HELPING V. HINDERING SOVEREIGNTY: THE DIFFERENTIAL POLITICIZATION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE AUSTRIAN AND SWISS PRESS

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ABSTRACT

In recent years, the European Court of Human Rights (ECtHR) has faced increasing criticism by various stakeholders. Its authority to pass binding judgments on human rights violations committed by the signatory states of the European Convention of Human Rights (ECHR) has been put in question not only by Russia and Turkey, which are frequently found to have violated the ECHR, but also by states such as Switzerland and the United Kingdom. However, the level of skepticism vis-à-vis the Court and the readiness to act upon the expressed criticism seem to vary across the different signatory states. Based on the conception of politicization proposed by Zürn, Binder, and Ecker-Ehrhardt, we compare the public evaluation of the ECtHR in Austria and Switzerland. Our analysis of evaluative statements on the ECtHR in the Austrian and Swiss quality press from 1999 to 2016 shows that the ECtHR is more strongly politicized in Switzerland than in Austria. Moreover, the justifications given for delegitimizing statements in Switzerland hint at different perspectives on the relation between international institutions and popular sovereignty. In the Austrian case, the ECtHR is seen to be *helping* to achieve sovereignty; in the Swiss debate, it is mainly viewed as *hindering*—or intruding on—popular sovereignty. In more general terms, this observation suggests a need to theorize and empirically map the interplay between local conceptions of legitimate political authority and the legitimation of international institutions.

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I. INTRODUCTION

The politicization of international institutions has become a sign of our times.[1] Historically, challenges to the post-war international institutions arose from the periphery.[2] In the 1970s, it was a coalition of developing countries that called for a New International Economic Order (NIEO).[3] Their message was strong but not very successful.[4] In the 1990s, a second wave of contestation came from social movements in the First World. Often summarized under the label of an "alter-globalization movement" and maintaining that "Fifty Years Is Enough," these groups primarily challenged the World Bank, the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT), and its newly established successor, the World Trade Organization (WTO).[5] Once more, protests

1. *See* MICHAEL ZÜRN, A THEORY OF GLOBAL GOVERNANCE: AUTHORITY, LEGITIMACY, AND CONTESTATION 137–39 (2018) [hereinafter ZÜRN, A THEORY OF GLOBAL GOVERNANCE] (explaining that today, international institutions are seen as political institutions requiring legitimacy).

2. Jens Steffek, *Mandatskonflikte, Liberalismuskritik und die Politisierung von GATT und WTO* [*Mandate Conflicts, Critique of Liberalism and the Politicization of GATT and WTO*], *in* DIE POLITISIERUNG DER WELTPOLITIK 213 (Michael Zürn & Mathias Ecker-Ehrhardt eds., 2013).

3. CRAIG MURPHY, THE EMERGENCE OF THE NIEO IDEOLOGY 1–2 (1984).

4. *See id.* at 10 ("It illustrates . . . the NIEO ideology would be inadequate as the operational ideology for an actual new international economic order.").

5. Britta Baumgarten, *The Global Justice Movement: Resistance to Dominant Economic Models of Globalization*, *in* THE HISTORY OF SOCIAL MOVEMENTS IN GLOBAL PERSPECTIVE 648

were loud but had few direct effects.

Since the 2010s, things have become slightly different. First, contestation is no longer limited to a small set of high-profile institutions, but also extends to science-policy bodies like the Intergovernmental Panel on Climate Change (IPCC) and to regional adjudication schemes like the Economic Community of West African States (ECOWAS) Court, the East African Court of Justice, and the South African Development Community (SADC) Tribunal.[6] Second, the origins of politicization are no longer limited to the periphery. Instead, legitimacy challenges come from the center of industrialized societies too. Finally, the effects of politicization are more direct. As a recent example, the U.K.'s withdrawal from the European Union renders the strength of anti-internationalist social forces particularly visible.

Unsurprisingly, scholars have begun to think about what drives the politicization of international institutions. How have citizens in Western countries come to challenge the international institutions their own governments have helped to build? And how has the appetite for international cooperation declined so sharply even where, as a widely shared narrative suggests, such cooperation has allowed Western societies to prosper in the past? A common answer suggests the internationalization of authority has made the difference. Willingly or not, the argument goes, post-war international cooperation has been so successful that a further deepening of cooperation became necessary to reign in the unintended, yet adverse, consequences of economic integration. For example, where states agreed to reduce tariffs, non-tariff barriers to trade began to rise. As a result, further international regulation had to deal with subsidies or national health and safety standards that importers found difficult to meet. Yet, regulating such "beyond the border" issues was a much more delicate issue than agreeing on tariff levels, and thus opened the door for politicization.[7]

While offering a plausible explanation for the observation that some institutions have become politicized more heavily than others, this account has difficulty explaining variations at the country-level. If two countries were subject to the same internationalized authority—say, the U.N. Security Council's competence pursuant to article 39 of the U.N. Charter to "determine the existence of any threat to the peace" or the authority of the WTO Appellate Body to interpret world trade law—why would one society challenge that authority more than

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(Stefan Berger & Holger Nehring eds., 2017); *see* ROBERT O'BRIEN ET AL., CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS 53 (2000) (noting that Fifty Years Is Enough, a campaign that NGOs launched to encourage rethinking the role of the Bretton Woods financial institutions, was in full force in 1995).

6. *See generally* Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 293–94 (2016).

7. *See* Michael Zürn et al., *Politische Ordnungsbildung wider Willen* [*Political Order Formation against the Will*], 14 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN [ZIB] 129, 139 (2007) [hereinafter Zürn et al., *Politische Ordnungsbildung*] (Ger.) (arguing that transnational regulations will lead to the politicization of international institutions, since society and political actors will question political order beyond its borders).

another?

In this paper, we therefore aim to scrutinize the domestic dimension of politicization. We ask why states that are exposed to similar levels of internationalized authority—*de jure* as well as *de facto*—might nonetheless politicize international authority to different degrees. Our effort to explore this question focuses on one particular institution, namely the ECtHR. In 1950, the Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the ECHR.[8] The aim of the ECHR was "to prevent the recurrence of the devastation of war and the attendant horrendous crimes" through "respect for democracy and the rule of law at the national level."[9] To effectively secure the protection of democracy and the rule of law, the ECtHR was established as a *collective* mechanism for the enforcement of human rights. States thus recognized the competence of the ECtHR to pass authoritative judgments on alleged violations of human rights by member states as being functionally necessary in view of the egregious atrocities committed by states during war. By ratifying the ECHR, a state relinquishes some of its sovereign authority, transferring it to the ECtHR. Pursuant to the scholarship of Michael Zürn and colleagues, such a transfer of authority to international institutions "requires legitimation and leads to politicization."[10]

To shed light on the drivers of cross-country variation, we compare the legitimation of the ECtHR in the Austrian and Swiss quality press. While both countries have been subject to the same internationalized authority, our quantitative as well as qualitative analysis reveals interesting differences in the ways each society views the ECtHR and its activities. Broadly speaking, the Austrian debate sees the ECtHR as *helping to realize sovereign democratic governance*. In Switzerland, in contrast, debate increasingly frames the ECtHR as a *hindrance to popular sovereignty* as the central component of any legitimate exercise of authority. Taken together, our analysis thus suggests that to explain different levels of politicization of the same international institution in different countries, the authority-based explanation for politicization by Zürn and colleagues needs to be *complemented* with an examination of the predominant conception of political legitimacy held by the citizens of the states relinquishing their authority to an international institution.

In the following, we unfold our argument in five steps. Part II recapitulates the authority-based approach to politicization proposed by Zürn and colleagues, reviews existing efforts to explain variation at the country-level, and contrasts the latter with the argument we propose in this article. In Part III, we describe our methodological approach. Part IV then presents the main results of our quantitative analysis of evaluations of the ECtHR in the Austrian and Swiss quality press from

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8. Steven Greer, *Europe*, *in* INTERNATIONAL HUMAN RIGHTS LAW 422 (Daniel Moeckli et al. eds., 2d ed. 2014).

9. Luzius Wildhaber, *The European Court of Human Rights: The Past, the Present, the Future*, 22 AM. U. INT'L L. REV. 521, 522–23 (2007).

10. Zürn et al., *Politische Ordnungsbildung*, *supra* note 7, at 129.

1999 to 2016. In Part V, we deepen our analysis by qualitatively comparing the different language used in the two countries to justify legitimizing and delegitimizing statements on the ECtHR. Based on this analysis, we suggest that domestic conceptions of legitimate political authority are a key source of the politicization of internationalized authority. Part VI concludes.

II. THE POLITICIZATION OF INTERNATIONALIZED AUTHORITY

Our starting point for thinking about the politicization of international authority is the authority-based approach proposed by Michael Zürn, Martin Binder, and Matthias Ecker-Ehrhardt.[11] According to these authors, politicization refers to the "public communication about and contestation over collectively binding decisions concerning the common good."[12] In line with this definition, the key indicators of politicization would be public awareness and public contestation. Yet, public awareness and contestation are very different things. While the former refers to the interest citizens take in international institutions,[13] the latter implies that the public is not only aware of, but also expresses conflicting views on the ways in which an institution defines and pursues the common good.[14] Empirically, awareness and contestation may, but need not, go together.

In the following, we use the term politicization to refer to *situations in which the legitimate authority of an international institution—in our case the ECtHR—is increasingly subjected to debate*. See Table 1 for our key concepts and definitions. In this definition, the notion of "legitimate authority" implies two layers of recognition. The first layer represents the recognition "that an authority is considered *per se* functionally necessary in order to achieve certain common goods."[15] The second layer pertains to "the acknowledgement of the rightful exercise of authority in the context of a given stock of normative beliefs in a community."[16] At this second layer, authority is thus exercised legitimately if it can be justified with reference to "shared beliefs about the common good and procedural fairness."[17]

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11. Michael Zürn et al., *International Authority and Its Politicization*, 4 INT'L THEORY 69, 82 (2012) [hereinafter Zürn et al., *International Authority*].

12. *Id.* at 73.

13. *Id.* at 75.

14. Michael Zürn, *The Politicization of World Politics and Its Effects: Eight Propositions*, 6 EUR. POL. SCI. REV. 47, 51 (2014).

15. Zürn et al., *International Authority*, *supra* note 11, at 83.

16. *Id.*

17. *Id.*; *see also* Mark Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. OF MGMT. R. 571, 579–80 (1995) (discussing broad types of legitimacy and their subtypes).

Table 1: Key Concepts

Concept	Definition
Authority	The recognition that an international institution with certain competences to set and implement commonly binding rules is necessary
Legitimacy	The recognition that authority is exercised in accordance with widely shared normative beliefs
Politicization	The process through which (or the situations in which) the legitimate authority of an international institution is increasingly subjected to debate

As a process of subjecting the legitimate political authority of an international institution to debate, politicization may imply the contestation of one or both layers of recognition. Thus, a critique can either challenge the idea that international authority is functionally necessary or useful, or it can recognize this necessity but hold that the way in which such authority is exercised violates shared normative standards. While the former critique would hint at an "authority crisis," the latter would imply a "legitimacy deficit."[18]

Separating authority and legitimacy in this way, as Zürn and colleagues point out, "makes it easier to conceptualize different distributions of recognition."[19] Such different distributions of recognition pertaining to either or both layers are inherent to the political, cultural, and social pluralism among the various constituencies of an international organization. Empirically, however, it is often difficult to judge whether what is under attack is the authority or the legitimacy of an institution. If, for example, we learn that tens of thousands of people have protested against a judgment of the ECtHR, according to which Spain will have to free dozens of jailed terrorists belonging to the underground organization ETA,[20] then we can only implicitly conclude that what the protestors challenge is the legitimate exercise of authority, but not the authority of the ECtHR itself.

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18. Zürn et al., *International Authority*, *supra* note 11, at 85.
19. *Id.* at 84.
20. *Proteste Gegen Freilassung von ETA-Terroristen [Protests Against the Release of ETA Terrorists]*, SALZBURG24 (Oct. 27, 2013, 3:41 PM), https://www.salzburg24.at/archiv/proteste-gegen-freilassung-von-eta-terroristen-44148538.

Similarly, when Austrian stakeholders call a judgment that prohibits public schools from displaying crucifixes in classrooms "unacceptable" because it fails to recognize the priority of local culture, this statement may challenge both the authority and the legitimacy of the ECtHR.[21] It challenges the Court's authority because the statement can be understood to imply that the Court has no authority to rule on issues with a strong cultural dimension. However, the statement may also be interpreted to deny the Court's legitimacy as it may be accused of failing to interpret European human rights law correctly. As a result, disentangling the "authority-legitimacy link,"[22] while analytically useful, meets some difficulties in the research practice.

Moreover, the authority-based approach to politicization is strongest when it comes to explaining why different authority holders are subject to varying levels of politicization. For example, it can explain very well why the European Union is "more politicized" than the Commonwealth of Nations or why the legitimate authority of the IMF is subjected to more heated debate than the legitimate authority of the Bank for International Settlements. In contrast, while the authority-based approach acknowledges the possibility that those subject to the *same internationalized authority* may politicize that authority and its exercise differently, it offers fewer inroads for theorizing such differences.

Other accounts offer some thoughts on this question, but the variables they identify cannot account for the differences between Austrian and Swiss evaluations of the ECtHR either. Coming from a social movement perspective, Robert O'Brien and colleagues hint at domestic incentives and opportunity structures.[23] Domestic incentives for opposing the WTO, for example, are greater in societies where larger groups stand to lose from trade liberalization.[24] Moreover, politicization is more likely if those groups are well organized, such as North American trade unions that were in the run-up to the 1999 Seattle protests against the WTO.

Focusing on the differentiated politicization of European governance, Pieter de Wilde, Anna Leupold, and Henning Schmidtke propose that "politicisation is largely driven by strategically competing party officials" (*strategic competition hypothesis*); that politicization will be particularly pronounced in countries where the gap between the national *status quo* and the international ambitions or prescriptions is largest (*institutional misfit hypothesis*); and that citizen evaluations will strongly reflect attitudes towards domestic political and economic performance. Where such performance is perceived to be strong, European institutions will be evaluated positively; where it is perceived to be weak, trust in

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21. *Religion: Muslime Gegen Kruzifixverbot in Schulen [Muslims Against Crucifix Ban in Schools]*, DIE PRESSE (Nov. 5, 2009, 6:36 PM), https://diepresse.com/home/panorama/oesterreich/519878/Religion_Muslime-gegen-Kruzifixverbot-in-Schulen.

22. ZÜRN, A THEORY OF GLOBAL GOVERNANCE, *supra* note 1, at 64–65.

23*. See generally* O'BRIEN ET AL., *supra* note 5, at 2 ("The [contest over global governance] takes place both over the form of the institutions (their structure, decision-making procedures) and over the content of their policies (free market oriented or a balancing of social values).").

24. *Id.* at 1.

European governance will be low (*proxy hypothesis*).[25]

Finally, Øyvind Stiansen, Øyvind Østerud, Andreas Føllesdal, and Geir Ulfstein find that the "uneven acceptance of international courts" is affected by a colonial past, the democratic vs. authoritarian nature of domestic regimes, economic wealth, and the level of oil exports, as well as cultural differences, notably in relation to the expectation that Islamic countries might be reluctant to "accept legal principles derived from non-Islamic law."[26]

Each of these approaches' explanations for "differentiated politicization" is theoretically and empirically plausible. Like the authority-based approach, however, they would lead us to expect similar, not different levels of ECtHR politicization in Austria and Switzerland. In terms of the authority-based explanation, both countries have been members of the European Human Rights System for several decades. While Austria ratified the ECHR in 1957, Switzerland followed in 1972, both without adding major reservations to their acceptance of the convention.[27] Moreover, the number of times both countries have been taken to the ECtHR and found to have acted in violation of the ECHR—hence requiring the state to adapt its behavior to the internationalized authority of the Court—is comparable. Between 1959 and 2017, the ECtHR received 9,137 applications from Austria and 6,918 applications from Switzerland (the ECHR entered into force in 1974). Of the Austrian applications, 4.2% of all applications, or 382 judgments, were delivered, 272 or 70% of which found at least one violation of the ECHR by the state. Of the Swiss applications, 2.6% of all applications, or 182 judgments, were delivered, 106 or 58% of which found at least one state ECHR violation. On average, Austria thus counted 4.6 judgments per year against itself while Switzerland was found to be in violation of the ECHR 2.4 times per year on average. If anything, Austria was thus slightly more exposed to the authority of the ECtHR than Switzerland.[28]

In terms of the factors mentioned by O'Brien and colleagues, domestic incentive, opportunity, and organizational structures in relation to human rights do

25. Pieter de Wilde et al., *Introduction: The Differentiated Politicisation of European Governance*, 39 WEST EUR. POL. 3, 11–12 (2016).

26. ØYVIND STIANSEN ET AL., WESTPHALIA WANING? THE UNEVEN ACCEPTANCE OF INTERNATIONAL COURTS 3–8 (May 15, 2017).

27. *Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR., https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations (last visited Feb. 6, 2019). Austria has issued two reservations to the ECHR to the effect that Articles 5 and 6 shall be applied without interfering with relevant provisions of the Austrian constitution. *Id*. Article 5 relates to liberty and security and Article 6 relates to the right to a fair trial. *Id.* Switzerland has not made any reservations to the ECHR. *Id*.

28. Statistics are based on authors' own calculations using documents provided by the Council of Europe. *See Overview, 1959–2017, ECHR*, COUNCIL OF EUR., https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf (last visited Feb. 6, 2019); *Violations by Article and by State, 1959–2017*, COUNCIL OF EUR., https://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf (last visited Feb. 6, 2019).

not differ much between the two countries. Of the driving forces of differentiated politicization de Wilde and colleagues identify, nationalist parties that create and/or cater to anti-internationalist sentiments are relatively strong in Austria (FPÖ)[29] as well as in Switzerland (SVP),[30] and their rise occurred in about the same time period. As a result, they cannot explain divergence in the ways the ECtHR is evaluated in both countries. Moreover, the moderate number of violations found by the ECtHR suggests that the gap between domestic protection levels and the rights enshrined in the ECHR is modest in both systems. In addition, because we do not rely on survey data but examine explicit evaluations of the ECtHR and its activities in the quality press, our research design rules out the proxy hypothesis. Finally, the factors identified by Stiansen and colleagues would equally lead us to expect homogeneity rather than heterogeneity as Austria and Switzerland are both wealthy democracies that neither have ties to Islam nor export oil.

In sum, the transfer of authority can be viewed as a *necessary condition* for the politicization of international institutions. This argument would clarify how it is possible for the ECtHR to become politicized in the first place: In the absence of authority, we could not discuss the subject of the "legitimate authority" of an institution.[31] Beyond authority transfer, however, the reason for country-level differences must lie somewhere else. In the remainder of this article, we develop the argument that *domestic conceptions of legitimate political authority* might be a strong candidate in this regard.

III. METHODOLOGY

To examine the politicization of the ECtHR in Austria and Switzerland, we analyze the public communications in these countries concerning the Court. Although the sites of public communication have proliferated with the rise of the internet, the quality press still plays an important role in the formation and reflection of political views held by political elites as well as the broader public. Therefore, we follow the approach adopted by Nullmeier and colleagues and analyze evaluative statements about the ECtHR and its activities made in two representative newspapers in Austria and Switzerland, respectively.[32] As political

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29. The Freiheitlichen Partei Österreichs (Freedom Party of Austria) is a right-wing nationalist political party in Austria.

30. The Schweizerische Volkspartei (Swiss People's Party) is a right-wing nationalist political party in Switzerland, and the largest party in the Federal Assembly.

31. *See* Jonas Tallberg & Michael Zürn, *The Legitimacy and Legitimation of International Organizations: Introduction and Framework*, REV. INT'L ORGS. (Jan. 5, 2019), https://doi.org/10.1007/s11558-018-9330-7 (discussing relationship between legitimacy and authority in international organizations).

32. *See generally* FRANK NULLMEIER ET AL., PREKÄRE LEGITIMITÄTEN: RECHFERTIGUNG VON HERRSCHAFT IN DER POSTNATIONALEN KONSTELLATION [PRECARIOUS LEGITIMACIES: JUSTIFICATION OF RULE IN THE POST-NATIONAL CONSTELLATION] (2010). Nullmeier et al. construct "legitimacy profiles" by evaluating media discourses on international institutions. As in our modified approach, they categorize statements pursuant to their general thrust as legitimizing (positive) or delegitimizing (negative) and the object they address. However, the authors then

ideology can be expected to make a difference, we choose one newspaper that leans towards the conservative spectrum and one politically left-leaning newspaper for each country. For Austria, we thus examine *Die Presse* and *Der Standard*; for Switzerland, we look at the *Neue Zürcher Zeitung* and the *Tagesanzeiger*.

Using the database *Factiva*, we search all articles from these four newspapers for paragraphs that reference the ECtHR,[33] with our period of investigation covering all years from 1999 to 2016 (N=3,977). In a second step, we filter all paragraphs that contain evaluations of the Court itself, of the wider European human rights system in which it is embedded, or of the activities the Court engages in (N=1,009). We subsequently subject all evaluative statements to further coding along three dimensions. First, we code the *direction of evaluation* as either positive or negative.[34] Second, in relation to the *object of politicization*, we are interested in whether a statement evaluates the institutions of the European human rights system—the ECtHR, the ECHR, and the Council of Europe—or the activities of the Court, notably its judgments. Third, we are interested in the *justifications* given for evaluations of the Court or its activities.

Table 2: Categorization of Justifications Given for (De-)Legitimizing Statements.

Frame	Definition
I. Functionality-based legitimation frames	
I.1 Protection of human rights	Evaluative statements that highlight the role of the European Human Rights (HR) system, of its elements, or of activities associated with it in protecting the human rights of European citizens

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classify justifications based on a two-dimensional typology distinguishing between input- and output-related and democracy- and non-democracy-related justifications. Input-related justifications concern the nature of the decision-making process or the actors involved therein. Output-related justifications pertain to the outcome of a decision-making process. Justifications are democracy-related if they describe necessary conditions for the system of governance which is based on rulers being accountable to their citizens through elections. As a court, however, the ECtHR differs from the more comprehensive organizations examined in Nullmeier et al. (the G8, the European Union, and the United Nations). We therefore adapt the distinction between different justifications for praise or criticism so that they fit our empirical material better.

33. The search was based on the search terms "Europäische Gerichtshof für Menschenrechte OR Europäischen Gerichtshof für Menschenrechte OR Europäischer Gerichtshof für Menschenrechte OR Europäischen Gerichtshofs für Menschenrechte OR Europäische Menschenrechtsgerichtshof OR Europäischen Menschenrechtsgerichtshof OR Europäischen Menschenrechtsgerichtshof OR Europäischer Menschenrechtsgerichtshof OR EGMR."

34. Where statements contained both positive and negative statements, we itemized these statements and then classified them pursuant to the binary positive/negative scheme.

I.2 Effectiveness	Evaluative statements that highlight the (in-) ability of the European HR system, of its elements, or of activities associated with it, to bring about change
I.3 Efficiency	Evaluative statements that highlight the (in-) capacity of the European HR system, of its elements, or of activities associated with it, to function well based on the resources the system has at its disposal
I.4 Expertise	Evaluative statements that refer to the legal qualifications or competences of the ECtHR's judges
II. Sovereignty-based legitimation frames	
II.1 Sovereignty	Evaluative statements that refer to the possibilities of national communities to achieve collective self-governance or self-realization
II.2 Development of the law	Evaluative statements that refer to the role of the ECtHR in developing human rights law further
II.3 Moderation	Evaluative statements that refer to the ability of the ECtHR to avoid extreme decisions and find a (politically or legally) 'moderate' position instead
II.4 Democracy	Evaluative statements that refer to the ways in which the ECHR, the ECtHR, or individual judgments of the ECtHR relate to the normative good of democracy, without drawing a clear link to (popular) sovereignty
III. Other substantive frames	
III.1 Integration	Evaluative statements that refer to the role of the ECtHR in creating or promoting a unified European legal space among members of the Council of Europe
III.2 Interpretation	Evaluative statements that refer to the legal quality of ECtHR judgments and the specific interpretations of European human rights

	law these judgments embody
III.3 Equality	Evaluative statements that refer to the consistency of the ECtHR's adjudication or to the ability of its judges to apply the law equally to comparable cases
III.4 Integrity	Evaluative statements that refer to the compliance or non-compliance of the ECtHR's judges with central normal principles of adjudication like impartiality, independence, or integrity
IV. Residual categories	
IV.1 Other	Positive or negative evaluations for which a justification that does not fall under the definitions of I.1 to III.4 is given
IV.2 Unspecified	Positive or negative evaluations for which no specific justification is given

Regarding the latter, our primary distinction is between functionality-based frames and sovereignty-based frames. *Functionality-based frames* include four distinct types of arguments. They either relate to the value of the ECtHR in protecting and promoting human rights, to the specific qualifications or qualities of the judges on the ECtHR, to the effectiveness of the European human rights system—that is, the ability of the Court to induce behavioral change—or to the ability of the Court to accomplish its work in an efficient manner.

Sovereignty-based frames also include four types of arguments. While the first type highlights sovereignty as a central norm or aspect of a legitimate exercise of authority, a second type comments on the ways in which the ECtHR is seen to develop human rights law. As this development of the law has implications for member states' sovereignty, we include it as a sovereignty-based frame. A third type of argument praises or criticizes the ability of the Court to avoid extreme positions, deferring to the margin of appreciation or finding a "moderate" middle way in situations of legal (and possibly political) conflict. Finally, we also include comments on the relationship between the ECtHR or its activities and democracy under the conceptual umbrella of "sovereignty-based arguments."

For the reasons outlined in Part II, the distinction between sovereignty-based justifications and functionality-based justifications does not exactly match the distinction between challenges of the authority and challenges of the legitimacy of the ECtHR. Nevertheless, it bears some resemblance in the sense that sovereignty-based justifications are somewhat more likely to include an authority challenge

than functionality-based justifications.

Lastly, our framework of justifications is complemented by a number of frames that cut across the distinction between functionality and sovereignty. These refer to the ability of the European human rights system to level legal differences and ensure a common human rights framework for Europe (*integration*); to the legal quality of their judgments (*interpretation*); to the normative expectation that the law is applied in a uniform and fair manner (*equality*); and to the expectation that the judges on the ECtHR adhere to common principles like independence and impartiality in executing the authority delegated to them (*integrity*).

We coded the statements ourselves. For the process of filtering evaluative statements and assigning a direction of evaluation (positive/negative) we trained until reaching a satisfactory threshold of inter-rater reliability (Krippendorff's alpha >0.65) and then coded separate parts of the data. Because the same threshold was more difficult to attain for legitimation objects and justificatory frames, we double-coded all statements in relation to these two categories. For statements to which we assigned different codes, we determined the definite code through bilateral discussions. While such discussions would be unnecessary in an ideal world, the texts we dealt with frequently left room for interpretation. Moreover, our procedure also proved useful to maintain a common understanding of our categories over a relatively long period of coding.[35]

IV. A BIRD'S EYE VIEW: PATTERNS OF POLITICIZATION IN AUSTRIA AND SWITZERLAND

What did we observe? First, there are some similarities across the two cases. In both countries, reporting on the ECtHR and its activities rises strongly after 1999, from an average of 64 (Switzerland) and 76 (Austria) paragraphs that mention the ECtHR per year between 1999 and 2002, to an average of 181 and 151 paragraphs between 2011 and 2014, respectively (Figure 1). This rise in reporting is consistent across all four newspapers—hence covering the conservative as well as the "liberal" or "left-leaning" press in both countries. In the Austrian press, we record the highest values for 2010 (93 paragraphs in *Der Standard*, 126 in *Die Presse*); in the Swiss press, for 2014 (154 paragraphs in *Neue Zürcher Zeitung*, 112 in *Tagesanzeiger*). Second, when we look at the proportion of paragraphs that contain evaluations—that is, at *legitimation intensity*[36]—we see no significant rise in either country. Overall, there is thus a rising interest in the ECtHR with stable proportions of debate over the desirability of the Court and its activities.[37] In terms of Zürn's politicization framework, this amounts to a growing *awareness* of the ECtHR, with growing *contestation* not rising independently, but following primarily from such a heightened awareness.

Beyond these similarities, however, we also observe four remarkable
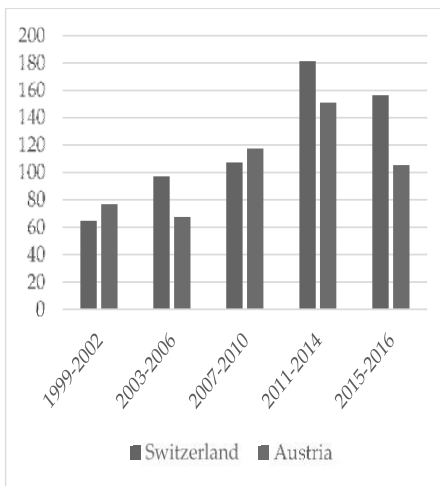
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35. *See generally* NULLMEIER ET AL., *supra* note 32.

36. *Id.*

37. In fact, intensity levels vary with no clear trend across our four-year periods, ranging between 17% (Austria, 2003–2006) and 32% (Switzerland, 1999–2002).
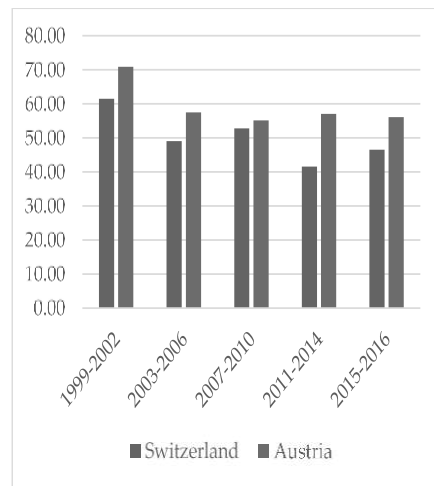
differences. First, while the share of positive evaluations of the ECtHR declines in both countries over time, the decline is stronger in Switzerland (Figure 2). Second, while sovereignty-based frames gain strength in both countries, their rise is, again, more pronounced in the Swiss case (See Figures 3 and 4). Third, while evaluations of the ECtHR in the Austrian press pay equal attention to the Court and to its judgments, the Swiss press predominantly comments on the institution as such. Fourth, the dynamic in the Swiss case is driven by the rise of one specific combination of arguments, namely negative evaluations that are based on sovereignty frames and applied to the institution as such. In the Austrian case, this combination does not rise in the same way, and its relevance is also limited to the conservative press. Taken together, these four differences provide empirical plausibility for the intuition that sovereignty concerns—or, more generally, domestic conceptions of what constitutes a legitimate exercise of political authority and who can exercise it under what conditions—are key to understanding the differential dynamics of politicization in the ECtHR case.

Figure 1: Media References to the ECtHR   *Figure 2: Share of Positive Evaluations*

(absolute numbers averaged per year)   *(in %)*

A. The Level of Support Declines More Sharply in Switzerland than in Austria

Dividing the period of investigation into four-year periods, Austria and Switzerland start at 71 and 61% positive evaluations between 1999 and 2002, respectively. In Austria, this value drops to 57% (2003–2006) and then remains between 56 and 59% in subsequent periods. In Switzerland, decline of support is more continuous, with shares of positive evaluations initially dropping to 49 and
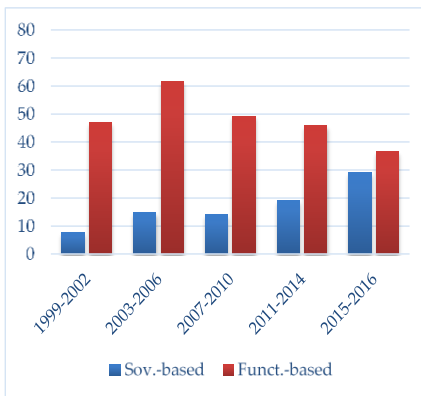
53% (2003–2006; 2007–2010) and reaching a low of 41% in the period from 2011 to 2014. For the most recent period (2015–2016), 46% of all evaluations of the ECtHR and its activities in the two Swiss newspapers are positive.

In both countries, the declining support is most visible in the conservative press. In the *Neue Zürcher Zeitung*, we thus observe a drop from 59% (1999–2002) to 39% positive evaluations (2015–2016); in *Die Presse*, the decline is from 69 to 50%. In the left-leaning press, the share of positive evaluations also declines, but less sharply. In the *Tagesanzeiger*, in contrast, the gap between the first and last period is merely two percentage points (56% as opposed to 54%), with the lowest share of positive recorded between 2011 and 2014 (45%). In *Der Standard*, support levels do not drop as sharply either, ranging between 75% positive statements initially and 65% positive statements in our final two-year period. Taken together, this hints at a pronounced left-right cleavage in both countries. Yet, it also suggests that the ECtHR can count on a more stable basis of support among the Austrian public.

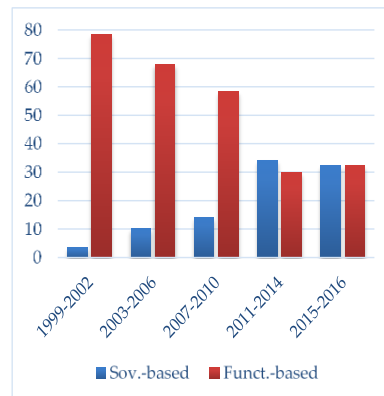### B. Sovereignty-based Evaluations Rise More Sharply in Switzerland

As Figure 3 shows, the share of ECtHR evaluations based on sovereignty-related claims rises steadily over the course of our period of investigation. Yet, the rise is significantly more pronounced in the Swiss case where sovereignty-based evaluations supersede the previously dominant functionality-based evaluations in the four-year period from 2011 to 2014 and then continue to match them in 2015 and 2016. In the Austrian case, the rise of sovereignty-related frames as justifications for praising or challenging the ECtHR is also pronounced, quadrupling from 7.6% (1999–2002) to 29% (2015–2016) from the beginning to the end of our period of investigation. However, it never reaches the share of evaluations based on functionality concerns. Even in the most recent periods, the latter are thus invoked significantly more often than sovereignty-based frames.

Fig. 3: Sovereignty vs. Functionality   *Fig. 4: Sovereignty vs. Functionality*

frames (in %, Austria, 1999–2016)   *frames (in %, Switzerland, 1999–2016)*

Looking at our family of sovereignty-related frames more closely, we also see that the rise in the Swiss case is primarily driven by those evaluations that invoke sovereignty itself. In the Austrian case, in contrast, references to the Court's role in the further development of European human rights law also play a significant role. Disentangling the data further, the pattern shows that, in the Swiss case, the sovereignty frame gains considerable strength in both the *Neue Zürcher Zeitung* and the *Tagesanzeiger* from 2011 onwards. In the Austrian case, the sovereignty frame itself only picks up somewhat in *Die Presse*. By contrast, references to sovereignty itself remain rare in *Der Standard* until the end of our period of investigation. Where we do observe comments linked to the broader family of sovereignty-related frames, these comments refer to the law-developing aspect of the Court's adjudication, which the commentators often applaud.

Finally, and maybe most importantly, while evaluations based on functionality concerns are mostly positive in both Austria (73%) and Switzerland (61%), evaluations differ sharply when based on sovereignty. Looking at the entire period of analysis, a slight majority of sovereignty-based evaluations of the ECtHR is positive in the Austrian case (51%). In the Swiss case, in contrast, only 16% of all sovereignty-based evaluations are positive. Overall, this reveals once more that sovereignty concerns are at the heart of Swiss, but not necessarily of Austrian, critique of the ECtHR.

C. While the Austrian Press Pays Equal Attention to the Court and its Judgments, the Swiss Press Primarily Evaluates the ECtHR as Such.

In the Austrian newspapers, a relatively large proportion of evaluations comment on individual judgments of the Court (48%). The respective values for our four-year periods fluctuate between 38% and 62%, with no clear trend over time. In the Swiss case, only 35% of all evaluations pertain to judgments. The majority of comments are thus on the ECtHR as such. Again, this value is relatively stable over time, without a clear trend.

In terms of effects, this stronger emphasis on the institution instead of its activities also translates into an overall more critical view. In both countries, the share of negative evaluations is thus higher when the object of evaluation is the ECtHR itself. In Austria, the share of negative evaluations of the ECtHR stands at 45% (as opposed to 38% for comments on judgments); in Switzerland it is 54% (as opposed to 50% for judgments). In brief, the stronger focus on judgments, paired with a more positive evaluation of these judgments, contributes to the overall higher support for the ECtHR in the Austrian press. By contrast, the stronger focus on the institution, paired with a more negative evaluation of that institution, renders the overall support for the ECtHR lower in the Swiss press.

D. Sovereignty-based Negative Evaluations of the ECtHR as an Institution Become Particularly Strong in Switzerland.

Overall, the differences we discuss above show a stronger tendency towards a more negative evaluation, a stronger increase of sovereignty-related frames, and a

stronger focus on the European human rights *institutions* (as opposed to their activities) in the Swiss case. When we look at these three features—the directionality of the evaluation, the object of evaluation, and the justificatory frame employed in support of an evaluation—in conjunction, this impression receives further backing.

In the Swiss press, this specific combination of arguments accounts for 1% and 2% of all evaluations in 1999–2002 and 2003–2006, respectively. It then rises to 7% (2007–2010) and 21% (2011–2014) and ends at 18% in the most recent years. The rise affects both newspapers examined in our study.[38] In the Austrian press, the same combination also increases in the conservative press, but it never accounts for the same share of evaluations as in the Swiss press.[39] Moreover, as indicated above, the more left-leaning *Der Standard* does not match this pattern—in fact, we count not a single occurrence of the combination in the two most recent years.[40]

In sum, this suggests a stronger and more homogeneous challenge in the Swiss case. In comparison to the Austrian case, the conservative as well as the left-leaning press are thus more critical of the ECtHR, and their criticism centers more clearly around a common theme, namely the threat the institution poses to the idea and practice of popular sovereignty. This suggests that *domestic legitimation cultures* matter when it comes to the politicization of internationalized authority. To probe this suggestion, the next section seeks to understand the predominance of negative sovereignty-based evaluations of the ECtHR (as opposed to its judgments) in Switzerland when compared to Austria in terms of the particular conceptions of legitimate political authority that prevail in both countries. To get such an understanding, we move from the quantitative bird's eye view we have taken thus far to a more qualitative content analysis of sovereignty-based statements in the Austrian and Swiss press.

V. A CLOSER LOOK: CONCEPTIONS OF POLITICAL LEGITIMACY

In light of these results, this part looks more closely at how the aggregate results we presented above relate to different national conceptions of legitimate political authority. Current popular conceptions of legitimate authority have developed for the national or sub-national levels. Yet, despite the increasing assumption of authority by international institutions, these popular conceptions of legitimacy have not necessarily adapted to this internationalization of authority. While some societies' conceptions of legitimacy may more readily allow for, or be adapted to, the transfer of authority to an international organization, other societies' conceptions of political legitimacy may be more difficult to transfer or

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38. The values for the *Neue Zürcher Zeitung* (1%, 1%, 10%, 26%, and 16% for the five periods we look at) are, again, slightly higher than the values for the *Tagesanzeiger* (0%, 4%, 0%, 10%, and 21% for the five periods).

39. The respective values for *Die Presse* are 0%, 0%, 2%, 7%, and 12% for our five periods.

40. The respective values for *Der Standard* are 0%, 6%, 5%, 2%, and 0% for our five periods.

realize at the international level.[41] This, we argue, becomes an important source of differentiated politicization in cases where countries are equally exposed to the same form or instance of internationalized authority.

The differences in how political authority is legitimized in Austria and Switzerland become evident from the analysis of the justifications given for evaluative statements on the ECtHR. As the most striking difference between Austria and Switzerland concerns the higher and sharply increasing level of negative statements with a sovereignty-based justification in Switzerland, the following argument will focus on the role popular sovereignty—the idea that "supreme authority within a territory"[42] lies with the people—plays in the conceptions of legitimate political authority in Austria and Switzerland.

In both Austria and Switzerland, the supreme authority rests with the people. Accordingly, Article 1 of the Austrian Constitution provides that "Austria is a democratic republic," and it further stipulates that "[i]ts law emanates from the people."[43] Although the Swiss Constitution does not contain an explicit reference to popular sovereignty, the fundamental principle that all authority emanates from the people manifests itself in the political rights provided for by the Swiss Constitution.[44] However, the manner in which this fundamental principle of popular sovereignty is realized in the political systems of the two countries differs. In light of our focus on the politicization of the ECtHR, the different conceptions of the legitimacy of political authority become particularly apparent when we contrast the role accorded to the judiciary in Austria and Switzerland.

Contrary to Switzerland, Austria has a specialized Constitutional Court, which, pursuant to Articles 139 and 140 of the Austrian Constitution, "has the mandate to strong-form constitutional review."[45] No other court in Austria has the power of constitutional review; rather, when in doubt about the constitutionality of a particular legal norm, all other courts are obliged to ask the Constitutional Court for a decision thereon.[46] Constitutional review thereby refers to the power of the Constitutional Court to review the constitutionality of, *inter alia*, laws. If the

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41. Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1, 2 (2016) (discussing how concepts of due process and legitimacy are contextual, rather than universal).

42. Daniel Philpott, *Sovereignty*, STAN. ENCY. PHIL. ARCHIVE, https://plato.stanford.edu/archives/sum2016/entries/sovereignty/ (last updated Mar. 25, 2016).

43. BUNDES-VERFASSUNGSEGETZ [B-VG] [CONSTITUTION] BGBL No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBL I No. 2/2008, art. 1, http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage= Bundesnormen&Gesetzesnummer=10000138 (Austria).

44. ULRICH HÄFELIN ET AL., SCHWEIZERISCHES BUNDESSTAATSRECHT [SWISS STATE LAW] 176–78 (9th ed. 2016).

45. ANNA GAMPER, STAAT UND VERFASSUNG [STATE AND CONSTITUTION] 89 (2014). All translations are ours.

46. BUNDES-VERFASSUNGSEGETZ [B-VG] [CONSTITUTION] BGBL No. 1/1930, as last amended by Bundesvergassungsgesetz [BVG] BGBL I No. 2/2008, arts. 89, ¶ 2, 135, ¶ 4, http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=100 00138 (Austria).

Constitutional Court finds a law to be unconstitutional, it may, if so requested, repeal the respective law. The Constitutional Court may thus meaningfully check the power of the democratically-elected legislature. As such, constitutional review is also an important component of the rule of law, as it emphasizes the primacy of the constitution over all other governmental and—in particular—legislative acts. The supreme authority of the people is therefore protected by the constitution and its fundamental principles, including, in particular, civil and political rights, but at the same time constrained because the laws passed by the legislators representing the people are subject to constitutional review.

A unique feature of the Austrian Constitution is that it incorporates the ECHR, as well as most of its Additional Protocols.[47] This means that the ECHR is recognized as "supreme law of the land."[48] Due to the constitutional status of the ECHR and most of its Additional Protocols, the Constitutional Court may review whether domestic legal norms violate the Convention. According to Anna Gamper, this is the main reason for the absence of any form of systematic and widespread criticism of the ECHR or the ECtHR.[49] The ECHR has been a highly respected part of the Austrian Constitution for a long time, and the constitutional review of laws passed by the democratically-elected legislature is not seen as an undue constraint on popular sovereignty. Rather, it is perceived as a necessity to effectively protect fundamental human rights and freedoms, as well as to democratically exercise one's political rights as provided for by the Constitution, including the ECHR.

This conclusion also receives support from a substantive analysis of the statements made by the Austrian press, both in *Der Standard* and *Die Presse*. As was noted in *Die Presse* on the occasion of the fiftieth anniversary of the Austrian ratification of the ECHR, the Convention "enriched the Austrian legal system in many ways."[50] This statement aptly summarizes the general tenor of statements with sovereignty-based justifications in Austria. Rather than perceiving the Court itself or its judgments as an undue encroachment on their sovereignty, the ECtHR and its individual judgments are frequently seen as a useful and, indeed, welcome instrument to stimulate public discussion, further develop Austrian law, and enhance human rights protection.

Accordingly, in a statement on a judgment concerning the legality of pre-implantation diagnostics, a commentator in *Die Presse* expressed the hope that these judgments would force lawmakers to reform the Austrian reproductive medicine act. This reform was long viewed as necessary, but, the commentator held, the government, as well as the parliament, "had thus far lacked the courage" to amend the law.[51] Similarly, with regard to a judgment on the rights of children

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47. GAMPER, *supra* note 45, at 75.

48. *Id.* at 101.

49. *Id.*

50. Franz Matscher, *Was 50 Jahre EMRK in Österreich Verändert Haben* [*What 50 Years of ECHR Changed in Austria*], DIE PRESSE (Sept. 8, 2008, 2:24 PM), https://diepresse.com/home/recht/rechtallgemein/412491/Was-50-Jahre-EMRK-in-Oesterreich-veraendert-haben.

51. Ulrich H. J. Körtner, *Verhindern von Leid, Nicht Selektion* [*Preventing Suffering, not*

after their parents' divorce, the press praised the Court for forcing the legislature to introduce the possibility of double residency for children of divorced parents with shared custody.[52] The same article also expressed hopes that the judges of the Constitutional Court would lift a "messed-up" provision in the Austrian family law. In the same vein, *Der Standard*, a few years earlier, welcomed a judgment finding Austria had violated the ECHR by denying children their "right to both parents," which gave rise to a substantial reform of the respective law in Austria.[53]

These excerpts suggest that judicial authority, whether national or international, is generally recognized as an adequate constraint on the power of the legislature in order to enhance the protection of fundamental human rights. In addition to catalyzing further development of the law and strengthening fundamental human rights, the Court's judgments also stimulate broader and more inclusive discussion of contentious political issues, thereby providing arguments for public deliberation, showing potential solutions, and thus facilitating democratic processes. As noted in *Die Presse*, the Court's decision that two mothers can be the legally-recognized parents of a child made it clear that an "active" discussion on the then still unresolved and closely-related question of artificial insemination of lesbian couples was required, and that the respective judgment would provide backing to the supporters of such a right.[54]

As indicated in the previous section, not all sovereignty-related statements are positive. Albeit to a lesser degree than in Switzerland, the ECtHR, too, is criticized for encroaching on Austrian sovereignty. However, negative statements with a sovereignty-based justificatory frame most often pertain to a specific judgment that addresses a particularly contentious issue, such as same-sex marriage. While the Austrian legislature generally seems eager to implement the judgments of the Court, press statements caution against implementing ECtHR judgments too hastily. As criticized in *Die Presse*, the Court's judgments narrow the discretion of the democratically-legitimated legislature and make it more difficult to find compromise and adopt more nuanced legislation that is sensitive to local

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Selection], DIE PRESSE (July 8, 2010, 6:28 PM), https://diepresse.com/home/meinung/gastkommentar/579887/Verhindern-von-Leid-nicht-Selektion.

52. *See* Benedikt Kommenda, *Der Verfassungsgerichtshof Kann Nicht Alles Reparieren* [*The Constitutional Court Can Not Fix Everything*], DIE PRESSE (Oct. 18, 2015, 6:38 PM), https://diepresse.com/home/meinung/kommentare/leitartikel/4846520/Der-Verfassungsgerichtshof-kann-nicht-alles-reparieren (discussing the benefits of double residency for children with divorced parents).

53. Julia Herrnböck, *Karl: "Menschenrecht auf beide Elternteile"* [*Karl: Human Rights to Both Parents*], DER STANDARD (Apr. 10, 2012, 6:42 PM), https://derstandard.at/1333528794371/Sorgerechtsstreit-Karl-Menschenrecht-auf-beide-Elternteile.

54. *See* Philipp Aichinger & Ulrike Weiser, *Homosexuelle: Rückenwind für Rechte von Lesben* [*Homosexuals: Tailwind for Lesbian Rights*], DIE PRESSE (Feb. 20, 2013, 6:12 PM), https://diepresse.com/home/panorama/oesterreich/1347108/Homosexuelle_Rueckenwind-fuer-Rechte-von-Lesben (asserting how a discussion of lesbian couples' rights was necessary in Austria and exploring relevant court decisions).

particularities.[55] However, as our substantive review of statements with a sovereignty-based justificatory frame suggests, the Austrian press overall seems to see the ECtHR and its judgments as necessary and even welcome instruments. More precisely, these instruments are portrayed as helping legislators—and hence, indirectly, the Austrian people—to adequately exercise sovereignty within a framework of democratic self-governance.

In Switzerland, by contrast, the constraint of popular sovereignty by fundamental rights and freedoms is at the very center of the strong politicization of the ECtHR. According to Romain Lachat, the strong emphasis on popular sovereignty in Switzerland stems from the construction of a national identity based on political will.[56] Due to the lack of a common cultural heritage, Switzerland is a "*Willensnation*."[57] What unites the Swiss is an identification with their fundamental political institutions: "direct democracy, federalism, and neutrality."[58] The particularly strong emphasis on direct democracy implies an inherent skepticism vis-à-vis judicial power. This skepticism finds expression in Article 190 of the Federal Constitution, pursuant to which the Swiss Federal Supreme Court and other judicial authorities shall apply federal acts and international law of the same rank as federal acts. Unlike in Austria, the Federal Supreme Court can thus review neither federal laws nor international legal agreements for their constitutionality. Rather, the Federal Supreme Court must apply federal laws and international law, even if unconstitutional. The reason for this obligation of the judiciary to apply federal and international law even if they are unconstitutional is a particular understanding of the separation of powers, which grants primary to the legislature. In Switzerland, it is considered unacceptable that a judge should be able to decide not to apply or even to repeal laws passed by democratically-elected legislators and subjected to the facultative referendum.[59] Accordingly, political authority directly legitimated by popular vote or election is considered to take precedent over any other potential form of legitimizing political authority, such as through the protection of human rights.

However, because federal laws and also international law—in particular, the ECHR—must be applied even if unconstitutional, Article 190 of the Federal Constitution in its current form has become increasingly contentious. Juxtaposing the direct democratic decisions by the Swiss people with judgments of the "foreign" judges in Strasbourg, which is binding as a matter of international law, the idea that the most fundamental Swiss political institutions—and by implication

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55. Gudula Walterskirchen, *Wer macht die Gesetze? Über die Selbstausschaltung des Parlaments* [*Who Makes the Laws? On the Parliament's Self-Disengagement*], DIE PRESSE (Jan. 18, 2015, 6:38 PM), https://diepresse.com/home/meinung/quergeschrieben/walterskirchen/4641578/Wer-macht-die-Gesetze-Ueber-die-Selbstausschaltung-des-Parlaments.

56. Romain Lachat, *Switzerland: Another Case of Transformation Driven by an Established Party*, *in* WEST EUROPEAN POLITICS IN THE AGE OF GLOBALIZATION 136 (Hanspeter Kriesi et al. eds., 2008).

57. *Id.*

58. *Id.*

59. HÄFELIN ET AL. *supra* note 44, at 654.

also Swiss national identity—are threatened where the ECHR and the ECtHR gain ground. There exists a perception that popular sovereignty, which is central to the Swiss conception of legitimate political authority, is limited by the human rights for which the ECHR provides. The decisions of the ECtHR, and thus the Court itself, are increasingly seen as undue obstacles to the implementation of the popular will. Accordingly, the Swiss People's Party polemically notes that international courts like the ECtHR are, in fact, the "new sovereign."[60]

    This highly skeptical sentiment vis-à-vis judicial power also becomes evident in the qualitative analysis of the statements in the *Neue Zürcher Zeitung* and the *Tagesanzeiger*. As observed by the *Neue Zürcher Zeitung*, the ECHR has become the object of political controversy, as it is increasingly perceived as an obstacle to the realization of the political will of the people as expressed in popular referenda.[61] The sharp increase in negative statements with a sovereignty-based justification thereby coincides with an increase in referenda purportedly conflicting with human rights enshrined in the ECHR. A recurring and ever more contentious issue is, for instance, the purported interference of the Court with the Swiss asylum policy. In an interview with the *Neue Zürcher Zeitung*, a SVP candidate for Federal Council called it "disturbing" that the ECtHR ordered Switzerland not to deport a criminal foreigner whose child lives in Switzerland.[62] Similarly, the *Tagesanzeiger* noted that the Court's judgments, which heavily favors the right to family life, conflicted with the will of the people as expressed in a popular referendum on the deportation of criminal foreigners.[63] As it did not allow for judicial discretion in the deportation decision, the judgment consequently undermined the Swiss immigration policy.[64] Thus, while the Austrian press generally perceives the Court as a useful instrument to develop the law, the Swiss newspapers heavily criticize the ECtHR for its ever more expansive notion of human rights, which is seen to lack democratic legitimacy and to conflict with the national conception of different human rights and the appropriate balance of conflicting rights and interests.[65] Calls to limit the power of the judges and the

    60. *See* Kathrin Alder, *Die Selbstbestimmungsinitiative auf einen Blick* [*The Self-Determination Initiative at a Glance*], NEUE ZÜRCHER ZEITUNG, https://www.nzz.ch/schweiz/selbstbestimmungsinitiative-die-vorlage-im-ueberblick-ld.1421931 (last updated Nov. 25, 2018) (discussing how the SVP believes that Switzerland's sovereignty is in danger in light of the expanding scope of international law).

    61. Katharina Fontana, *Eine Beziehungskrise ist noch kein Scheidungsgrund* [*Relationship Crisis Not Yet Reason for Divorce*], NEUE ZÜRCHER ZEITUNG (May 16, 2014), http://www.genios.de/presse-archiv/artikel/NZZ/20140516/eine-beziehungskrise-ist-noch-kein-/L8DNS.html.

    62. Simon Hehli & Christof Forster, *Mein Rucksack Reicht* [*My Backpack is Enough*], NEUE ZÜRCHER ZEITUNG (Nov. 27, 2015, 5:30 AM), https://www.nzz.ch/schweiz/mein-rucksack-reicht-1.18653431.

    63. Markus Brotschi & Urteil aus Strassburg, *Recht auf Familienleben Geht Vor* [*Right to Family Life Goes Forward*], TAGESANZEIGER (June 24, 2013).

    64. *Id.*

    65. Hans Giger, *Völkerrecht Contra Souveränität* [*International Law Against Soverignty*], NEUE ZÜRCHER ZEITUNG (Apr. 25, 2013), https://www.nzz.ch/meinung/debatte/voelkerrecht-

judgments of the ECtHR, which are perceived as an "unacceptable" interference of the Court in purely internal affairs of the state,[66] and even to disregard judgments which disrespect Swiss sovereignty,[67] evidence the strong emphasis on a democratically legitimized exercise of authority.

This is also consonant with the finding that, in contrast to Austria where praise and criticism primarily pertain to the ECtHR's judgments, it is the Court and its judges that are the primary target of criticism with sovereignty-based justifications in Switzerland. Accordingly, with regard to the contentious issue of the relationship of Swiss national law and international law, the *Neue Zürcher Zeitung* criticizes the ECtHR for being essentially the highest "Swiss" Court in questions of immigration law.[68] In the same vein, a later article in the *Neue Zürcher Zeitung* identifies the root of popular criticism to be the lack of judicial restraint or moderation and the judges' "evolutionary" and "dynamic" interpretation of human rights, which negates legal pluralism within Europe and disrespects more legitimate decisions by the popular sovereign.[69] Negative statements with sovereignty-based justifications thus primarily target the "institution seated in Strasbourg"[70] rather than particular judgments. They thereby question, to use the vocabulary of Zürn and colleagues, the functional necessity of the Court to achieve certain common goods.[71]

In sum, the comments by the press in the Swiss case give expression to a conception of political legitimacy pursuant to which authority is primarily perceived to be legitimate if checked by popular votes as the most immediate expression of the will of the sovereign. Such direct democratic legitimacy pursuant to the Swiss conception has intrinsic value. Due to an absence of a clearly defined demos with common and unifying values, this intrinsic value is difficult to realize at the European level. As a consequence, it is unlikely that the internationalization of authority will be perceived to be as legitimate as a national exercise of authority backed and checked by the popular sovereign. In contrast, pursuant to the Austrian conception of legitimacy, authority is not only legitimate if the popular sovereign consented to it, but also if it helps or enables the exercise of popular sovereignty. By its dynamic and evolving protection of fundamental human rights and freedoms, the ECtHR forms part of the Austrian conception of legitimacy. It

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contra-souveraenitaet-1.18070665.

66. Martin Wilhelm, *Vorwand für Autokraten* [*Pretext for Autocrats*], TAGESANZEIGER (July 25, 2016), https://www.tagesanzeiger.ch/schweiz/standard/Vorwand-fuer-Autokraten/story/25727432.

67. *See generally* Giger, *supra* note 65.

68. *SVP Warnt vor Fremdem Recht* [*SVP Warns Against Foreign Law*], NEUE ZÜRCHER ZEITUNG (Aug.12, 2013 10:45 PM), https://www.nzz.ch/schweiz/svp-warnt-vor-fremdem-recht-1.18131823.

69. Paul Widmer, *Mehr Richterliche Zurückhaltung in Strassburg* [*More Judicial Restraint in Strasbourg*], NEUE ZÜRCHER ZEITUNG (June 26, 2014, 5:30 AM), https://www.nzz.ch/meinung/debatte/mehr-richterliche-zurueckhaltung-in-strassburg-1.18330415.

70. Stefan Schürer, *Gang Nach Strassburg Bringt Meistens Nichts* [*Gang to Strasbourg Mostly Brings Nothing*], TAGESANZEIGER (May 3, 2013).

71. *Id.*

stimulates more active and inclusive public deliberation, and helps to initiate and, to a certain extent, steer democratic legislative processes. Accordingly, while an international institution may lack direct democratic legitimacy, its increasing assumption of authority may be legitimized with reference to its role in enhancing domestic democratic and legislative processes.[72] Compared to the Swiss conception, the more instrumental Austrian conception of legitimate political authority can thus more easily absorb the internationalization of such authority, thereby leading to different levels and patterns of politicization of the ECtHR in the two countries.

VI. Conclusions

When and why do international institutions become politicized? Taking Zürn, Binder and Ecker-Ehrhardt's authority-based theory of politicization as a starting point, international institutions become politicized when and because they develop the capacity to significantly affect the lives of individuals in member states. However, as we sought to argue in this article, there is an additional and more domestic dimension to politicization. Theorizing differential politicization requires us to take national conceptions of legitimate political authority into account. Probing the empirical plausibility of this argument yields four key observations evidencing the different levels of politicization of the ECtHR in the Austrian and Swiss quality press. First, the level of support for the Court declines more definitively in Switzerland than in Austria. Second, over the period of analysis from 1999 to 2016, sovereignty-based evaluations rise sharply in Switzerland, but not in Austria. Third, while the Austrian press pays equal attention to the Court and its judgments, the Swiss press primarily evaluates the ECtHR as such. Finally, in contrast to Austria, sovereignty-based negative evaluations of the ECtHR itself become particularly strong in Switzerland.

A more qualitative look at the same evaluations confirms that the differences in the level of politicization in Austria and Switzerland arise, to a significant extent, from different conceptualizations of the political legitimacy at the national level which are then projected at (or transferred to) the international level. The Austrian conception of political legitimacy is more instrumental than the Swiss conception, allowing it to be more readily adapted to the reality of an international exercise of authority. The exercise of authority pursuant to the Austrian conception is not only legitimate if it refrains from interfering with directly democratic decision-making. Instead, it is also recognized as legitimate if it is conducive to, and helps to realize, such democratic decision-making. This instrumental conception of legitimacy is also evident in the Austrian newspaper statements examined. In general, the Court is seen as a useful and welcome instrument to stimulate inclusive public discussion and initiate, lend momentum to, or steer legislative processes.

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72. This conclusion is also supported by Gamper's observation that euro-sceptic attitudes in Austria "do not distinctly refer to the ECtHR and not even to the Council of Europe, as it is much more the European Union that is referred to." GAMPER, *supra* note 45, at 83.

In Switzerland, by contrast, political authority is to be directly democratically legitimized by the popular sovereign. Due to the difficulty in internationalizing a conception of political legitimacy with such a strong focus on popular sovereignty, the ECtHR becomes more strongly politicized. Rather than it being perceived as a necessary component of democratic decision-making, the Court and its judgments are viewed as hindering or encroaching on popular sovereignty. This also becomes evident in the substantive analysis of Swiss newspaper statements. The ECtHR and its "foreign judges" are strongly criticized for adopting an expansive and dynamic notion of human rights, which is not only not directly democratically legitimized, but also conflicts with the balance between different fundamental rights and public interests struck by popular vote in Switzerland.

In many ways, the Swiss debate thus hints at an "authority crisis" in which the usefulness and even necessity of the ECtHR itself is fundamentally questioned. By contrast, the authority of the ECtHR is widely recognized in the Austrian debate. In Austria, rather, the ways in which the Court exercises its authority have been the primary focus of public contestation—moving us into the terrain of legitimacy concerns. In more general terms, this conclusion suggests that the authority-based explanation of politicization is correct, but incomplete. To improve our understanding of differentiated politicization, it would therefore be helpful to more systematically theorize and empirically reconstruct the interplay between local or national conceptions of legitimate political authority on the one hand, and the practices of legitimating international authority on the other.