Certiorari and the Political Judge: Discretionary Case Selection by the United States Supreme Court and the European Court of Human Rights Compared

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Abstract

Courts face a need to make their caseload manageable, thus preserving the operability of their system of adjudication. Discretionary case selection methods are amongst the tools available to that end. This paper compares the *certioriari* practice of the United States Supreme Court and the various proposals of discretion in selecting cases for adjudication advanced in the course of reforming the European Court of Human Rights to date. It focuses on the question of the politics of discretionary judicial review powers in the two courts. Are the justices of the Supreme Court acting as strategic political thinkers or prudent judges when accepting or denying petitions? Are these mutually exclusive mindsets, or do they coexist, maybe even purposefully? How is the politics of the Strasbourg Court, and how would that influence any possible future discretionary powers? The present paper offers some cautious glimpses into this relatively sensitive aspect of the reform debate and concludes that judicial discretion of that sort would have the potential of enhancing both the functioning and the jurisprudential quality and reputation of the European Court of Human Rights.

I INTRODUCTION

The ongoing reform process of the European Court of Human Rights ('ECtHR') is driven by the motivation to make the caseload of the Court manageable. This preserves the operability of a system of international human rights adjudication that is both essential for the continent and its over 800 million citizens and residents. Even today, after the reform steps introduced in 2010 have taken effect, the system continues to be on the brink of collapse. At the same time, the role and character of the Court is an issue, namely whether it should acquire more traits of a quasi-constitutional tribunal with Europe-wide jurisdiction as opposed to a

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court providing a final – and for some countries, first – true remedy against systematic and structural non-compliance with human rights standards. The idea of entrusting the Court with discretionary powers to either reject, or accept cases for adjudication and the consequences this would have both on the right to application and the status of the Convention system has occasionally surfaced during the reform deliberations. The United States model of petitions for a writ of *certiorari* before the Supreme Court has been considered as a model for such an idea.

Of course, the ECtHR and the US Supreme Court are not identically placed tribunals. While the latter is constitutionally endowed with final appellate jurisdiction over all matters federal in the United States, the former is an international court empowered, essentially, only with monitoring compliance with one, albeit spectacularly constitution-like, treaty. No claim is made in this paper that the two courts are identical for any purpose; and yet, they are undoubtedly sufficiently comparable in so far as the narrow topic of (discretionary) case selection is concerned. The emerging 'constitutional', or 'supreme' character of the ECtHR. is mentioned here, but only to the extent that its discussion has informed the comparative *certiorari* debate. Certainly other case selection processes, such as the Australian High Court's leave to appeal power, or the summary dismissal procedures employed, eg, by the German Federal Constitutional Court and other European national courts, would allow valid and exciting comparative studies – they have been excluded here solely for lack of space.

This paper thus focuses on the question of the politics of discretionary judicial review powers in the US and European courts. Are the justices of the Supreme Court acting as strategic political thinkers or prudent judges when accepting or denying petitions? Are these mutually exclusive mindsets, or do they coexist, maybe even purposefully? How is the politics of the Strasbourg Court, and how would that influence any discretionary powers that might be enshrined in the procedure in future reforms? The present paper offers some cautious glimpses into this relatively sensitive aspect of the reform debate. After introductions to the time-tested *certiorari* process of the US Supreme Court and the deliberations on related steps of ECtHR reform, the 'politics' behind both courts will be considered and compared.

II STATUTORY *CERTIORARI* IN THE UNITED STATES SUPREME COURT

A *The Ground Rules*

Rule 10 of the *Rules of the Supreme Court of the United States* states: '[r]eview on a writ of *certiorari* is not a matter of right, but of judicial

discretion'.[1] Out of some 10,000 petitions for *certiorari* received each year, the Court hears and decides on average, about 75-80 cases after a full hearing, with a similar number of cases disposed of by means of grants and reversals. The principle of constitutional, or statutory *certiorari* may be seen as a vehicle for exercising judicial authority in moderation while at the same time asserting the supremacy of the central constitutional order and its interpretation. Introduced in 1891, the writ of *certiorari* basically empowers the Court to select cases it wishes to review.[2] In turn, it is a means by which the Court can permit variations in the interpretation and application of federal norms by the constituent states, thus allowing an issue to 'percolate'[3] in the lower courts before possibly stepping in.

The writ of *certiorari* originated with the *Judiciary Act of 1891*,[4] but it did not become a major vehicle for access to the Court until the passage of the *Judiciary Act of 1925* ('*the 1925 Act*'). This statute, or 'Judge's Bill', was enacted after extensive lobbying by Chief Justice Taft.[5] The Bill 'sweeping[ly] embrace[d] … the idea that the Supreme Court should be vested with broad discretion to decline to review the vast majority of the cases that litigants bring to it'.[6] It greatly extended the Court's discretionary appellate jurisdiction by replacing most mandatory appeals with petitions for a writ of *certiorari* which added what Taft called a 'preliminary test'.[7] The purpose and philosophy of *the 1925 Act*, Freund wrote in 1961, was that 'on the whole, only controversies of general importance should find their way to the calendar of the Supreme Court'.[8] In the words of Justice Frankfurter, the purpose 'was to put the right to come here, for all practical purposes, in the Court's judicial discretion;'[9] that discretion was already 'almost complete'.[10]

Despite other motives, clearly one of the core purposes of the 1925 changes was to enable the Court to decrease its caseload. In an effort to

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[1] Rules of the Supreme Court of the United States r 10.
[2] Cf Robert W Gibbs, 'Certiorari: It's Diagnosis and Cure' (1954/5) 6(2) *Hastings Law Journal* 131.
[3] Geoffrey R Stone et al, Constitutional Law (Aspen, 5th ed, 2005) 160.
[4] *Judiciary Act of 1891*, 26 Stat 826 (1991).
[5] Cf William H Taft, 'The Jurisdiction of the Supreme Court under the Act of February 13, 1925' (1925) 35(1) *Yale Law Journal* 1, 2.
[6] Margaret Meriwether Cordray and Richard Cordray, 'The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection' (2004) 82(2) *Washington University Law Quarterly* 389, 392.
[7] Taft, above n 5, 2.
[8] Paul A Freund, The Supreme Court of the United States. Its Business, Purposes, and Performance (Meridian, 1961) 12.
[9] *United States v Shannon*, 342 US 288, 295 (Frankfurter J, dissenting) (1952).
[10] Arthur D Hellman, 'The Business of the Supreme Court under the Judiciary Act of 1925: The Plenary Docket in the 1970's' (1978) 91(8) *Harvard Law Review* 1711, 1712.

decrease it even further, Congress enacted legislation in 1988 (the '*Supreme Court Case Selections Act*') that eliminated practically all the remaining mandatory appeals.[11] The *Supreme Court Case Selections Act* 'complete[d] an historic transformation of the Court's jurisdiction from a mandatory to a discretionary base'.[12]

Of course, while the Court can 'without limits, control the volume of cases to be argued and decided on the merits', it cannot – most pertinently for the present study – 'control the volume of petitions … filed'.[13] The Court early on summarized the purpose of discretionary case selection as follows:

> The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes - first to secure uniformity of decision between those courts in the ... circuits, and second to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort.[14]

B *The 'Supremacy' of the United States Supreme Court and its 'Symbiotic Relationship' with Litigants*

The choice of *certiorari* as the means of effecting a docket decrease has been questioned by authors, for instance in light of other options available to the Court to dispose of larger numbers of cases by dismissals and summary (*per curiam*) opinions.[15] Buchanan has argued that behind the Chief Justice's lobbying was an 'overarching' motive, namely to transform the Court into a 'tribunal whose significance would rest in its power to rule on issues of great legal or political significance to the public-at-large, to supervise the federal judiciary, and to ensure uniformity throughout the system'.[16] One would today call this the 'constitutional' character of the Court, much in line with the discussion currently underway about the 'constitutional' character of the ECtHR, even though the discussion in the United States speaks openly of the intended 'policymaking capacity'[17] of the Court.

Despite the unfettered docket control, the Court would be very unlikely not to take cases that pose a substantial challenge to the constitutional order, such as a lower federal court vacating a major legislative act of

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[11] 28 USC § 1257.
[12] Bennett Boskey and Eugene Gressman, 'The Supreme Court Bids Farewell to Mandatory Appeals' (1988) 121 *Federal Rules Decisions* 81, 81.
[13] Freund, above n 8, 15.
[14] *Magnum Import Co Inc v Coty*, 262 US 159, 163 (1923).
[15] Jeremy Buchman, 'Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925' (2003) 24(1) *Justice System Journal* 1, 9–10.
[16] Ibid 10.
[17] Ibid.

Congress or a state court redefining a federal civil right.[18] There is thus a degree of a 'symbiotic relationship' between the Court and litigants, with the latter being required to clearly articulate that their cases 'present questions whose resolution will have immediate importance far beyond the particular facts and parties involved'.[19] Addressing practicing attorneys, Vinson CJ concluded: 'Those of you whose petitions for certiorari are granted by the Supreme Court will know … that you are … prosecuting or defending … tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country'.[20] 'It is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law,'[21] or to address issues of mere academic interest.

C *How Does the Certiorari, or 'Agenda-setting'[22] Process Work in Practice*

28 USC § 1254 provides for writs of *certiorari* in '[c]ases in the [federal] courts of appeals,' and § 1257(a) adds that such writs are also possible against '[f]inal judgments or decrees rendered by the highest court of a State ... where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States'. *Certiorari* petitions are routinely considered by the clerks of the individual justices in a first review stage within the '*certiorari* pool', or Cert Pool, except where a justice is not a member of the Cert Pool. According to Supreme Court historians and some justices, in 1972, Justice Powell suggested that the justices pool their law clerks for the purpose of evaluating the *certiorari* petitions and drafting memos for the justices' review.[23] This process leads to the pool memo being drafted by one clerk and sent to all the justices participating in the Cert Pool. With respect to chambers not participating in the Cert Pool, the process is handled entirely by the individual justices' clerks. Cert Pool memos are then subjected to a review process within the individual chambers, the so-called mark-up. Following those initial written review processes, cases are scheduled for discussion in conference. A preliminary step in this respect is the creation by the Chief

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[18] Cf Jeffrey A Segal, Harold J Spaeth and Sara C Benesh, *The Supreme Court in the American Legal System* (Cambridge University Press, 2005) 276.
[19] Chief Justice Fred Vinson (Speech delivered before the American Bar Association, 7 September 1949).
[20] Ibid.
[21] *Anderson v Harless*, 459 US 4, 12 (Stevens J, dissenting) (1982).
[22] Phillip Cooper and Howard Ball, *The United States Supreme Court from the Inside Out* (Prentice Hall, 1996) 108.
[23] See William H Rehnquist, *The Supreme Court* (William Morrow, 1987) 263–4.

Justice of a 'discuss list' complemented by a so-called 'dead list'.[24] These lists form the basis for the 'Friday conference' during which all the justices discuss matters submitted for review. Only cases that are placed on the discuss list are voted on.[25] The justices, in order of seniority, present their views on the 'cert-worthiness' of the cases, and cast their vote, either implicitly or formally.[26] The so-called 'vote of four' allows a minority of four justices to elect to have a case docketed. The vote is not generally made public – research thus routinely relies on the private papers of (retired) justices – nor are there any opinions on behalf of the Court rendered as to why *certiorari* was denied. Justice Stevens once said:

> It is, of course, not possible to explain the reasons supporting every order denying a petition for a writ of *certiorari*. An occasional explanation, however, may allay the possible concern that this Court is not faithfully performing its responsibilities.[27]

The most succinct explanation of the absence of a 'reasoned' *certiorari* was given by Justice Frankfurter in *Maryland v Baltimore Radio Show*:

> Since there are these conflicting and, to the uninformed, even confusing reasons for denying petitions for certiorari, it has been suggested … that the Court indicate its reasons for denial. Practical considerations preclude. … If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact … that different reasons not infrequently move different members of the Court.[28]

Justices are at liberty to dissent from the denial of *certiorari* or to make statements respecting it (quasi-concurring statements), but that is relatively rare. 'One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta.'[29] Dissents usually reflect that a denial of *certiorari* was hard fought, although there also have been statements of public policy, such as a perceived need to clarify a legal issue that remains unresolved in previous jurisprudence. Occasionally statements also are invitations to litigants: 'Should circumstances

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[24] Cf Segal, Spaeth and Benesh, above n 18, 276.
[25] Cf Lawrence Baum, *The Supreme Court* (CQ Press, 9th ed, 2007) 89.
[26] Cf Ibid.
[27] *Castorr v Brundage*, 459 US 928 (Stevens J, respecting the denial of the petition for writ of certiorari) (1982).
[28] *Maryland v Baltimore Radio Show Inc*, 338 US 912, 918 (Frankfurter J, respecting the denial of the petition for writ of certiorari) (1950).
[29] *Singleton v CIR*, 439 US 940, 944 (Stevens J, respecting the denial of the petition for writ of certiorari) (1978).

materially change … petitioners may of course raise their original issue (or related issues) again in the lower courts and in this Court'.[30]

D *The Formal Grounds for Granting Certiorari*

Rule 10 states that 'a petition for certiorari will be granted only for compelling reasons' and then lists several situations which, 'although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers'. The reasons are:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from [established case-law];

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

It has been argued that these rules are insufficiently precise to inform a litigant about preconditions for *certiorari* petitions. Several justices have emphasized the relevance of what they called a 'feel' for a case: Justice Harlan, for instance, stated that '[f]requently the question whether a case is "certworthy" is more a matter of "feel" than of precisely ascertainable rules'.[31] Justice Brennan spoke about 'the special "feel" one develops after a few years on the Court [that] enables one to recognize the cases that are candidates for … review'[32] and added: 'I need not spend much time examining the papers in depth when the questions strike me as worthy of review, or at least as warranting conference discussion'.[33]

From a legal point of view, Rule 10 provides a framework of sorts, but certainly fails to give proper, let alone comprehensive guidance. Decisions are 'certainly ... not random', Baum wrote, but justices 'look

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[30] *Kiyemba v Obama*, 563 US (Docket No 10-775) (2011) (Statement of Breyer J, with whom Kennedy, Ginsburg, and Sotomayor JJ join, respecting the denial of the petition for writ of certiorari).
[31] John Marshall Harlan, 'Manning the Dikes' (1958) 13 *The Record of the Association of the Bar of the City of New York* 541.
[32] William J Brennan Jr, 'The National Court of Appeals: Another Dissent' (1973) 40 U(3) *University of Chicago Law Review* 473, 478.
[33] Ibid.

for cases whose attributes make them desirable to hear;'[34] this resounds Justice Frankfurter's approach of 'different reasons … move different members of the Court'.[35] The issue of frivolous or unmeritorious petitions – which have plagued the ECtHR and its predecessor, the Commission, since their inception – must be discussed here as the 'other side of the coin' of legal validity. Chief Justice Taft believed in 1925 that '[e]asily one-half of the certiorari applications now presented have no justification at all'.[36] In the 1970s, a sitting justice submitted that 'approximately only 30 percent of the docketed cases are discussed at conference. In other words, the Court is unanimously of the view in 70 percent of all docketed cases, that the questions sought to be reviewed *do not even merit conference discussion*'.[37] Chief Justice Rehnquist reasoned in 1987 that roughly half of the then 4,000 petitions were 'patently without merit; even with the wide philosophical differences among the various members of our court, no one of the nine would have the least interest in granting them'.[38]

The prevailing reason for the Court to accept a case remains an inter-circuit conflict.[39] Right after the adoption of the Judges' Bill, Taft went considerably further by declaring that '[w]here there is a conflict of opinion between intermediate appellate courts … or between the federal intermediate appellate courts and the Supreme Courts of the States, the public interest certainly requires that the Supreme Court hear the cases, if the decision will remove the conflict,'[40] thus in effect advocating for an obligatory acceptance of cases that show a *prima facie* split. A split arises when different circuit courts of appeal interpret Supreme Court precedents differently,[41] which may well be prompted by a lack of clarity of such precedent.[42] There is broad consensus in US scholarship that not every inter-circuit conflict requires intervention, and 'most would agree that the Court should hear only important cases, even when a conflict exists. No consensus has emerged, however, on what makes a case presenting a conflict "important" enough to justify review',[43] and that is true for the 'importance' of inter-circuit conflicts as much as it is for the

[34] Baum, above n 25, 91.
[35] *Maryland v Baltimore Radio Show Inc*, 338 US 912, 918.
[36] Taft, above n 5, 3.
[37] Brennan, above n 32, 479 (emphasis added).
[38] Rehnquist, above n 23, 264.
[39] Cf Stephen L Wasby, 'Intercircuit Conflicts in the Courts of Appeals' (2002) 63(1) *Montana Law Review* 119, 140.
[40] Taft, above n 5, 3.
[41] See Wasby, above n 39, 140–1.
[42] *Derby v United States*, 564 US (Docket No 10-8373) (2011) (Scalia J, dissenting from the denial of certiorari).
[43] Michael F Sturley, 'Observations on the Supreme Court's *Certiorari* Jurisdiction in Intercircuit Conflict Cases' (1989) 67(6) *Texas Law Review* 1251, 1252.

'importance' of an issue for granting *certiorari* in general.[44] Indeed, it has been argued that '[t]he many circuit courts act as the "laboratories" of new or refined legal principles ... providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments'.[45] This would suggest a proper hesitation to bring these experiments to a premature end by Supreme Court intervention. Rarely has the Court itself explained why it considered a matter of conflict between lower courts important either in general terms[46] or more specifically, such as in *INS v. Cardoza-Fonseca*, a case concerning immigration law:

> The question presented in this case will arise, and has arisen, in hosts of other asylum proceedings … or [by aliens] who are seeking entry as refugees … . The importance of the legal issue makes it appropriate for us to address the merits now.[47]

Thus, the formal question of a circuit split works in tandem with the substantive relevance of a matter for clarifying an important question of law. Sturley has suggested that there are cases, on the one hand, that are so significant that they warrant Supreme Court review despite the absence of circuit disagreement and, on the other hand, cases that do not warrant such review even if there was a circuit split because of their absolute or relative insignificance.[48] Furthermore, justices can choose the issues they will consider in any given case and can 'limit the grant of *certiorari* to one issue raised by the petitioner',[49] or they can ask the parties to address a (constitutional) issue not raised by either of them, or decide the case on the basis of a consideration not addressed by the parties.[50] Political scientists address this as 'issue fluidity' and within cue theory.[51]

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[44] Donald R Songer, 'Concern for Policy Outputs as a Cue for Supreme Court Decisions of Certiorari' (1979) 41(4) *Journal of Politics* 1185, 1186.
[45] J Clifford Wallace, 'The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill' (1983) 71(3) *California Law Review* 913, 929.
[46] Bowen v Yuckert, 482 US 137, 144–5 (1987): 'Because of the importance of the issue, and because the court's decision conflicts with the holdings of other Courts of Appeals, we granted certiorari'.
[47] 480 US 421, 426, fn 2 (1987).
[48] Cf Sturley, above n 43, 1255.
[49] Baum, above n 25, 87.
[50] See ibid. See also *Mapp v Ohio*, 367 US 643 (1961).
[51] See, eg, Vanessa A Baird, *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda* (University of Virginia Press, 2007) 25.

III POLITICAL SCIENCE SCHOLARSHIP ON US SUPREME COURT JUSTICES' "AGENDA SETTING"

A *The Politics of Discretionary Case Selection*

Let us now turn to how political scientists have addressed the Supreme Court's discretionary case selection prerogative. Drew Noble Lanier sets the stage when he writes: '[p]erhaps the primary goal of all justices is to write their policy views into the law of the land'.[52] A long tradition of scholarship[53] has examined the conditions under which justices vote to grant review. Common to virtually all these authors is that they view the granting or denial of *certiorari* as closely connected with the disposition of the merits of the case. In other words, justices are said to accept or deny cases for review with a keen awareness of the projected outcome. Their focus thus is on criteria for accepting cases for plenary consideration on the merits that relate to the ultimate 'strategy' or 'tactics' on the merits, rather than legal or jurisprudential considerations. Ulmer, for instance, concluded in 1975 that justices' *certiorari* votes were a 'predictor' of their opinion on the merits and, more specifically, that 'those justices who voted for government in fully reviewed criminal cases in the 1947-56 terms were precisely those justices who voted not to review cases in which government was victorious below'.[54] He concluded that the distinction between *certiorari* voting reasons and decisions on the merits was 'fuzzier than previously conceded' and that 'attitudinal and other personalized factors'[55] were equally meaningful for both.

Some political scientists voice doubts as to whether legal considerations are essential, or even relevant in selecting cases for review, or in deciding cases altogether. There is of course ample scholarship on judicial policies on US courts in their decisions on the merits, where authors can rely on extensive published opinions, dissents, concurrences, and transcripts of oral proceedings. Whether *certiorari* decisions are determined primarily by legal or by 'strategic' policy choices of the justices has been analyzed.[56] However, it remains an open question because of methodological shortcomings and empirical constraints of earlier

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[52] Drew Noble Lanier, *Of Time and Judicial Behavior: United States Supreme Court Agenda-setting and Decision-Making, 1888-1997* (Associated University Press, 2003) 177.
[53] Cf Ryan C Black and Ryan J Owens, 'Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence' (2009) 71(3) *Journal of Politics* 1062, 1063–4.
[54] S Sidney Ulmer, 'Voting Blocs and 'Access'"Access" to the Supreme Court: 1947-56 Terms' (1975) 16(1) *Jurimetrics* 6, 8.
[55] Ibid 13.
[56] Glendon A Schubert, 'The Study of Judicial Decision Making as an Aspect of Political Behavior' (1958) 52(4) *American Political Science Review* 1007.

studies[57] and also because only indirect assessments are possible under circumstances of relative secrecy in *certiorari* voting.

The two probably most in-depth studies of *certiorari* decision-making so far, by Hersel W Perry[58] and Doris Marie Provine,[59] concluded that agenda setting is largely a function of legal considerations and that case selection is an entirely appropriate and 'important aspect of the Supreme Court's institutional power'.[60] Political scientists, Perry contends, 'do often over-politicize the court, disregarding many of the very real constraints upon it'.[61] While Provine's and Perry's treatises are not the most current discussions of *certiorari* practice, their significance is enduring.

Provine's main conclusions center around two topics: Firstly, she contends that '[w]hat cases receive favoured treatment depends in large part on the views of the justices about what kinds of issues the Supreme Court should tackle on the merits'.[62] She characterizes the essential criterion for case selection as 'the intrinsic importance of the issues in controversy'.[63] This merits-focused explanation is also reflected in Provine's assessment of the significance of the strength of petitioner's legal arguments. Provine assures us that 'the justices are familiar with the arguments of the contending parties … and it seems clear that they take their evaluations of the merits into account in voting'.[64] When discussing the statistically considerably higher success rate of *certiorari* petitions filed either by the United States Solicitor General or organized litigant groups pursuing either civil rights or labor cases, she attributes the former to the 'expertise of the Solicitor General and his ability to anticipate Supreme Court concerns'.[65] She then immediately links the 'petitioning expertise' with 'the Supreme Court's view of its decision-making responsibilities'.[66]

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[57] See Gregory A Caldeira, John R Wright and Christopher J W Zorn, 'Sophisticated Voting and Gate-Keeping in the Supreme CourtCourt' (1999) 15(3) *Journal of Law, Economics & Organization* 549, 552–3.
[58] Hersel W Perry Jr, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press, 1991).
[59] Doris Marie Provine, *Case Selection in the United States Supreme Court* (University of Chicago Press, 1980).
[60] Ibid 177.
[61] Perry, above n 58, 3.
[62] Provine, above n 59, 174.
[63] D Marie Provine, 'Deciding What to Decide: How the Supreme Court Sets its Agenda' (1981) 64(7) *Judicature* 320, 326.
[64] Provine, above n 59, 129.
[65] Ibid 92.
[66] Ibid.

The second crucial determining factor for *certiorari* grants that Provine identifies are 'judicial beliefs concerning the proper work of the Supreme Court'[67] deeply held by the justices. She relates this to the occurrences of changes in the membership of the Court, which, Provine contends, 'did not disrupt voting propensities, even when they affected how a majority of the Court could be expected to vote on the merits'.[68] Her data leads Provine to conclude 'that most justices who tend to vote frequently for review do so in a wide variety of cases, and similarly, that the less review-prone are restrictive with their votes across the board'.[69] This differentiation between aggressive *certiorari*-voters and conservative-voters on the bench can easily be related to the beliefs related to the Court's proper role in the overall structure of governance, but less to individual political ideologies and strategies. Provine emphasizes the institutional mindset in her conclusions by saying that

> [t]he evidence that power politics was not central in case selection, where such behaviour could have been highly effective, suggests that Supreme Court justices deem outcome-orientated voting inappropriate. It seems likely that a shared conception of the proper role of judges prevents the justices from exploiting the possibilities for power-orientated voting in case selection.[70]

Provine later asserts even more strongly that 'justices are not ordinary political decision makers'[71] because of a shared conception of their proper role.

Perry's book differs from Provine's in that his primary method of investigation was to interview justices of the Supreme Court, law clerks and other court practitioners. Perry prominently discusses strategic decision making and identifies two tools used by justices to influence the spectrum of cases to be decided by the Court. One tool is called 'defensive denial', that is when justices vote against granting *certiorari* in a case 'where a justice believes that if a case is reviewed, he will not like the outcome on the merits'.[72] Perry notes that such denials are commonplace, but 'not used with wild abandon, contrary to what some of the political science literature suggests'.[73] The second tool Perry identifies are 'aggressive grants,' or a decision to take a case that is not the best candidate, because justices have calculated that it has certain characteristics that render it suitable for developing doctrine in a certain

[67] Provine, above n 63, 329.
[68] Ibid 330.
[69] Provine, above n 59, 130.
[70] Ibid 172.
[71] Ibid 174.
[72] Perry, above n 58, 199.
[73] Ibid 200.

way.[74] Perry then finds another type of affirmative case selection in prominent cases such as *Gideon v Wainwright* [75] or *Brown v Board of Education*.[76] He contends that the 'outcomes [in these cases] were foregone conclusions'[77] and that the specific case was merely chosen 'to reach the desired outcome'.[78] This selection of lead cases features prominently in the debate regarding the pilot judgment procedure by the ECtHR.

In the context of 'aggressive grants', Perry defines justices sending out 'signals'[79] as important players in the exercise of inviting welcomed cases. Baird,[80] Jacobi[81] and others[82] have considered the issue more thoroughly in recent years; the former proposed in 2009 'that … Justices shape the Court's agenda by providing signals to litigants about the sort of cases they would like to see, and litigants consider those signals when deciding whether or not to pursue a given case'.[83] However, Perry proceeds in his analysis to a discussion of what he calls 'certworthiness'.[84] He identifies a 'presumption against a grant'[85] in the denial rate of approximately 95% of all *certiorari* petitions, which is strikingly similar to the rate of inadmissibility decisions before the ECtHR. Similar to the proponents of a European Court that has primarily a constitutional stature, Perry finds that 'the Court basically sees itself not as a place to right wrongs in individual cases but as a place to clarify the law'.[86] Perry then turns to the question of 'importance' of issues presented in cases as a trigger for granting *certiorari*. He assures us that 'importance is ultimately subjective'[87] and indeed the three categories he identifies appear a bit subjective by themselves: the first category are cases that are important *sui generis* or where 'the resolution of the

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[74] Ibid 208.
[75] 372 US 335 (1963).
[76] 347 US 483 (1954).
[77] Perry, above n 58, 210.
[78] Ibid.
[79] Ibid 212.
[80] Baird, above n 51; Vanessa A Baird, 'The Effect of Politically Salient Decisions on the US Supreme Court's Agenda' (2004) 66(3) *Journal of Politics* 755.
81 Tonja Jacobi, 'The Judicial Signaling Game: How Judges Shape Their Dockets' (2008) 16 *Supreme Court Economic Review* 1.
[82] Cf Andrew F Daughety and Jennifer F Reinganum, 'Speaking Up: A Model of Judicial Dissent and Discretionary Review' (2006) 14 *Supreme Court Economic Review* 1; Andrew P Morriss, Michael Heise and Gregory C Sisk, 'Signaling and Precedent in Federal District Court Opinions' (2005) 13 *Supreme Court Economic Review* 63.
[83] Vanessa Baird and Tonja Jacobi, 'Judicial Agenda Setting through Signaling and Strategic Litigant Responses' (2009) 29 (1) *Washington University Journal of Law and Policy* 215.
[84] Perry, above n 58, 216–17.
[85] Ibid 218.
[86] Ibid 220.
[87] Ibid 253.

particular case, not necessarily the legal nature … is important'.[88] This could be cases that require immediate resolution for domestic political reasons, such as *United States v Nixon*.[89] A second category identified by Perry are 'cases … that present issues that are important to the polity'.[90] These are cases that 'almost anyone would consider important' or that 'resolve or address important issues of law, but their importance clearly emanates from their impact on society'.[91] Perry's third category refer to 'cases that are important to the law'.[92] He says that 'the[ir] importance stems from confusion in the legal system … generated by conflicting or improper interpretations by courts'.[93]

In a chapter entitled '[a] decision model',[94] Perry finally turns to the modes and steps in *certiorari* decision making. This model is related to Perry's distinction between two types of Supreme Court justices: those who are 'more "judge-like",[95] who are known to be 'less ideological, less result-orientated'.[96] Other than the more strategic thinkers on the Court, these justices display a *certiorari* voting behavior that is determined by 'certworthiness in some jurisprudential sense rather than a strategy for outcome … and some ultimate doctrinal stance'.[97] Perry proposes two so-called 'decision modes'[98] and suggests that 'the decisional steps for one case may look very different from those used by the same justice to evaluate another case'.[99] If a justice 'cares strongly about the outcome of a case … then he will enter the outcome mode to decide whether or not to take the case'.[100] That justice will then 'exhibit different behavior – behavior that is much more strategic and is more in line with the decision making portrayed by political scientists'.[101] As to the steps the justice takes in this mode,

> while the justice does not ignore jurisprudential concerns, they do not dominate his decision process. Rather, it is dominated by strategic considerations related to the outcome of the case on the merits. Jurisprudential concerns play a rather different role in the calculus.[102]

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[88] Ibid.
[89] *United States v Nixon*, 418 US 683 (1974).
[90] Perry, above n 58, 253.
[91] Ibid 253.
[92] Ibid.
[93] Ibid 254.
[94] Ibid 271–2.
[95] Ibid 211.
[96] Ibid.
[97] Ibid.
[98] Ibid 274.
[99] Ibid.
[100] Ibid.
[101] Ibid 279.
[102] Ibid 274.

In contrast, in the 'jurisprudential mode', 'the justice does not feel particularly strongly about the outcome of a case on the merits [and] makes his decision based on legalistic, jurisprudential types of considerations such as whether or not there is a [circuit] split'.[103]

Despite the well-balanced Perry and Provine studies, political science continues to contend that '[i]n the land of *certiorari*, ... law provides precious little constraint on judicial action'.[104] Most political scientists are 'quite blunt'[105] in their estimates that the Judges' Bill has given the Supreme Court broad powers to position itself as an active policy-maker. Prominent amongst these theories are Ulmer,[106] Brenner,[107] and others' 'error-correction strategy,'[108] which suggests that justices vote for a *certiorari* grant if a lower court has 'departed significantly from their preferred doctrinal position,'[109] or 'cue' theory, which in essence suggests that justices look for certain cues that signal petitions worthy of review. Tanenhaus et al identified three 'cues' associated with the granting of *certiorari* during the period 1947 to 1956: (1) that the federal government was as a petitioner; (2) that there was disagreement among lower court judges or disagreement among two or more courts or governmental agencies and; (3) that the case concerned a civil rights issue.[110] Later scholars agreed with,[111] or disputed these findings,[112] and sometimes expanded them further. Songer,[113] for example, explored whether the

[103] Ibid.
[104] Edward A Hartnett, 'Questioning Certiorari: Some Reflections Seventy-five Years after the Judges' Bill' (2000) 100 *Columbia Law Review* 1843, 1720.
[105] Ibid 1718.
[106] S Sidney Ulmer, 'The Decision to Grant Certiorari as an Indicator to Decision on the Merits' (1972) 4 *Polity* 429.
[107] See John F Krol & Saul Brenner, 'Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation' (1990) 43 *Western Political Quarterly* 335, and Saul Brenner, 'Error-Correction on the U.S. Supreme Court: A View from the Clerks' Memos' (1997) 34 *Social Science Journal* 1.
[108] Saul Brenner, 'Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies' (2000) 92 *Law Library Journal* 193, 195.
[109] Songer, above n 44, 1187, referring to Lawrence Baum, 'Policy Goals and Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction' (1977) 21 *American Political Science Review* 14.
[110] Joseph Tanenhaus, Marvin Schick & David Rosen, 'The Supreme Court's Certiorari Jurisdiction: Cue Theory' in Glendon A Schubert (ed), *Judicial Decision-Making* (Free Press, 1963) 111.
[111] Virginia Armstrong & Charles A. Johnson, 'Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?' (1982) 15 *Polity* 141.
[112] S Sidney Ulmer, William Hintze & Louise Kirklosky, 'The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory' (1972) 6 *Law & Society Review* 637.
[113] Songer, above n 44, 1185.

social status of petitioners triggered positive votes in certain justices.[114] These authors concluded that policy cues have 'a reinforcing effect'.[115]

'Issue fluidity',[116] which was mentioned before, may be considered a modification of cue theory.[117] Here, justices are seen not only as responding to cues, but as modifying the cases before them by either creating issues not addressed by the parties or by suppressing issues that were argued in favor of one specific issue viewed as crucial by the (majority of the) Court. McGuire and Palmer found in 1995, that in 18 out of 160 cases they sampled, the justices in their final decisions addressed issues not briefed and provided 'authoritative answers to questions that have not been asked'.[118] They added further empirical evidence in 1996.[119] Subsequent studies, especially by Palmer,[120] have found evidence for extensive use of both creation and suppression techniques.[121] However, other authors have harshly criticized such findings.[122] Other theoretical approaches, such as the 'attitudinal model',[123] or the voting bloc theory[124] need not be examined further in the present context. More recent explorations using, for instance, the cue theory as a starting point, have further refined the analysis in part, but remain inconclusive in sum, leading to the conclusion that strategic agenda setting is at most 'situational'.[125]

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[114] See S Sidney Ulmer, 'Underdogs and Upperdogs: Litigant Status as a Factor in the Selection of Cases for Supreme Court Review' (paper presented at the 1976 meeting of the Southern Political Science Association, Atlanta, Georgia, November 4-6, 1976) 18-21; see also Glendon Schubert, 'Policy Without Law: An Extension of the Certiorari Game' (1962) 14 *Stanford Law Review* 284, 292.

[115] Songer, above n 44, 1191.

[116] S Sidney Ulmer, 'Issue Fluidity in the US Supreme Court: A Conceptual Analysis' in Stephen C Halpern & Charles M. Lamb (eds), *Supreme Court Activism and Restraint* (Lexington Books, 1982) 319.

[117] Kevin T McGuire and Barbara Palmer, 'Issue Fluidity on the Supreme Court' (1995) 89 *American Political Science Review* 691.

[118] Ibid 699.

[119] Kevin T McGuire & Barbara Palmer, 'Issues, Agendas, and Decision Making on the Supreme Court' (1996) 90 *American Political Science Review* 853.

[120] See Barbara Palmer, 'Issue Fluidity and Agenda Setting on the Warren Court' (1999) 52 Political Research Quarterly 39; Barbara Palmer, 'Issue Definition and Policy Making on the United States Supreme Court' (1999) 27 *Southeastern Political Review* 699.

[121] See Palmer, above n 120, who concluded on the basis of 200 random sample cases that the Warren Court created new issues in approximately 25%, and suppressed issues in about 50% of these cases.

[122] See Lee Epstein, Jeffrey A Segal & Timothy Johnson, 'The Claim of Issue Creation on the U.S. Supreme Court' (1996) 91 *American Political Science Review* 845, 846–8.

[123] See C Herman Pritchett, *The Roosevelt Court: A Study of Judicial Politics and Values* (Macmillan, 1948).

[124] Cf Ulmer, above n 54, 7 (quoting Pritchett).

[125] Lawrence Baum, *The Puzzle of Judicial Behavior* (University of Michigan Press, 1997) 80.

B *An Attempt at a Conclusion: Politicians in Robes or Legalists on the Bench?*

In 2004, Cordray & Cordray expounded on the broader jurisprudential considerations of case selection and contended

> that a Justice's views about what role the Supreme Court should play in the judicial system and American life - including his or her views on the nature of precedent, the importance of uniformity in federal law, and the Court's appropriate role in effectuating social change - play a central role in shaping his or her decisions about case selection.[126]

This point of view reflects a mixed legal/attitudinal model, proposed for instance by Braman & Nelson, pursuant to which judicial officers 'really do use the law in thinking through cases, though their preferences may influence the kinds of arguments and evidence they find persuasive'.[127] These authors also place emphasis on the inappropriateness for unelected judges to 'impose their own beliefs on their decisions',[128] an assertion that is rendered at least questionable in light of the voting behavior of certain justices.[129]

However, while emphasizing 'the political', social science does not discount legal factors as determinants of *certiorari* decisions. Ulmer, a proponent of 'cue' theory, concluded that inter-circuit or precedential 'conflicts' were factors that made a *certiorari* grant 'significantly more likely,'[130] identifying such conflicts as 'far and away the most significant predictor' for decisions. Conflict, being 'highly germane' to cue models, represents a 'legal-systemic variable'[131] or, in other words, a formal legal determinant for *certiorari* decisions. Arguing that the Supreme Court was a 'highly specialized bureaucratic organization',[132] Levinson suggests that in view of the number of *certiorari* petitions, the Court would rather create 'quasi-formalistic checklists of the type that can be found in any overworked bureaucracy'.[133] These constraints on the time available to

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[126] Cordray and Cordray, above n 6, 391.
[127] Eileen Braman & Thomas E Nelson, 'Mechanism or Motivated Reasoning? Analytical Perceptions in Discrimination Disputes' (2007) 51 *American Political Science Review* 940, 942.
[128] Ibid 941.
[129] See Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America* (Times Books, 2006), especially the chapter on justices William Rehnquist and Antonin Scalia, at 177–220.
[130] S Sidney Ulmer, 'The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable' (1984) 78 *American Political Science Review* 901, 910.
[131] Ibid.
[132] Stanford Levinson, 'Strategy, Jurisprudence, and Certiorari' (1993) 79 Va. L. Rev. 717, 729, with reference to Owen M Fiss, 'The Bureaucratization of the Judiciary' (1983) 92 *Yale Law Journal* 1442.
[133] Ibid 730.

justices to assess petitions permits the conclusion that one 'rarely need go beyond Perry's "legalistic" criteria in order to decide that most of these petitions were not "certworthy"'.[134] The remainder of the cases, much smaller in number, may in part be those that trigger policy and strategy considerations in the assessment of their certworthiness, or rather the individual justices' views on their suitability for being put on the docket. This places the *certiorari* process squarely in the same realm as the screening of the mass of applications arriving daily at the European Court of Human Rights. It also de-mystifies *certiorari* as something much more like a routine process, with occasional, but probably statistically negligible, highlights that lead to contentious discussion in conference and possibly to dissents from the denial of *certiorari*.

IV Discretion in the Case-selection of the European Court of Human Rights?

The reform process of the ECtHR for the past two decades has at its center the question whether and how far every individual applicant should have his or her day in court and, correspondingly, whether and to what extent the Court should be (en)trusted to pick and choose which cases are best suitable to accomplish its mission to both secure individual justice and further advance the quasi-constitutional parameters state agencies have to fulfil under the *Convention*. The question came to the forefront after the two-step process of the original *Convention* came to an end in 1998, which had placed the former European Commission of Human Rights as an efficient screening body in front of the then part-time Court. The current debate reflects the nostalgic sentiments towards a discreet screening body that would 'unburden' the Court with respect to the task of eliminating cases not worthy of full review.

Discretion has been and is present in the procedures of the *Convention* system, and seems to have a major impact on the vast majority of cases filed with the Court. Among the examples that could be cited are

(i) Activities of the Court's screening panels prior to 1998 under Article 48(2) of the Convention then in force[135] and Rule 26 of Rules of Court B,[136] when three judges of the Court were to examine whether cases concluded by the Commission with a report that were referred to the Court by the applicant should be accepted;

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[134] Ibid 731.

[135] That was the Convention as amended by Protocol No 9, dated November 6, 1990, ETS No 140, Art 5 modifying 48 (2) ECHR: "If a case is referred to the Court only in accordance with paragraph 1.e, it shall first be submitted to a panel composed of three members of the Court". Protocol No 9 was repealed as from the date of entry into force of Protocol No 11, ETS No 155, on November 1, 1998, which created a permanent Court.

[136] Rules of Court B came into force on 2 October 1994.

(ii) Referrals in 'exceptional cases' pursuant to Article 43(1) ECHR to the Grand Chamber[137] that are being assessed by the panel of five judges of the Grand Chamber on the basis of the referring party's specifications that there was a 'serious question affecting the interpretation or application of the Convention … or a serious issue of general importance'.[138] The panel 'shall accept the request only if it considers that the case does raise such a question or issue. Reasons need not be given for a refusal of the request'.[139]

(iii) The decision of the Court to pick one or more parallel applications – and not necessarily the first application(s) reaching it[140] – as candidates for the pilot judgment procedure is essentially discretionary, albeit within the parameters of certain criteria. Judge Tulkens characterized both the decision to apply the procedure and the selection of the modus operandi as 'guided by considerations of feasibility and expediency'.[141] Thus, the Court decides 'based on free judicial discretion', whether a potential systemic dysfunction exists and which specific cases are to be elevated to the test case to be subject to the accelerated and substantially different procedure in place for pilot judgments.[142]

(iv) Elements of discretion are clearly present in friendly settlement acceptances or denials or the new admissibility criterion of 'substantial disadvantage' introduced by Protocol No. 14. One could furthermore argue that the substantive rights are just as much determined by flexible, vague, or - yes - discretionary concepts, not the least of which are the 'margin of appreciation' and the question of 'proportionality'. Discretion, suffice it to say, is omnipresent in the application and interpretation of the European Convention on Human Rights, on and below the surface.

A *The Discussion of Certiorari in the Reform Process*

Many discussions of the far-reaching reform proposals for the Court's proceedings have addressed the question whether the Court should be granted judicial discretion in selecting its own cases; academe has

[137] "[A]ny party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber."
[138] *Rules of Court* r 73(1).
[139] *Rules of Court* r 73(2).
[140] See Jörn Eschment, *Musterprozesse vor dem Europäischen Gerichtshof für Menschenrechte* (Lang, 2011) 178.
[141] Françoise Tulkens, 'Perspectives from the Court: A Typology of the Pilot-judgment Procedure', in *Seminar: Responding to Systemic Human Rights Violations, Pilot Judgments of the European Court of Human Rights and their Impact at National Level* (Council of Europe, 2010) 5, 7.
[142] See Eschment and Musterprozesse, above n 140, 177–8.

addressed the issue only occasionally.[143] This discourse is firmly embedded in the larger dialogue about the dual role of the Strasbourg system as a guarantor of individual liberties and a process of quasi-constitutional adjudication. This dichotomy[144] is well expressed in the Report of the Wise Persons which, in 2006, was a point of departure for the reform process to follow:

> This protection mechanism confers on the Court at one and the same time a role of individual supervision and a 'constitutional' mission. The former consists in verifying the conformity with the Convention of any interference by a state with individual rights … Its other function leads it to lay down common principles and standards … and to determine the minimum level of protection which states must observe.[145]

The question 'whether the Court can systematically deliver individual justice … or whether it must concentrate upon the delivery of constitutional justice instead'[146] is very politically charged, but still easy to answer from a real life point of view. Greer asserts that it

> is naúve … to regard the manifestly ill-founded criterion as an objective test. Determining if an application is, or is not, manifestly ill-founded requires the exercise of judgment and the interpretation of conduct, facts and norms; it is, therefore, inescapably discretionary.[147]

Applications are today being rejected without reasons being given to the applicants or publicly,[148] which excludes the possibility of external review of the soundness of such denials of review and in turn means full *internal* discretion of the Court not to adjudicate certain cases. '[O]ver any given time-frame it would almost certainly be possible to find, amongst the 95 percent or so of formal applications which do not proceed to judgment on the merits, other 5 percent batches that could just as plausibly have been chosen for adjudication instead.'[149] Jackson very openly compares this 'limiting its selection of cases to those which may

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[143] Eg Rudolf Bernhardt, 'The Admissibility Stage: The Pros and Cons of a Certiorari Procedure for Individual Applications' in Rüdiger Wolfrum & Ulrike Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Springer, 2009) 29.

[144] Luzius Wildhaber spoke of a 'fundamental dichotomy running throughout the Convention'. Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Humanitarian Rights Law Journal* 161, 162.

[145] Council of Europe, 'Report of the Group of Wise Persons to the Committee of Ministers' (Report CM(2006)203, 15 November 2006) [24].

[146] Steven Greer & Andrew Williams, 'Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?' (2009) 15 *European Law Journal* 462, 466.

[147] Steven Greer, 'What's Wrong with the Euopean Convention on Human Rights?' (2008) 30 *Human Rights Quarterly* 680, 688.

[148] Rule 52A(1) of the Court's Rules of Procedure.

[149] Greer, above n 147, 686.

potentially have a significant impact on people's rights generally'[150] to the practice of the US Supreme Court or the German Federal Constitutional Court. With that, we are firmly in the territory of an at least factual *certiorari* procedure. McKaskle, writing from a US perspective, is less timid than European commentators when describing the right to individual petition as 'presumably' obligating the Court to 'accept and decide any case presented to it that credibly alleges a violation of the *Convention'*.[151] He continues by saying that '[t]hough there is nothing in the *Convention* … granting discretion to ignore what, prima facie, appear to be credible claims, some observers of the Court suspect that a substantial amount of discretion is exercised in rejecting cases'.[152]

What are the reasons, then, for rejecting a European 'leave to appeal-system'?[153] They can loosely be grouped in four categories:

(1) The *sanctity of the 'right to petition'*: The Wise Persons, 'felt that ... [t]he right of individual application is a key component of the … *Convention* and the introduction of a mechanism based on the *certiorari* procedure would … undermine the philosophy underlying the *Convention*'.[154] The Explanatory Report to *Protocol No 14* limits its reasoning to this point: 'It was felt that the principle according to which anyone had the right to apply to the Court should be firmly upheld'.[155]

(2) Secondly,

> a greater margin of appreciation would entail a *risk of politicising the system* as the Court would have to select cases for examination. The choices made might lead to inconsistencies and might even be considered arbitrary.[156]

Keller and Bertschi's analysis of the US *certiorari* process is too cursory to yield a much more profound result than that of the deliberations in the reform process, yet they correctly view it as driven more by the preservation of legal certainty than the protection of individual petitioners.[157] The authors err, however, in viewing *certiorari* grants and

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[150] Joshua L Jackson, '*Broniowski v Poland*: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court' (2006) 39 *Connecticut Law Review* 759, 781.
[151] Paul L. McKaskle, 'The European Court of Human Rights: What It Is, How It Works, and Its Future' (2005) 40 *University of San Francisco Law Review* 1, 40.
[152] Ibid 41.
[153] Luzius Wildhaber, 'Ein Überdenken des Zustandes und der Zukunft des Europäischen Gerichtshofs für Menschenrecht', (EuGRZ, 2009) 541, 551.
[154] Council of Europe, above n 145, [42].
[155] Explanatory Report [34].
[156] Council of Europe, above n 145, [42].
[157] Helen Keller & Martin Bertschi, ‚Erfolgspotential des 14. Protokolls zur Europäischen Menschenrechtskonvention', EuGRZ 2005, 204, 217.

denials as being based on 'clear rules'.[158] As we have seen, the Rules of the Supreme Court are descriptive and vague at best, and allow precisely the broad, but not random or arbitrary discretion that Keller and Bertschi find inappropriate for the European Court.

(3) The risk of *limiting consideration to 'important cases' only*: The Reflection Group of the Council of Europe's Steering Committee for Human Rights ('CDDH') 'considered that accepting this suggestion would be tantamount to calling into question the entire philosophy on which the *Convention* was based'[159] and found the issue to be intrinsically linked to the question whether the Court should morph into a constitutional court of sorts. When comparing the proposed approach to the *certiorari* process of the US Supreme Court, the Group failed to fully internalize the meaning and purpose of the Supreme Court's discretion:

> If the idea of transforming the Court into a constitutional court were to be adopted, the *certiorari* system could be envisaged, but this would be tantamount to giving general jurisdiction to the Court to decide not to hear a case that it did not consider sufficiently important (the practice of the United States Supreme Court).[160]

A mentioning of US *certiorari* should have triggered a substantial discussion of the ramifications of granting a court full or at least broad case selection discretion on the political status of that court. After all, much of the political science analysis of *certiorari* practice centers around political choices, strategizing, signalling between court and parties, and other subliminal means of shaping the intake, and thereby also the output of that court. As we have seen, granting or denying of *certiorari*is not based solely on the – relative or absolute – importance of a case or issue.

(4) Risks of introducing an alien concept into a radically changing 'Europe of rights': In the Reflection Group '[o]ne expert considered that the *certiorari* system was a good one but premature, as the existing system was still in the throes of change'.[161] This should be understood as a warning against granting discretion to the Court not so much because of the Court's own insufficiencies, but because of the ongoing changes to the system in light of the geographical expansion of the territory governed by the *Convention*, or European 'legal space'.[162] In particular, the

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[158] Ibid.

[159] Council of Europe, 'Reflection Group on the Reinforcement of the Human Rights Implementation Mechanism' (Activity Report, CDDH-GDR(2001)010, Steering Committee for Human Rights) Appendix II: Report of the 3rd Meeting (June 5-8, 2001), [10].

[160] Council of Europe, above n 159, Appendix II, [10].

[161] Ibid [11]..

[162] ECtHR, *Bankovic et al v Belgium et al*, Decision on the Admissibility [GC] of December 12, 2001, Reports 2001–XII, [80].

accession of newly democratic – and, one might argue, semi-democratic – states would rightly be considered 'throes of change'.The evolution of the *certiorari* jurisdiction of the US Supreme Court also has a historical dimension, but while geographical expansion may have played a role, it is rather the substantive expansion of federal and state law that seems to have triggered a gradual transition from mandatory to discretionary jurisdiction. The firm basis – judicial review established in *Marbury v Madison*[163] and the review power of the federal Supreme Court also over federal issues decided in state courts in *Martin v Hunter's Lessee*[164] – has been in place since the early days of American constitutionalism. Yet the scope of federal regulatory powers under the Constitution has evolved in reach and depth after the Civil War, in the 1930's and 40's, and most notably in the civil rights era after 1960.

In all this, terminology is a material consideration. The Reflection Group considered that 'the term *certiorari*, which was liable to be misunderstood, should be avoided and replaced by "restricted access to the *Convention* system" or a similar phrase'.[165] This alternative term is in fact more negative than *certiorari*, which after all does *not* restrict access to a court, but allows the court to exercise its judicial function to select.

When trying to piece together the drafting saga into a forward-looking agenda for purposeful discretion of the Court, guidance can be found in an early observation by former President Wildhaber:[166] referring to the 'significant disadvantage' criterion but in reality discussing a vision of a modified *certiorari* procedure, Wildhaber emphasized that he would propose to 'leave it open to the Court, but not as an automatic consequence, to decline to deal with cases which have no general interest where to do so would not be unduly harsh or unjust to the applicant'.[167] Wildhaber suggests:

> [T]he great majority of applicants … will have suffered a significant disadvantage and all of them will have experienced what they perceive to be a significant disadvantage. I have no doubt that many applicants will feel offended or even outraged if the Court were to inform them that they have not suffered a significant disadvantage. What we should in fact be looking at is whether the Court's decision not to examine the case will give rise to a significant disadvantage.[168]

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[163] 5 US (1 Cranch) 137 (1803).
[164] 14 US 304 (1816).
[165] Council of Europe, above n 159, Appendix II, [11].
[166] Council of Europe, 'Statement by the President of the European Court of Human Rights at the Meeting of the Ministers' Deputies' Liaison Committee with the Court 17 March 2003' (Statement, CDDH-GDR(2003)018, 10 March 2003).
[167] Ibid 2.
[168] Ibid.

Wildhaber proposed that the Court should be empowered to

> declare inadmissible cases which do not raise a serious question affecting the interpretation or application of the *Convention* or any other issue of general importance unless to do so would entail a significant disadvantage for the applicant.[169]

The advantage of Wildhaber's flexible proposal would be that the Court could 'select important cases, but it would not prevent it from picking cases on the basis of individual circumstances'.[170] Thus, the response to the case-load problem, according to Wildhaber, was *flexibility*.

The Court embraced the approach to a degree. While it always emphasized the right to *submit* a complaint to the Strasbourg machinery,[171] it stated:

> While the *Convention* machinery must remain open to all within its jurisdiction, it is not every individual application that contributes to the [*Convention*'s] aim … . [I]t must be possible for the Court to concentrate on the cases which do so contribute. … Similar mechanisms exist in national systems to protect superior courts in particular from excessive caseload.[172]

Several judges found, however, that

> '[t]he Court's internal measures to streamline and rationalise procedures have [already] pared down judicial examination to the bare minimum in the great majority of cases. It is not possible … to take that process any further by empowering the Court simply to reject cases on the basis of a new and rather vague, even potentially arbitrary, condition'.[173]

The CDDH deliberations culminated in the following observation in the pre-Interlaken stage:

> In the longer term, there lies the possibility that the Court might one day develop to have some degree of power to choose from amongst the applications it receives those that would receive judicial determination. The time is not yet ripe, however, to make specific proposals to this end.[174]

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[169] Ibid.
[170] Ibid.
[171] See Position Paper of the ECtHR on Proposals for Reform of the ECHR and Other Measures as Set Out in the Report of the CDDH of 4 April 2003, 12 September 2003, CDDH-GDR(2003)024[31].
[172] Ibid [36].
[173] Ibid [34].
[174] CDDH, 'Opinion on the issues to be covered at the Interlaken Conference' (Opinion, CDDH(2009)019) Addendum I, [15].

B *The Court's 2012 Referral-Approach and the Wilton Park Conference Proposal*

Prior to the April 2012 Brighton conference, the Court embraced, albeit with much hesitation, the thought that some form of 'pick and choose' might become necessary in the future design of its jurisdiction:

> [T]he Court would prefer to use the already existing criterion of 'well-established case-law'.Under this test, where there is well-established case-law, the Court would only take up the case … if respect for human rights … required it to do so.[175]

Then what would happen to cases not meriting consideration in full? The Court here accepts the inevitable conclusion that '[a]dmissible cases not satisfying this test would have to be dealt with outside the Court either under another international process or by being *remitted to a national mechanism*'.[176] It is hard to imagine what other international process could be envisaged as a 'catch all' alternative to the Court's jurisdiction. Thus, referrals back to national courts remain as the most viable option for cases in which the Court may in the future decline jurisdiction. The CDDH in fact went further in its own contribution to the Brighton conference, stating that there were proposals

> introducing a procedure whereby the Court would *send back to the relevant national court* cases that were well-founded but had not been properly examined by national courts.[177]

Thus, the 'subsidiary' character of the Strasbourg proceedings is brought back to our attention in the context of referrals. These considerations are in part based on the deliberations of the November 2011 Wilton Park conference, and were reiterated by the CDDH in February 2012.[178] This proposal

> entails conferring on the Court a discretion to decide which cases to consider, mirroring similar provisions in the highest national courts in certain Contracting Parties. … [A]n application would not be considered unless the Court made a *positive decision* to deal with the case.[179]

The arguments in favor of a 'pick and choose' model include case-handling efficiency; the ability of the Court to focus its work only on the

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[175] Preliminary opinion of the Court in preparation for the Brighton Conference, adopted by the Plenary Court on 20 February 2012, [34].
[176] Ibid (emphasis added).
[177] CDDH, 'Contribution to the Ministerial Conference organized by the United Kingdom Chairmanship of the Committee of Ministers' (CDDH (2012)R74, 15 February 2014) Addendum III, para 17 (iii) [emphasis added].
[178] CDDH, above n 177, Addendum I, Appedix VI 3, Conferring on the Court a discretion to decide which cases to consider.
[179] Ibid 5555, [A. 1] [emphasis added].

highest priority cases and to ensure consistent case-law of the highest quality, and the formalization of the Court's priority policy, under which it already categorizes cases and sends them off on different tracks.

Arguments against include a significant restriction of the right of individual petition; that the proposal 'presupposes a high level of implementation at the national level, which is not currently achieved in all instances', and a relatively limited effect on the actual work of the Registry, 'since the judges will have the right to pick and choose their cases, they will still have to take note of all the information provided by the Registry'.[180] The CDDH further reasoned that '

> the criteria on which … decisions [rejecting applications] were based should be clearly stipulated. … It is important to guarantee that the selection of applications is done objectively and independently by the Court, in order to avoid any kind of politicising of the decisions'.[181]

Also, '[t]he introduction of a pick and choose model could be accompanied by the elaboration of a mechanism, which would allow the Court to return cases to the domestic legal order for further examination in conformity with *Convention* standards'.[182]

These considerations constitute the most advanced discussion of a *certiorari*-like procedure for the Court to date. They also indicate that the discretionary element, and in particular one closely connected to referrals of cases back to national authorities, is politically viable and worthy of further exploration. This distinguishes such proposals from other reforms implemented in *Protocol No 14*, such as the 'absence of a significant disadvantage criterion' pursuant to Article 35(3)(b) ECHR that has neither simplified the admissibility procedure nor yielded jurisprudence that would withstand closer scrutiny of quality and/or consistency.[183]

V THE POLITICS OF THE EUROPEAN COURT OF HUMAN RIGHTS

A *The Political Framework for International Judges*

Compared to the expansive literature in the field of political science pertaining to the US Supreme Court, the published literature both on the politics of international judicial decision-making in general[184] and the

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[180] Ibid [B. 2]–[C. 3].
[181] Ibid 55–6, para [D. 4].
[182] Ibid.
[183] Cf. Alexander H E Morawa, 'The European Court of Human Rights' Rejection of Petitions where the Applicant has not Suffered a Significant Disadvantage: A Discussion of Desirable and Undesirable Efforts to Safeguard the Operability of the Court' (2012) 1 *Journal of Transnational Legal Issues* 1.
[184] Eg, Dinah Shelton, 'Form, Function, and the Powers of International Courts' (2009) 9 *Chicago Journal of International Law* 537–71 (2009); Eric Posner and John Yoo, 'Judicial

particular role of judges of the European Court of Human Rights and the legal culture behind the Court is very limited.[185] Most authors have focused either on the election of judges,[186] the background and effect of concurring or dissenting opinions,[187] or the relationship of Strasbourg jurisprudence and the national legal system,[188] also in the context of transitional justice.[189] However, if one links this literature with that on the role and status of international courts in general, a few useful conclusions can be drawn. Caron's recent identification of international tribunals as oriented towards the international legal community as a whole, rather than particular interests, as being prospective, and as gradually shifting agenda-control away from their creators, is a helpful starting point.[190] International courts are thus presumably inherently 'political' in the sense that they aim at promoting their own preferences with respect to what compliance with the legal regime they monitor should mean by inducing a certain state behaviour. The latter aspect, namely taking control of the substance of the law an international court is called upon to apply, is done by progressively interpreting that law,[191] a function routinely performed by the Strasbourg Court. Stone, Sweet and Keller thus conclude that 'the Court possesses all of the formal power required for it to acquire dominance over the evolution of the Convention regime; today, its *de facto* dominance over the regime is fully secure,'[192] also due to its influence and persuasive force emanating from the overall quality of the jurisprudence. Of course, the Court's taking control of the Convention must be viewed against the expected and actual responses of states parties, in particular full or partial non-compliance. Dothan has recently

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Independence in International Tribunals' (2005) 93 *California Law Review* 1; Lawrence R Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 899.

[185] Cf Nina-Luisa Arnold, The Legal Culture of the European Court of Human Rights (Brill, 2007).

[186] Henry G Schermers, 'Election of Judges to the European Court of Human Rights' (1998) 23 *European Law Review* 568–78 (1998).

[187] Florence Rivière, Les Opinions Séparées des Juges à la Cour Européenne des Droits de l'Homme (Brylant, 2004).

[188] Andrew Z Drzemczewski, European Human Rights Convention in Domestic Law (Clarendon Press, 1983); Alec Stone Sweet, & Helen Keller, 'The Reception of the ECHR in National Legal Orders', Yale Law School Faculty Scholarship Series, Paper 89 (2008), <http://digitalcommons.law.yale.edu/fss_papers/89>.

[189] Eva Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights' (2011) 6 *International Journal of Transitional Justice 282*.

[190] Cf. David Caron, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 *Berkeley Journal of International Law* 401, 402–3.

[191] Cf Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 6 *British Yearbook of International Law* 195.

[192] Stone Sweet & Keller, above n 188, 23.

written about the 'costliness' of jurisprudence, and that costliness concerns both the states and the Court.[193]

Shelton has extracted four inherent powers of the judicial function, namely 'to (1) interpret the submissions of the parties to isolate the issue(s) in the case and identify the object(s) of the claim; (2) determine whether the court is competent to hear a particular matter; (3) determine whether the court should refrain from exercising jurisdiction that it has;'[194] and (4) to determine all legal questions relating to the merits of the dispute. Items (1) and (3) on this list are not all, but essential elements of *certiorari*. Indeed, the isolation or identification of the – real – issues and the predetermination whether taking cognisance of them is appropriate and suitable (by whatever standards) is what optional jurisdiction of a court is all about. A determined and purposeful selection of cases thus adds to the reputation and the ability of an international court to make an impact.

Let us revisit the US paradigm of conservative vs liberal in the present context: a conservative outlook in the European context may be seen as judicial restraint, liberalism as judicial activism. 'The institutional setting of the ECHR rephrases the distinction between judicial restraint and judicial activism in terms of subsidiarity and supervision.'[195] How can conservative vs liberal, restraint vs activism, be explained in the European context? In keeping with the domestic tradition, more conservative authors from the US have indeed endorsed or even advanced a point of view that 'vociferously question[s] the legitimacy, utility, impartiality, effectiveness and authority'[196] of international tribunals in general.[197] International literature reflects this, with proponents of judicial trusteeship and professional ethics-based independence[198] confronting critics who advocate for a principal-agent relationship between states and international tribunals/judges.[199]

Measuring the success of international courts on the basis of the acceptance of their decisions by the states that established them follows the 'agent theory' of delegation of judicial decision-making powers.

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[193] Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12 *Chicago Journal of International Law* 115.
[194] Shelton, above n 184, 545.
[195] Fred J Bruinsma, 'The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)' 2008 *Ancilla Juris* 32, 40.
[196] Karen J Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 *European Journal of International Relations* 33, 55.
[197] Robert Bork, Coercing Virtue: The Worldwide Rule of Judges (AEI Press, 2003).
[198] See Alter, above n 196.
[199] See Geoffrey Garrett, Daniel Kelemen & Heiner Schulz, 'The European Court of Justice, National Governments and Legal Integration in the European Union' (1998) 52 *Int'l Organization* 149, and Paul B. Stephan, 'Courts, Tribunals and Legal Unification – The Agency Problem', 2002 *Chicago Journal of International Law* 333.

Delegation to 'agents' differs from delegation to 'trustees' in so far as the latter are, according to Alter,[200] selected and empowered differently and act in the best interests of a defined beneficiary, be it a target group of individuals or an abstract concept. Selection, to follow Alter even further, of trustees is based on their qualifications or their 'personal and/or professional reputation'[201] or 'expert authority',[202] and the selection criteria affect the scope of delegated power, here to 'make meaningful decisions according to the trustee's best judgment or … professional criteria'[203] or purposeful exercise of discretion, which can be said to have been delegated to the trustee as well.[204] Grant & Keohane argue, for instance:

> Principal–agent models are inappropriate, for example, when calling judges to account. … [T]hey are not responsible for enacting the will of those who empower them; … among their duties is the duty to resist enacting the will of those who empowered them when to do so would bend or violate the law.[205]

This does not mean that 'politics does not matter in international judicial decision-making',[206] but there should be a 'presumption … in favor of [international courts'] independence',[207] instead of their control by states as their principals.

At the micro-level of international court-state agent interaction, one must turn to the interrelationship between international and national courts and judges. Lupu & Voeten do so in their study involving network analysis of case citations in the Strasbourg Court:[208] international judges 'look to domestic judges as potential allies'[209] and as contributors – positioned closer to the facts and issues underlying day-to-day cases – to the implementation of 'their' norms on the ground. In part, as we have seen, this is mandated by the supervisory role of the Strasbourg Court, the primacy of the *Convention* within its scope, and the correspondingly 'inferior' role of supreme national courts in that particular regard. The above-mentioned allies approach implies *constructive* signalling, or the

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[200] Alter, above n 196, 38 et seq.
[201] Ibid 39.
[202] Cf Michael N. Barnett & Martha Finnemore, Rules for the World: International Organizations in Global Politics (Cornell University Press, 2004) 22–9.
[203] Alter, above n 196, 40.
[204] Cf Ibid.
[205] Ruth W Grant & Robert O Keohane, 'Accountability and Abuses of Power in World Politics',(2005) 99 *American Political Science Review* 29, 32.
[206] Alter, above n 196.
[207] Ibid.
[208] Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: a Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413.
[209] Ibid 24.

constructive use of precedent and reason to quell national discomfort with international rulings while at the same time endorsing and empowering national judges who, after all, (a) will have to give practical effect to the broader Strasbourg guidelines in real life and (b) will likely have to contend with sometimes hesitant political agents at home. The recruitment, as it were, of domestic judges as sub-trustees, or at least trusted 'more-than-agents' can, as Lupu & Voeten suggest, be utilized in the *Convention* context. This is after all a system where the central Court by virtue of its own 'European consensus' doctrine not infrequently relies on national courts spearheading expansive interpretation of the *Convention*.

B *Politics on the European Court of Human Rights*

A relatively comprehensive analysis of empirical data on dissents in the European Court of Human Rights analysed by Voeten in 2009 confirms '[m]ost strongly … that international judges are policy seekers'.[210] This is partly prompted by nominating states, for instance candidate states for EU admission 'were more likely to appoint activist judges'.[211] The author concludes that 'ECtHR judges are politically motivated actors in the sense that they have policy preferences on how to best apply abstract human rights in concrete cases, not in the sense that they are using their judicial power to settle geopolitical scores'.[212] To distinguish his research from in particular the research on the US Supreme Court, Voeten focuses on what he calls 'two plausible sources of policy preferences',[213] namely the desired reach of the *Convention* in relation to national law and the values of judges based on what Voeten calls the 'impact [of] specific injustices experienced'[214] by the judges. The parameters of the research are – and this is quite similar to what we have seen in the context to the US Supreme Court – the 'desired degree of judicial activism or restraint of the Court'.[215] Voeten contends that activist judges 'strive for a more universal implementation of human rights across [Europe]'.[216] The data leads Voeten to conclude that European judges are not particularly motivated by career prospect and in this respect resemble justices of the US Supreme Court, despite their European counterparts' lack of a lifetime appointment. While the judges are, in the opinion of the author, a 'heterogeneous lot, who have varying preferences for expanding the reach

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[210] Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 *American Political Science Review* 417.
[211] Erik Voeten 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61 *International Organization* 669, 693.
[212] Voeten, above n 210, 417.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.

of their court',[217] he identifies judges coming from former socialist countries as being more critical of the governments of countries similarly positioned as their own. If governments propose former civil servants or diplomats as judges, and they are elected by the Parliamentary Assembly, analysts have argued that they tend to be more favourably disposed not only towards their own, but towards respondent states in general.[218] The in-depth knowledge of the national legal system and its realities may in part explain such a stance, as it may be apparent to those judges that their respective governments are indeed striving to give effect to the *Convention*. The limited analytical literature on that issue emphasizes that their voting behaviour does 'not suggest that the national judges involved were influenced by national interest'.[219]

Most relevantly for the present study, Voeten concludes that 'the decision-making process on the ECtHR appears not all that different from that of national review courts such as the US Supreme Court'.[220] The judges are human rights-policy makers in concrete cases,[221] but neither states' diplomatic agents are unaware of the political implications of their functions.[222] 'The court will … avoid giving extremely costly judgments against high-reputation states, so as not to provoke them into strategic noncompliance,'[223] according to Dothan. An example of cautious judicial action is the 'warning-shot' jurisprudence of the Court, where instead of finding violations right away, a government is advised that a particular law or policy should, or needs to be reviewed,[224] and only if there is continuous state inaction, will the Court ultimately find a breach.[225] Also, the 'appeals' option to the Grand Chamber may at least occasionally serve the purpose of containing, if not reversing,[226] jurisprudential trends that may trigger negative responses by individual, and even more so by

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[217] Ibid 431.
[218] See Fred J Bruinsma, 'Judicial Identities in the European Court of Human Rights', in Aukje van Hoek et al (eds), *Multilevel Governance in Enforcement and Adjudication* (Intersentia, 2006) 203.
[219] Martin Kuijer, 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice' (1997) 10 *Leiden Journal of International Law* 49, 65.
[220] Voeten, above n 210, 432.
[221] Ibid.
[222] Cf Eric Voeten, 'International Judicial Independence', in Jeffrey L. Dunoff & Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2013) 421, 438.
[223] Dothan, above n 193, 137.
[224] See *Rees v United Kingdom* (1986) Eur Court HR 106 (ser A) [47] and *Sheffield and Horsham v United Kingdom* (1998) V Eur Court HR 84, [60].
[225] See Alexander H E Morawa, 'The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v the United Kingdom' (2002) 3(8) *German Law Journal.*
[226] See *Lautsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 30814/06, 18 March 2011) [47].

groups of, states parties and thus contribute to the maintenance of what Follesdal calls a 'common judicial culture within the ECtHR'.[227] That combines an ambitious progressive interpretation with political realism.

VI CONCLUDING THOUGHTS

That domestic constitutional and international human rights decision making is a process at the intersection of law and politics is a fact. And so is that judges and their actions are to a degree political. The US Supreme Court operates on the basis of full discretion in case selection; the Strasbourg Court has, in theory, to examine each of the tens of thousands of applications arriving annually, at least in a cursory fashion. *Both* have, interestingly, yielded (a) a body of jurisprudence that is, by and large and with occasional exceptions, regarded as top-quality and a point of reference for other courts worldwide and, (b) a culture of dealing on the merits with roughly equal portions of their actual case-intake, namely 5%. It would appear that the two systems are relevantly comparable.

The analysis has shown, in the space allocated, that the politics of both courts are not all that dissimilar. US and European justices/judges are policy-seekers indeed, and driven in part by their past experiences, their views of the law, their court, and the role of both in society, and the ambitions and visions they have for their adjudicative framework. Both US and European judges seek to further their operational basis – the Constitution and the *Convention*. Both are driven by their judicial identity. Some are at least sometimes driven by their personal ambitions or their fundamentally held world-views. Some may occasionally encounter a case where their judicial independence is challenged and their innermost convictions overshadow the formal law they are to apply and uphold. But, to borrow from the famous saying by Henkin,[228] *almost all judges almost all of the time apply their law mostly faithfully and almost always keep politics at bay*.

So, should one then take the US example and equip the overburdened European Court of Human Rights with a power of discretionary case selection? This article is not the place to answer that question definitively. But the analysis allows at least one conclusion: judicial discretion of that sort has enhanced the functioning and reputation of the U.S. Supreme Court after *it* had been at risk of also being overburdened by its case-intake. It has not made the judicial process in the US more political – in

[227] Andreas Follesdal, 'Why the European Court of Human Rights Might be Democratically Legitimate – a Modest Defense' (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 289, 301.

[228] Louis Henkin, How Nations Behave (Columbia University Press, 2nd ed, 1979), 47: '[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.

fact, political science scholarship that emphasizes the 'political' character of judging links the *certiorari* decision making to the substance of the case to substantiate its claims, but finds no independent reason for holding that discretionary case selection in itself would further politicize the Court. And, to paraphrase Wildhaber, an open discretionary element in case selection would be more honest and likely also re-induce more public confidence in the still excellent work of the Court than adherence to some formally 'objective' standards that disguise the already largely discretionary jurisprudence of the judges of the Court when it comes to case-selection and adjudication.