it may be a fruitful area for future research.

Finally, the results suggest that the interpretive approaches of international courts and tribunals should not be understood solely in the context of Articles 31 and 32 of the VCLT. Psychological responses to complex choices play a role in how individuals approach the decision-making process. Academics must go beyond the bounds of the VCLT and incorporate insights from the behavioral social sciences in order to understand how and why judges and arbitrators adopt particular interpretive methodologies.

V. AVENUES FOR FUTURE RESEARCH

The findings of the present study suggest that exploring the links between behavioral social sciences and legal interpretation may be fruitful. This section outlines three potential avenues for future research and explains how they could build on the work presented in this article.

First, the size of the correlation between standards and use of the consensus doctrine reported in this study implies that other factors may influence the Court to adopt consensus analysis in particular cases. This provides empirical support for the suggestion that monocausal explanations of the consensus doctrines inevitably fail to capture “the richness, the variety and the recurrent inconsistencies of the Court’s case law.”²⁰⁷ The finding that one explanatory variable cannot itself account for why the Court uses consensus opens future research avenues to explore what combination of legal, political, and psychological factors renders cases more susceptible to the use of consensus analysis. For example, one plausible factor that may also influence the use of consensus is the desire to create greater acceptability for judgments rendered against the State.

206. Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 123, art. 1.

207. Wildhaber et al., *supra* note 87, at 251.

As noted above, however, this concern seems to have only a weak impact on the Court's use of consensus.

Second, while the results demonstrate that there is a significant positive correlation between the use of consensus and the interpretation of standards, these results do not establish that consensus is deployed *because* of the interpreters' aversion to choice overload; it simply suggests there could be such a relationship. This is an unavoidable limitation of a quantitative survey but one that might be ameliorated by future research supporting such a link. Such research could take the form of quantitative empirical studies like the present one or qualitative empirical surveys, in which questions might be designed to reveal the underlying psychological processes that lead to a particular interpretive approach.

Third, the findings in the present study are limited to the particular legal and political context of the Grand Chamber of the ECtHR. However, individuals' inherent aversion to choice overload should be equally applicable to other courts and tribunals that interpret and apply standards. International investment tribunals, for example, frequently determine whether a particular measure breached the obligation to accord investors "fair and equitable treatment."²⁰⁸ States can claim necessity defenses before a wide range of international courts and tribunals,²⁰⁹ and the "reasonable basis" for believing that crimes have been committed constitutes a crucial aspect of the ICC's jurisdiction under Article 15 of the Rome Statute.²¹⁰ Future research could examine the interpretive approaches of these courts and tribunals in order to study the generalizability of the findings presented in this article.

VI. CONCLUSION

Interpreters of international law—whether they be judges, arbitrators, or government officials—are not immune

208. *E.g.*, *Suez v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 174–218 (Jul. 30, 2010).

209. *E.g.*, *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶¶ 344–91 (Sept. 28, 2007).

210. *E.g.*, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 31 (Apr. 12, 2019).

from the normal cognitive processes shown to characterize human decision-making. Social psychology studies over the past thirty years have consistently demonstrated that individuals are inherently averse to large choice sets and that they will act to constrain those choices to better manage them. This article builds on these studies, examining whether this reaction to the tyranny of choice might help explain why courts and tribunals draw on interpretive materials extraneous to those described in Articles 31 and 32 of the VCLT when interpreting standards such as fairness, necessity, or proportionality. Considering the inability of the present literature to explain interpretive step zero, the article examined how and why the theory might prove instructive in understanding the ECtHR's use of the consensus doctrine. In order to test the hypothesis, the article reported the results of an empirical study of 461 judgments of the Grand Chamber of the ECtHR, which found a statistically significant relationship between the presence of a standard and the Court's use of consensus. Although the results suggested that other factors might play a role in the use of consensus analysis, the correlation between standard and consensus remained significant even when potentially confounding variables were held constant, supporting the hypothesis that interpreters draw on extraneous materials in order to limit the myriad ways to interpret a standard.

The findings of the study have both theoretical and practical implications for understanding how judges think. From a theoretical perspective, the results demonstrate that important insights may be gained from integrating behavioral science research into international law analysis. Adopting this multidisciplinary approach allows for more descriptively accurate models of how key actors behave. This goal is especially important in the international legal sphere, where the behavior of states and state officials counts as much as written law and the decisions of courts and tribunals have an outsized influence compared to many domestic legal systems.

From a practical perspective, the demonstrated link between individuals' innate cognitive reactions and interpretive methodologies may allow practitioners to better understand why judges might adopt different interpretive approaches for different treaty terms. In turn, this may allow practitioners to focus their time and energy on arguments that are likely to have more success in a given case. For example, the results

suggest that the Court will be more receptive to arguments based on comparative law when related to the interpretation of one of the specified standards.

International legal scholarship has primarily examined treaty interpretation from a doctrinal or philosophical perspective. Yet insights from behavioral social sciences offer the ability to construct more descriptively accurate models of how interpreters approach a treaty, which in turn enables researchers to better understand how and why certain interpretive methodologies are used in relation to a particular treaty text. This article does not claim to have solved the “mystery” of the consensus doctrine.²¹¹ However, it does provide a novel perspective on the doctrine and, in doing so, demonstrates the value of applying behavioral insights and empirical methodologies to the study of treaty interpretation.

211. SENDEN, *supra* note 129, at 395.