The Shadow Effect of Courts:

Judicial Review and the Politics of Preemptive Reform

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Abstract

Political scientists often presume that courts can only influence policy if they are solicited in a dispute. Conversely, we theorize *the shadow effect of courts*: Policymakers preemptively altering policies in anticipation of judicial review. Building on American studies tying these preemptive reforms to interest group litigation and political support for judicial review, we elaborate a theory capable of traveling to less litigious and judicialized contexts. We argue that in these settings shadow effects may still emerge when bureaucratic conflicts threaten to trigger adjudication and policymakers resisting judicial interference seek to preclude courts from building caselaw. To illustrate our theory, we trace how a sudden overhaul of welfare policy in Norway – a country with limited judicial review and interest group litigation – was triggered by an administrative conflict and government efforts to avoid interference by an often-overlooked international court. Our findings advance research on judicial impact, resistance to courts, and bureaucratic politics.

Introduction

A common refrain amongst policymakers and political scientists is that courts can only impact politics and policy if they are solicited in a dispute. In this view, courts are inherently constrained as public institutions by their reactive nature: Unlike legislators or executives who can set their own agendas, judges "have no self-starting mechanisms" (Horowitz 1977, 53) and can only impact the policy process in the controversies that are litigated before them (Keck and Strother 2016, Hall 2017).

We challenge this common understanding of judicial impact by investigating the surprising politics behind what we call *the shadow effect of courts*: Policymakers preemptively altering actions or policies because of their anticipation of judicial review. We propose a novel theory of courts' shadow effects that significantly broadens the scope for inquiry on "the judicialization of politics" (Shapiro and Stone Sweet 2002, Ferejohn 2002, Hirschl 2008, Alter, Hafner-Burton and Helfer 2019): If judicial review can impact policymaking even where the dogs did not bark, then "the radiating effect of courts" may be more encompassing than is often presumed (Galanter 1983, 118).

To this end, we build on research probing the anticipatory politics of judicial review in highly judicialized contexts – particularly the US – to elaborate a theory capable of traveling to less litigious and judicialized settings. American public law scholars have demonstrated that when courts are regularly mobilized by interest groups (Kagan 2019) and their exercise of judicial review is broadly supported by legislative and executive actors (Whittington 2005, Farhang 2010), policymakers will anticipate judicial oversight and adjust policy to avoid adverse rulings (Canes-Wrone 2003, Langer and Brace 2005, Silverstein 2009, Epp 2010). These findings demonstrate the need to take shadow effects seriously, yet admittedly the US constitutes a "most likely case" (Rohlfing 2014, 613) for these effects: If the anticipation of adjudication only prompts policy change where courts are very active and policymakers support their exercise of judicial review, then courts' shadow effects would be limited to uniquely fertile contexts for judicial authority.

Conversely, we argue that courts can prompt preemptive policy reforms even where they are seldom solicited, their authority is contested, and their judicial review powers

are limited. What differs in these contexts is not the absence of shadow effects, but the political process most likely to generate them: A politics catalyzed by bureaucratic conflict rather than interest group litigation, grounded in policymakers' opposition to judicial review rather than their support for judicial oversight. When policymakers neither favor nor expect judicial interference, noncompliance with legal obligations can fester and become systemic. In turn, providing judges with an opportunity to expose noncompliance and interpret the scope of necessary reforms can become a powerful threat. Even where litigious interest groups fail to mobilize this threat, judicial review can still be triggered when fissures within state institutions catalyze bureaucratic conflicts that prompt disaffected public officials to consider turning to the courts. Government leaders intent on precluding judicial interference may thus be pushed to concede sufficient reforms to avoid judicial oversight. Over time, shadow effects thus prove a double-edged sword for courts' judicial impact: While preemptive reforms can alleviate noncompliance, they can also starve courts of the cases they need to build case law and cultivate the perception that judicial oversight is unnecessary to prompt reforms of problematic policies.

To illustrate our argument, we trace the politics of compliance with an international court that has been neglected by political scientists and is embedded in a seemingly infertile context for judicial impact: The European Free Trade Association (EFTA) Court. The deck would seem stacked against the EFTA Court casting any semblance of shadow effects: Not only is the EFTA Court far less active and powerful than more high-profile international courts like the European Court of Justice and the European Court of Human Rights (Alter 2014), but the largest member state under its jurisdiction – Norway – has traditionally opposed judicial review alongside other Nordic countries (Selle and Østerud 2006, Wind 2010, Hirschl 2011) and many corporatist and civil law states (Kagan 2007, Merryman and Perez-Perdomo 2007). For years, the relationship between Norway and the EFTA Court has been described as "troubled" (Fredriksen 2014). Leveraging this hard case seemingly outside the scope of existing theories of judicial impact, we trace the surprising politics behind a recent overhaul of Norwegian welfare policy that had led to the wrongful jailing of dozens of individuals and the denial of social benefits to thousands

more. We demonstrate that this reform was catalyzed by a conflict within the Ministry of Labor and Social Affairs (hereafter 'Ministry of Labor') and a campaign by government officials to preclude this conflict from triggering and legitimating adjudication by the EFTA Court. These findings suggest that the same politics of resistance to judicial review that have hitherto been treated as a source of backlash (Voeten 2020, Madsen, Cebulak and Weibusch 2018, Abebe and Ginsburg 2019, Blauberger and Martinsen 2020) or to legislative and bureaucratic efforts to evade court decisions (Rosenberg 2008, Conant 2002, Martinsen 2015, Martinsen et al. 2019) can also catalyze a politics of preemptive reform indicative of an important – albeit often overlooked – type of judicial impact.

The rest of this article proceeds as follows. We begin by conceptualizing the shadow effect of courts and distinguishing our theory from existing research on judicial impact. We then justify our case selection of Norway and the EFTA Court, outline a process-tracing methodology to assess our theoretical claims, and deploy it in an intensive case study of Norway's welfare-policy reforms leveraging a large corpus of primary sources. We conclude by elaborating how our findings integrate and advance research on the politics of judicial impact, resistance to domestic and international courts, and the bureaucratic politics of institutional change.

Theorizing the Shadow Effect of Courts

Scholars of judicial politics have tended to adopt a rather restrictive conception of how courts influence policymaking, defining judicial impact as "policy-related consequences of a decision" (Becker and Feeley 1973, 213), "impacts that judicial decisions have on politics or policy" (Keck and Strother 2016, 3), "the causal effect of judicial rulings on others' behavior" (Hall 2017, 460), and "the effects of judicial decisions" (Volcansek 2019, 154). In truth, judicial impact also includes how politics and policy are conditioned by the anticipation of adjudication, irrespective of whether a court is ultimately solicited and renders a decision.

When political actors such as executives, legislators, and bureaucrats adopt costly behavioral or policy changes because of the mere threat of judicial review, we call this

"the shadow effect of courts." Our definition differs from research employing similar language to describe the ripple effects of judicial decisions (Schmidt 2018, 95) by following other political science research conceiving shadow effects as anticipatory actions by rational political actors. In this light, courts are most likely to produce a shadow effect when forward-looking policymakers with discretion perceive the likelihood of costly adjudication as high (Stone 1989, Canes-Wrone 2003, 206). It follows that the shadow effect of courts should be distinguished from managerial theories of compliance (Chayes and Chayes 1993) probing remedial actions by political actors after they become aware that they are violating the law – what we call "the shadow effect of law". Managerial theories stress that political actors may unintentionally fail to follow the law when they are unaware or uncertain of their legal obligations. Consequently, rectifying these knowledge gaps is sufficient to prompt efforts to alleviate noncompliance irrespective of the threat of judicial review. As we will show, recalcitrant policymakers may sometimes pass off anticipatory policy changes meant to diffuse the threat of judicial review as these more innocuous responses to new information regarding their legal obligations.

To date, the most compelling empirical evidence for the shadow effect of courts has emerged from the US. Given the entrenchment in the US of what Kagan (2019, 3) describes as adversarial legalism – "policymaking, policy implementation, and dispute settlement by means of party-and-lawyer dominated means of legal contestation" – policymakers have good reason to anticipate judicial review. Indeed, a "litigation explosion" in the wake of the civil-rights movement (Galanter 1986, Olson 1991, Frymer 2008) produced a correlate "explosion in the fear of liability amongst professional practitioners" across levels of government (Epp 2010, 3). Policymakers and street-level bureaucrats grew accustomed to "prospectively trying to anticipate" future judicial rulings and adjusting their decisions on the basis of past precedents (Silverstein 2009, 65), a finding confirmed by econometric studies of bureaucratic and legislative behavior (Canes-Wrone 2003, Langer and Brace 2005). While social-movement activists, interest groups, and rent-seeking lawyers were the primary catalysts of the threat of judicial review (Epp 1998; 2010, Frymer 2003, Kagan 2019), they were also able to exploit favorable political opportunities for adjudication.

Skrentny (2002) and Epp (2010, 3) reveal how government bureaucrats and public managers "enthusiastically joined with external activists in using the threat of liability as a lever of reform." Farhang (2010, 53-54) shows that Congress incentivized interest-group litigation by adopting private enforcement statutes that transferred policy implementation discretion to the judiciary. In turn, party leaders and presidents often supported courts intervening in salient political controversies in order to overcome obstructions to their policy agenda (Graber 1993, Whittington 2005; 2007).

These studies confirm the existence of shadow effects and demonstrate that a politics of preemptive reform constitutes a key component of judicial impact. Yet the pathway to this outcome – interest-group litigation coinciding with political/bureaucratic support for judicial review – admittedly depends on a favorable conjunction of "permissive conditions" (Soifer 2012, 1574). Adversarial legalism greatly increases the likelihood of judicial review, while legislative and executive support for judicial oversight incentivizes courts to monitor and intervene in the policy process. Such judicialized and litigious settings constitute "most likely cases" for judicial impact (Rohlfing 2014, 613; Beach and Pedersen 2019, 108) yielding insights that may not generalize to other polities. For instance, in civil-law jurisdictions and corporatist states with scant histories of judicial review, statist modes of interest intermediation, and political opposition to American-style litigiousness, both legal mobilization and judicial review are significantly politically constrained (Kagan 2007, Merryman and Perez-Perdomo 2007, Kelemen 2011, Pavone 2018, Hofmann and Naurin 2021). Judicial review is even more contested supranationally (Voeten 2020, Madsen, Cebulak and Weibusch 2018), where most courts' caseloads are so small that they struggle to build caselaw (Alter 2014, 108) and even the most active international courts routinely face government efforts to contain or evade their rulings (Conant 2002, Martinsen et al. 2019).

Does the absence of sustained litigation and political support for judicial review constitute a "scope condition" (Mahoney and Rueschemeyer 2003, 10) for courts' shadow effects? We argue that it does not, for there may be multiple pathways to an outcome of interest. Allowing for such "equifinality" (Checkel 2015, 90) enables us to theorize a

novel politics of preemptive reform capable of germinating in less judicialized and litigious contexts. In particular, we posit that what differs in these contexts is not the absence of shadow effects, but the political process that is most likely to generate these effects. While in both judicialized and non-judicialized settings shadow effects are born out of justiciable political conflicts, the agents triggering these conflicts – and policymakers' incentives to respond via a politics of preemptive reform – are likely to be markedly different.

To wit, in countries without a history of strong judicial review, political elites neither actively support nor regularly expect judicial interference in policymaking. Accordingly, the policies they adopt may significantly eschew legal obligations and deviate from how judges would interpret the law. So long as noncompliance is not detected, political elites can adopt their favored policies without procuring courts with an opportunity to exercise oversight and without harming their reputation for compliance (Simmons 2000, Davis 2012, 246).[1] At the same time, inviting a court to exercise judicial oversight and expose noncompliance can become a powerful threat. What happens if interest groups fail to mobilize this threat? Existing studies suggest that the prospect of shadow effects would evaporate, since the threat of judicial review is maximized when "the spectrum of potential litigants becomes too vast" (Blauberger 2014, 472) and minimized without "interested litigants to pressure national policy-makers" (Schmidt 2008, 304).

Conversely, we argue that although the prospect of judicial review might decrease in the absence of sustained interest group litigation, it is hardly eliminated. An alternative trigger can arise when fissures within the state generate bureaucratic conflicts amongst public officials that are potentially justiciable by courts. While these intra-state conflicts may be more likely in federal polities with concurrent jurisdictions (Bednar 2011, 281-282), even corporatist and unitary states seldom behave as a "single, centrally motivated actor" (Migdal 2001, 22). Instead, they more closely resemble a "heap of loosely connected parts or fragments" (Migdal 2001, 22) wherein "desires to maintain the status

[1]Reputations for compliance have several benefits, such as bolstering the capacity to make credible commitments (Guzman 2008, 71-118).

quo co-exist with the same persons with desires for change" (Berger 2009, 397). In such contexts, conflict could emerge vertically between low-level officials and their superiors or horizontally between public agencies or between political appointees and technocratic professionals (Rosenthal, Hart and Kousmin 1991, Christensen 1991). When these conflicts arise, public officials dissatisfied with the status quo who lack the discretion or authority to spearhead change may threaten to solicit a court and expose noncompliance to bolster their own institutional standing and policymaking influence. In turn, policymakers who previously resisted reform are incentivized to placate these officials by making sufficient concessions to diffuse the threat of judicial review.

This alternative pathway to a politics of preemptive reform does not rely on the comparatively exigent permissive conditions suggested by existing studies. First, even courts who lack a steady caseload and the authority to induce compliance with their rulings can still prompt a politics of preemptive reform. What matters is that courts are visible enough that policymakers perceive a real risk of publicized judicial oversight, and that judges expand the scope of justiciable conflicts by procuring standing to a broad array of potential plaintiffs – including public officials.[2] Second, public officials mobilizing the threat of judicial review need not be activist "guerillas" (O'Leary 2019), individuals normatively committed to progressive litigation campaigns (Epp 2010, 3), nor entrepreneurs engaged in a broader politics of legitimacy (Carpenter 2001). While these motives may play a role, it suffices that they be pragmatic actors whose dissatisfaction with the bureaucratic status quo renders the threat of turning to the courts an expedient means to gain leverage over the policy process. Finally, policymakers who concede preemptive reforms need not be broadly supportive of judicial oversight (Whittington 2005, Farhang 2010) nor persuaded about the merits of reform. Rather, they can also be driven by a strong opposition to judicial review, wherein preemptive reforms serve to preclude courts from building their case law and avoid legitimating future judicial oversight. Figure 1 contrasts

[2]As we elaborate in the conclusion, many domestic and international judiciaries have very encompassing standing rules that render bureaucratic conflicts justiciable.

this alternative pathway with existing accounts derived from litigious and judicialized settings. We unpack both pathways in more detail in the next section.

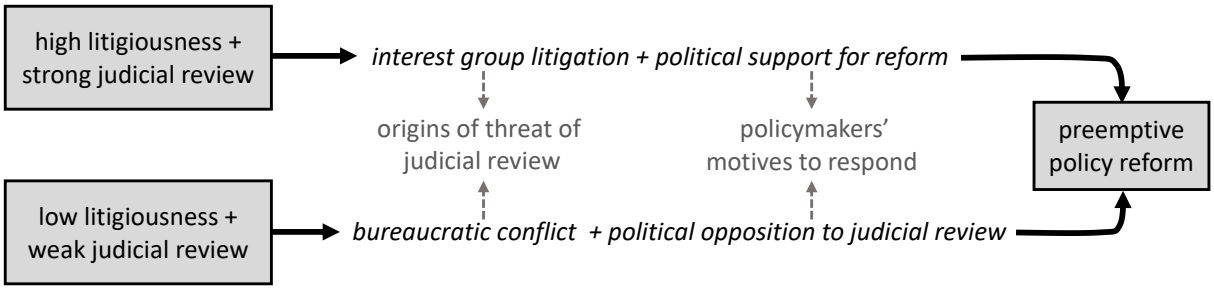

Figure 1: Alternative Pathways for the Shadow Effect of Courts

One important implication of our theory is that the political resistances to judicial review that have hitherto been tied to backlash (Voeten 2020, Madsen, Cebulak and Weibusch 2018) and efforts to restrict compliance with judgments (Conant 2002, Martinsen et al. 2019) can also produce anticipatory reforms and a less visible form of judicial impact. After all, recalcitrant policymakers may find conceding preemptive policy changes a reasonable price to pay to avoid risking an adverse judgement or the unintended consequences of ex-post resistance. As Blauberger (2014, 460) argues, noncompliance with disfavored rulings are "vulnerable to follow-up challenges and, thus, invite ever more judicial interference in domestic affairs." Adverse rulings not only enable courts to build case law that can focalize future litigation (Blauberger and Schmidt 2017), but they can also cultivate the public perception that policymakers require judicial oversight, a "worst case scenario" (Blauberger 2014, 461-462) when public officials are unaccustomed to being constrained by courts. Even if adopting preemptive reforms risks exposing past noncompliance, government officials can still cultivate the perception that they are capable of detecting and reforming problematic policies on their own (thus passing off the shadow effect of courts for the shadow effect of law.) Finally, being subjected to an adverse judgment can attract unwanted foreign scrutiny when states are embedded in transnational organizations that – like the EU – institutionalize procedures to shame and sanction noncompliant governments (Tallberg 2002, 70).

In short, our theory suggests that shadow effects bear Janus-faced implications for courts seeking to impact policy and build their authority. On the one hand, courts can influence policy without being solicited and even in seemingly inhospitable political contexts. On the other hand, recalcitrant policymakers can leverage a politics of preemptive reform to evade direct judicial interference and make judicial oversight appear unnecessary (Baudenbacher 2019, 327-240).

Tracing Shadow Effects: Case Selection and Methods

To empirically assess our alternative theory of the shadow effect of courts, we deploy process-tracing methods in a carefully selected and contextualized case study.

Our case-selection strategy is to identify a case appropriate for "theory-testing process tracing" in which both the threat of judicial review (the theorized cause) and a preemptive policy reform (the outcome of interest) are observed in a different setting from those featured in most existing studies of anticipatory responses to judicial review (Beach and Pedersen 2018; 2019, 97,160). That is, because we wish to assess if an alternative mechanism (bureaucratic conflict and political opposition to judicial review) than that stressed by existing research (interest group litigation and political support for court-driven reform) may also undergird courts' shadow effects, we draw from a population of cases with a divergent set of contextual conditions (Beach and Pedersen 2019, 144): Cases where interest group litigation is rare and judicial review and court-driven policymaking is politically constrained. Because the mechanisms underlying causal processes are context-bound (Falleti and Lynch 2009, Beach and Pedersen 2018; 2019, 322), in such settings it becomes less likely that any observed reforms triggered by the anticipation of adjudication would emerge from the same sequence of entities engaging in activities as in more litigious and judicialized contexts. In turn, by demonstrating that the threat of judicial review can catalyze preemptive reforms even in a case falling outside the scope of existing theories, we demonstrate that the contextual factors that have hitherto been treated as "permissive conditions" (Soifer 2012, 1574) do not preclude shadow effects from emerging via alternative mechanisms, thus broadening the scope for future research on

judicial impact.

To this end, we probe what Hirschl (2011, 449) calls a "largely unexplored paradise" for the study of judicial politics: The Nordic states. Compared to other liberal democracies like the US or Canada, "the Nordic countries have traditionally been agnostic, at best, toward American-style high-voltage constitutionalism, rights talk, and judicial activism" (Hirschl 2011, 450). First, the Nordic countries lack a tradition of judicial review (Wind 2010, 1039). In particular they lack the constitutional courts that tend to serve as motors of judicial policymaking outside of the US (Stone Sweet 2000; 2002, Ginsburg 2004). Second, compared to other European democracies, the Nordic states are more hostile to the authority of international courts and the constraints stemming from international law (Gstohl 2002, Wind 2010, Fredriksen 2014). In Norway, for instance, it is commonplace for policymakers and academics to warn that strict compliance with international institutions would "erod[e] representative democracy" (Selle and Østerud 2006). Third, the Nordic countries are exemplary unitary and corporatist states that adopt a "consensus-seeking approach" of interest-group intermediation that "frequently resolve[s] conflicts without the use of the courts" (Sverdrup 2004, 21-28). Finally, the Nordic countries are characterized by a comparatively high levels of public trust in the state, affording wide scope for "active and interventionist" policymaking with minimal judicial oversight (Selle and Østerud 2006, 551). Indeed, critics often malign that "in the Scandinavian countries, there is too much trust in, and too much dependence upon, state bureaucracy, while, at the same time, too few checks and balances limiting the scope of state power" (Selle and Østerud 2006, 551-552).

Within this population of comparatively non-litigious and non-judicialized cases, we trace the domestic politics of compliance with a little-known international court – the EFTA Court – unfolding within Norway, the largest Nordic state under the Court's jurisdiction. Compared to other European courts like the European Court of Justice, the EFTA Court has been wholly neglected by political scientists, and for seemingly good reasons. The Court appears not only contextually ill-positioned, but also institutionally ill-equipped, to have much policymaking impact: It is relatively new, most of its rul-

ings are advisory rather than binding,[3] it lacks direct access for private litigants, and in a ranking of 24 international courts' formal independence it occupies the middling 14th spot (Alter 2014, Squatrito 2020). In this light, the EFTA Court better approximates the limited power of most international courts than its more-studied European counterparts (Staton and Moore 2011).[4] Furthermore, despite rhetorical claims of acceptance of the Court's authority, Norway has a history of political resistance to the EFTA Court and its capacity to interpret European law (Fredriksen 2014). According to the EFTA Court's recently retired President, "Oslo bureaucrats... got into the habit of systematically denigrating the EEA [European Economic Area] agreement and... in particular, the EFTA Court [which was] seen as a threat to Norwegian sovereignty and to the traditional social model." Thus, "when it comes to defending the 'Norwegian model,' even against clear international law obligations," government officials would "close ranks" (Baudenbacher 2019, 329-332).

The tendency to "close ranks" was placed in sharp relief as the Norwegian Labor and Welfare Administration (NAV) – an agency within the Ministry of Labor – denied thousands individuals their free movement and social benefit rights under European law – including by prosecuting dozens for welfare fraud. Then after more than a decade of non-compliance, in 2019 the Norwegian government suddenly announced that this restrictive welfare policy would be immediately reformed, that prosecutions would cease, and that victims would be compensated. This announcement was followed by an internal NAV audit, a government-appointed inquiry, and the release of a large corpus of archival documents.[5] By scouting this rich paper trail, we reconstruct how Norway's welfare reforms

[3]EFTA Court decisions are advisory in cases referred by national courts and binding in infringements by the surveillance authority. As of 2017, the Court had issued 124 advisory and 107 binding decisions.

[4]The EFTA Court also shares several features with a dozen international courts, including, compulsory jurisdiction, access to a surveillance authority that can launch infringements against states, and a preliminary reference procedure serving as a transmission belt with national courts (Alter 2014, 338).

[5]`https://www.regjeringen.no/no/tema/pensjon-trygd-og-sosiale-tjenester/feilpraktisering-av-eos-sin-trygdeforordning/id2675673/` (retrieved December 21st, 2020).

arose in a campaign by top government officials to preclude a bureaucratic conflict within the Ministry of Labor from triggering adjudication by the EFTA Court.

In particular, we adopt a mechanistic approach to process tracing that crystallizes an "emerging understanding of [causal] mechanisms" as a "system that produces an outcome through the interaction of a series of parts of the mechanism" (Bennett, Fairfield and Soifer 2019, 11; Beach and Pedersen 2019, 39).[6] We follow Beach and Pedersen (2019, 99-100) who conceive mechanisms as entities engaging in activities that generate observable traces in the empirical record concerning the chronology of events (sequence evidence) and the existence and content of hypothesized activities (trace and account evidence). To this end, Figure 2 unpacks the alternative mechanisms summarized in Figure 1 into more detailed sequences of entities engaging in activities. First, we make explicit the common mechanism and chronology of events that tends to underlie existing studies focused on litigious and judicialized settings (the upper pathway). We then proceed likewise for our theory of how bureaucratic conflict and political opposition to judicial review can trigger preemptive reforms in less litigious and judicialized contexts (the lower pathway).

Figure 2 includes examples of the types of evidence that can corroborate each part of the pathway(s).[7] A key advantage of the archival materials available to us is that they include unusually detailed chronologies of correspondence from public officials with discretion to change government policy who did not expect their communications to be made public, which bolsters the evidence's credibility and increases our capacity to evaluate precise predictions (Beach and Pedersen 2019, 104-106). In particular, we adopt a Bayesian inferential logic wherein we assess if the archival evidence increases confidence in one mechanism being at work relative to its alternative(s) (Fairfield and Charman

[6]Following Beach and Pedersen (2019, 36-40), mechanistic approaches seek to overcome the black-boxing of causal processes that tends to occur when they are conceived as intervening variables (ex. King, Keohane and Verba (1994, 86-97)), which is well-suited for causal case studies meant to "better understand policy-making institutions and processes" (Capano, Howlett and Ramesh 2019, 4).

[7]These examples are not exhaustive; On the infeasibility of specifying beforehand the universe of relevant evidence for process tracing, see Fairfield and Charman (2019, 160).

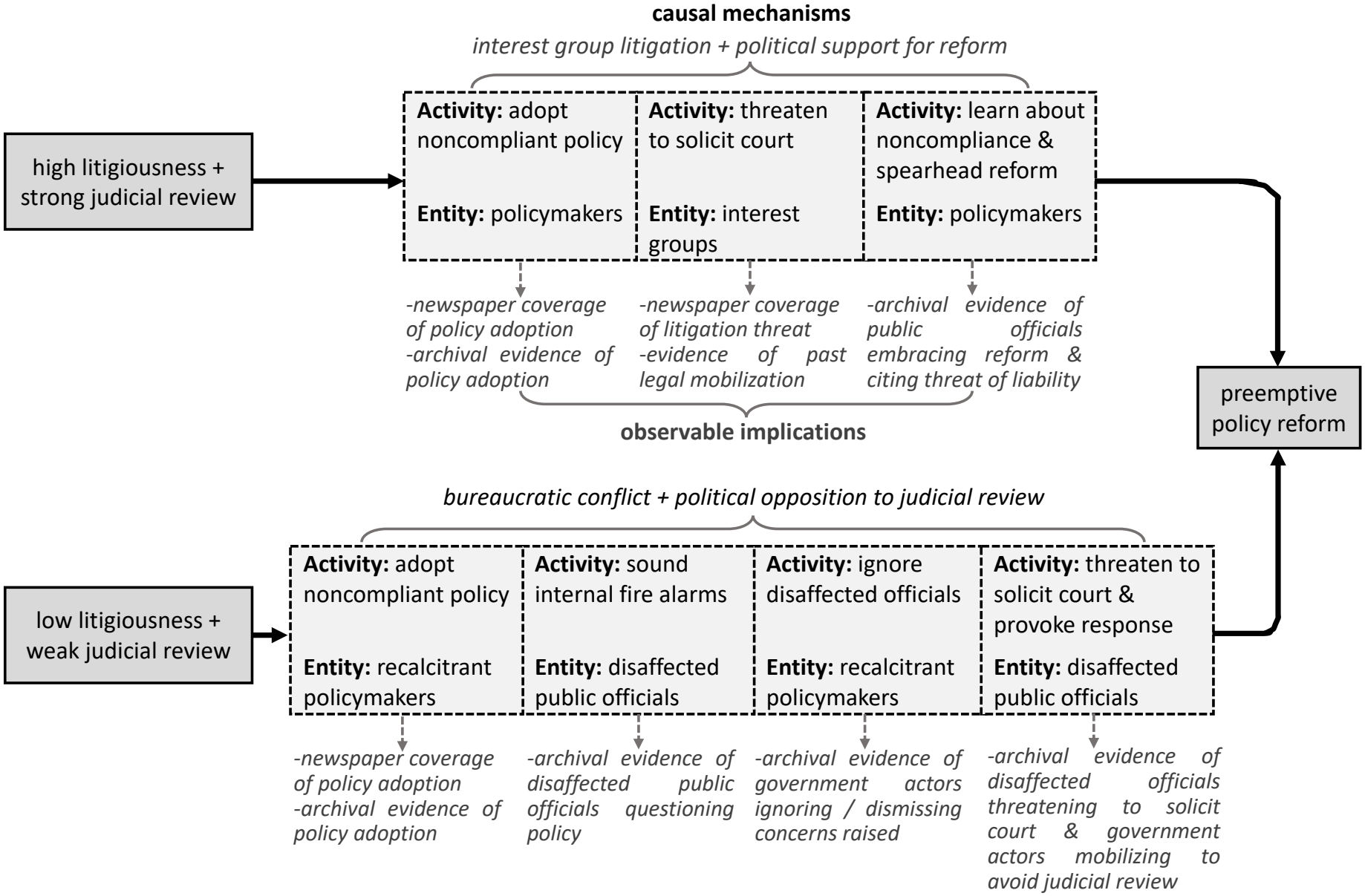

Figure 2: Unpacking Shadow Effects into Entities, Activities, and Observable Implications

2019, 158). The probative value of evidence grows the more it helps us evaluate "certain predictions" about evidence that must be observed for a mechanism to be present and "unique predictions" concerning empirics tied to only one theorized mechanism (Van Evera 1997; Bennett, Fairfield and Soifer 2019, 3; Beach and Pedersen 2019, 96-102). For example, uncovering a letter by a social-rights organization threatening to sue the NAV would increase confidence in existing theories stressing interest-group litigation as the catalyst of preemptive reform. Conversely, government correspondence wherein disaffected public officials threaten to trigger judicial review would increase confidence in our theory stressing bureaucratic conflict as an alternative driver of shadow effects. Finally, to evaluate whether reforms attenuating noncompliance denote the shadow effects of courts (rather than the shadow effects of law), we focus on sequence evidence impinging on the Norwegian government's claim that it speedily changed policy as soon as policymakers became aware of noncompliance.

Our roadmap for process tracing follows four steps summarized in Table 1. As in most case-based research, we begin with the outcome of interest Y (Norway's welfare-policy reform), work our way backwards to corroborate the presence of the theorized cause X, and then trace the mechanism m – the relevant entities and activities – that linked the cause to the observed outcome. Since these inferences constitute contestable evidentiary claims, we follow Moravcsik (2014) and compile our sources in a transparency appendix (TRAX) that can be consulted to assess our analysis.

Table 1: Roadmap for Tracing the Shadow Effect of Courts

Step 1	Verify presence of the outcome of interest: A policy reform (Y)
Step 2	Verify presence of theorized cause in a "shadow effect of law" account – new information about legal obligations (X_1) – & trace whether it prompted a response from policymakers
Step 3	If the "shadow effect of law" is not supported, verify presence of theorized cause in a "shadow effect of courts" account – the threat of judicial review (X_2) – & trace whether it arose from interest-group litigation (m_1 under existing explanations) or bureaucratic conflict (m_2 under our alternative theory)
Step 4	Trace the entities & activities responding to the threat of judicial review (X_2) to catalyze policy reforms (Y) & adjudicate whether reform was tied to political support for court-driven reforms (m_1 under existing explanations) or political opposition to judicial review (m_2 under our alternative theory)

Preemptive Reform in the Shadow of the EFTA Court

The Outcome: A Sudden Reform After Years of Noncompliance

Our theory-testing case study begins with a 2019 welfare-policy reform in Norway following more than a decade of noncompliance with European law. The reform shook the country's political landscape, yet at first glance it hardly appeared a preemptive act sparked by the threat of judicial review.

Although Norway is not a member of the European Union (EU), it is nonetheless bound by European law. As an EFTA member state alongside Iceland, Lichtenstein, and Switzerland, Norway ratified the 1994 European Economic Area (EEA) Agreement that renders it part of the European common market and binds it to EU rules protecting the free movement of persons, goods, services, and capital. EU regulations are continuously incorporated into the EEA agreement and are supposed to be speedily transposed into domestic law. Where conflicts between EEA rules and domestic law arise, EEA rules and the EFTA Court's interpretation of these rules prevail – at least on paper.

Yet, as is often the case in legal orders that lack strong enforcement mechanisms, "rules that exist on paper [may be] widely circumvented and ignored" (Helmke and Levitsky 2004, 727), and this political dynamic is particularly evident when it comes to EEA rules protecting the so-called "exports" of social benefits. Norway's ability to restrict "exports" of social benefits has been progressively constrained by EU rules – specifically by EU Regulation No. 1408/71 (pre-2012) and then by EU Regulation No. 883/2004 (post-2012), whose goal is to coordinate social-security systems within the European common market. Crucially, these regulations prohibit discrimination in allocating social benefits based on beneficiaries' country of residence or their choice to travel or relocate to another EEA country, thus tying beneficiaries' welfare rights to their free-movement rights (Arnesen, et al. 2020).

In spite of these international obligations, the Norwegian government enacted and enforced policies that severely curtailed social benefits to individuals traveling abroad. For instance, in 2006 social benefits legislation was amended to explicitly state that "[i]t is a

condition of entitlement to sick pay that the beneficiary resides in Norway" (Transparency Appendix [TRAX], A.1). A subsequent circulaire to NAV bureaucrats – the civil servants charged with implementing the law and processing social benefit cases – specified that they should use their discretion to identify if EEA rules should prevail over established practice. Even upon EU Regulation No. 883/2004's incorporation into the EEA agreement in 2012, the Norwegian government communicated both to Parliament (TRAX, A.2) and to the relevant bureaucracies (TRAX, A.3) that it did not believe that important changes needed to be made to Norwegian law or its practice of restricting the "export" of social benefits. In fact, when in 2013 bureaucrats in the Ministry of Labor proposed relaxing the requirement that beneficiaries secure NAV approval before traveling, the political leadership in the Ministry blocked the proposal from being discussed at the cabinet level (TRAX, A.35).

These restrictive policies crystallized an increasingly salient objective across successive governments coinciding with growing anti-migration sentiment across Europe, mobilized with particular zeal in Norway by the ascendant right-wing Progress Party. Calls to prevent the exploitation of Norway's generous social welfare regime became frequent. For instance, a government white paper that

> "with the rise in labour immigration to Norway and the increased mobility of people between Norway and other EEA countries, the proportion of benefits that are exported is growing. The possibility that benefits will be exported is assessed when the various schemes are developed. The Government is monitoring the situation closely to ensure that benefit schemes are not abused" (TRAX, A.31).

In seeking to stem these supposed "abuses," Norwegian policymakers acknowledged that their discretion was formally limited by EEA rules. Another white paper cited how the new 2012 EU Regulation "restrict[s] the scope for action to regulate immigrants' and emigrants' access to, and opportunities to bring social-security benefits to other countries"(TRAX, A.4). In turn, EEA free movement rules became a growing target of political criticism. In 2012 Siv Jensen, the leader of the Progress Party, told journalists

that "[w]e are for work immigration, but against welfare refugees. Therefore, we have to set restrictions. If we encounter obstacles in the EEA system, we will have to challenge them" (TRAX, A.5). When the Progress Party became part of the governing coalition the following year, the government announced that it would "[c]onsider measures that will limit and bring to a halt the export of social security benefits" (TRAX, A.32).

As travel restrictions for welfare beneficiaries continued to be applied by NAV bureaucrats and law enforcement into 2019, even short-term and necessary travels without prior authorization became prohibited. As a result, at least 2400 individual cases were wrongly assessed in violation of EEA rules, resulting in the loss of cash benefits, at least 78 individuals who undertook long or repeated stays abroad were convicted for social-security fraud, and 48 individuals were wrongfully jailed (TRAX, A.33). One resident of Norway since 1982 who was slapped with a two month jail sentence and deportation notice for visiting his ailing mother in Greece would later tell the press that "this case has ruined my life"(TRAX, A.34).

Then suddenly, after at least a decade – and possibly up to 25 years – of noncompliance with EEA obligations (TRAX, A.33), the Norwegian government abruptly balked. On October 28$^{\text{th}}$, 2019, the Minister of Labor, Anniken Hauglie, requested to be summoned to Parliament to account for the application of EU Regulation No. 883/2004 (TRAX, A.30). Flanked by the NAV Director and the Director of Public Prosecutions, Hauglie then held a press conference admitting that Norway had for years violated its EEA obligations by barring social-benefit recipients from traveling abroad (TRAX, A.33). The NAV had thus reformed its practice and individuals who had been unlawfully prosecuted, imprisoned, or denied their cash benefits would have their cases reopened and be compensated accordingly.

The October 28$^{\text{th}}$ press conference triggered a political firestorm. Norwegian newspapers described the government's admission as an "unprecedented scandal" and "the biggest welfare scandal of all time," running front-page stories featuring victim interviews and headlines like: "I was viewed as a criminal" (TRAX A.34). The sense of surprise was conveyed by the frustrated head of the NAV employees' union, who confessed that

"we're not super-happy that we (in the union) didn't know a thing either until it hit the media" (TRAX A.34).

To counter public criticism, government officials repeatedly invoked a benign account of noncompliance consistent with managerial theories of "the shadow effect of law." Claiming that "Norway is generally far ahead in terms of loyal adherence to EU/EEA law," Norway's Attorney General tied noncompliance to a "lack of awareness and investigation" (TRAX, A.29). The NAV Director echoed this sentiment, claiming that noncompliance was due to "a collective misinterpretation" of EEA law (TRAX A.34), as did the Director of Public Prosecutions, who lamented that "if we'd been notified earlier" about relevant EEA provisions, "we would have investigated thoroughly" (TRAX A.34). In this framing, insufficient knowledge was the root of noncompliance, yet the government demonstrated its capacity to reform problematic policies and its willingness to bolster awareness of EEA law.

Rather tellingly, public officials' damage-control efforts did not elaborate on the sudden timing of reforms. Thankfully, a trove of archival evidence released to the public allows us to identify when policymakers became aware of noncompliance, how they failed to act upon this knowledge, and how they reacted differently to an event conspicuously absent from the government's press statements: A mounting conflict between the NAV and an administrative appeals board within the Ministry of Labor that threatened to trigger adjudication by the EFTA Court.

The (Non-)Cause: How Evidence of Noncompliance Was Ignored

To identify what triggered Norway's policy reforms, we first assess the explanatory purchase of existing managerial theories of compliance favored by the Norwegian government itself: Were government officials unaware of their EEA obligations, and did they speedily enact reforms once they received evidence of noncompliance (the theorized cause, X_1, in "shadow effect of law" accounts (see Table 1))? To this end, we gather evidence that sequentially captures how policymakers responded to a series of events where, by their own admission, "the alarm[s] went off" (TRAX, A.34). By tracing not just to what

happened, but when it happened (Pierson 2000), we cast significant doubt on managerial explanations and demonstrate that policymakers' behavior belied both awareness of noncompliance and recalcitrant policy preferences.

We have already noted that by 2013, government-coalition leaders expressed a desire to "challenge" any EEA rules (TRAX, A.5) that constrained their capacity to "halt the export of social security benefits"(TRAX, A.32). Even when policy was eventually reformed in 2019, the Minister of Labor expressed concerns that they would lead to increased social-security "exports" and called for other mitigating measures to be implemented (TRAX, A.24). In light of these policy preferences, is unsurprising that mounting evidence of noncompliant practices was repeatedly ignored, dismissed, and even suppressed within the Ministry of Labor. As early as 2009, the NAV's own audit revealed that the agency's Directorate expressed doubts about whether restrictions on welfare "exports" conflicted with beneficiaries' EEA free movement rights. Nevertheless, the Ministry of Labor reiterated that "as a general rule, there should be a condition for the right to [cash benefits] that the person resides in Norway" (TRAX, A.6). Then in 2014 and 2015, NAV street-level bureaucrats voiced concerns that the agency's application of domestic law was violating EEA rules on an internal online discussion board (TRAX, A.10). On two occasions these concerns were not addressed by their superiors, and in a third they were rebutted by recapitulating existing policy (TRAX, A.10).

Simultaneously in 2015, an individual lodged a complaint to the EFTA Surveillance Authority (ESA) after the NAV denied his request to relocate to Sweden while continuing to receive Norwegian social benefits. In response, the ESA requested that the Norwegian government provide information and discuss its allegedly restrictive policy, underscoring that under EU Regulation No. 883/2004 "neither the acquisition, nor the retention of the benefit may be denied on the sole ground that the person concerned resides in another Member State" (TRAX A.23). The NAV and the Ministry of Labor corresponded in preparation for these meetings in 2016 and 2017, yet Norwegian officials presented inaccurate information about domestic practice to the ESA. The NAV's audit concluded that NAV representatives in these meetings were aware of the inaccuracies, but did not

believe that it was their responsibility to correct the record (TRAX, A.11). After being supplied incorrect information, the ESA chose not to pursue the matter further via an infringement proceeding.

By 2017, the Ministry of Labor was hardly the only government agency that had received clear internal signals that its restrictive welfare policy contravened European law. In the same year, Norway intervened as a third party in a European Court of Justice case concerning validity of UK legislation very similar to the NAV's restrictive social-benefits policy. UK law required residency in Great Britain for individuals to receive disability living allowances, and rather tellingly, lawyers from Norway's Attorney General's office intervened "largely [in] support [of] the British authorities" (TRAX, A.33). These efforts proved unsuccessful, as the European Court unequivocally rebutted in its *Tolley* ruling that EU law

> "must be interpreted as preventing legislation of the competent State from making entitlement to an allowance such as that at issue in the main proceedings subject to a condition as to residence and presence on the territory of that Member State."[8]

The Norwegian government was immediately notified of the ECJ's adverse judgment. Although the legal advice that the Attorney General's office subsequently supplied the government has not been made public, it is very unlikely that the Attorney General and other high-level officials did not recognize that the *Tolley* judgment impinged directly on the legality of NAV's restrictive benefits policy.

The foregoing evidence is not exhaustive: In the following sections we will highlight additional materials corroborating the inference that growing awareness of noncompliance failed to persuade Norwegian officials to change course. Thus even if Norway's *initial* noncompliance could be partially attributed to insufficient legal knowledge consistent with managerial theories of the "shadow effect of law," this explanation cannot account for why reforms were not enacted well before 2019 once information became abundant.

[8]C-430/15, Secretary of State for Work and Pensions v Tolley [2017], ECLI:EU:C:2017:74, par. 93.

The Cause: A Bureaucratic Conflict, a Threat of Judicial Review

The lone citizen complaint lodged with the ESA in 2015 puts in sharp relief how Norwegian advocacy associations had failed to organize prospective litigants and serve as "fire alarms" of noncompliance (McCubbins and Schwartz 1984). We uncovered no archival evidence that Ministry of Labor officials worried or were aware of a coordinated litigation campaign targeting the restrictive social benefits policy, nor did we identify media reports suggesting the existence of such legal mobilization efforts. Yet despite the absence of interest-group litigation (m_1 in Table 1), the NAV did suddenly face a threat of judicial review (the cause, X_2, in "shadow effect of courts" accounts (see Table 1)) arising via an alternative mechanism: The escalating tensions between the agency and the Ministry of Labor's quasi-judicial appeals board – the National Insurance Court (NIC) (m_2 in Table 1).

The NIC (or *Trygderetten*) is an appeals body for disputes concerning the NAV's allocation of social-security and pension benefits. Although the NIC operates under the auspices of the Ministry of Labor, is not part of Norway's ordinary court system, and does not formally have a "case law", it describes itself as an independent administrative body with "court-like" functions that "cannot be instructed by any political or other organisation."[9] It is in great part the NIC's liminal institutional status that became the source of bureaucratic conflict: Beginning in 2017, the NIC issued a series of ever-clearer decisions against the NAV citing EEA law, and it interpreted these decisions to be binding rulings by an independent authority. Conversely, the NAV ignored these decisions and treated the NIC as a mere advisory body within the executive branch, causing the NIC's frustrated members to seek new ways of gaining leverage over their recalcitrant interlocutors.

In the summer of 2017, two lawyers with expertise in EEA law became members of the NIC – one of whom had previously served in the ESA legal affairs department (TRAX, A.33). The NIC thus grew increasingly skeptical that national restrictions on social benefits "exports" could comply with beneficiaries' free movement rights under EEA

[9] `https://www.trygderetten.no/page/about` (retrieved April 6th, 2020).

law. Initially, the NIC signaled this skepticism by prodding the NAV to take beneficiaries' EEA rights more seriously. The first of these decisions were delivered on June 12th and 16th, 2017, wherein the NIC held that since the NAV had not "assessed the case complex in accordance with the EEA agreement" (TRAX A.25) nor

> "made any assessment of article 21 [of EU Regulation No. 883/2004]... the court finds it appropriate to revoke the appealed decision so that [the beneficiary's] claim for sickness benefit can be assessed against article 21. The court would note that Article 21, in its wording, applies not only in cases where the member lives in a Member State other than the competent State, but also in cases where the member temporarily resides in another Member State" (TRAX, A.7).

In the subsequent months, the NIC rendered at least nine similar rulings against the NAV (Internrevisjonen 2019, 41–42). In addition to citing the relevant EEA rules, several of these decisions explicitly cited the ECJ's judgment in the *Tolley* case and clearly held that the NAV was failing to take EEA law into account. Yet the NAV chose to deliberately "si[t] on this information" (TRAX, A.33) and continue to deny travel requests by social-benefit recipients and file criminal charges against some beneficiaries. The NAV's internal audit confirms that the NIC's decisions were debated, but practices were not changed, at least in part, because some officials disagreed with the rulings (TRAX, A.8). In response, the NIC issued even more pointed decisions admonishing the NAV. In August 2018, the NIC held that not only had the NAV failed to take EEA law into account, but that its entire policy restricting social-benefit "exports" directly conflicted with EEA law. Strikingly, the NAV again refused to alter its disposition even in the case that had triggered the NIC's latest adverse decision (TRAX, A.9). As a result, frustration within the NIC intensified. The NIC's President later testified before the Norwegian Parliament that the NIC's "legal understanding must have been known before these cases were sent to us. So in the fall of 2018, it was clear to us that the NAV did not [intend to] comply with the NIC's interpretation of the law" (TRAX, A.9).

Yet beyond the NAV's defiant stance, the testimony of the NIC's President suggests

that two factors aggravated the conflict with the NAV. First, the NAV's litigation strategy was leaving judges (and the public) in the dark. The NAV did not appeal any of the NIC's adverse decisions within Norway's ordinary court system, which would have been the normal procedure if the NAV believed that the NIC was misinterpreting the law (TRAX, A.9). By ignoring rather than appealing the NIC's rulings, the NAV ensured that awareness of its dispute with the NIC would remain contained within the Ministry of Labor. Indeed, even experts on the NIC and Norwegian social policy acknowledged that they were unaware of any cases challenging the legality of domestic restrictions on social-benefit "exports" (Lundevall 2017, 161).

Second, the NAV's defiance belied a deeper disagreement within the Norwegian state concerning the policymaking autonomy of the NIC. The NAV's behavior was ensconced in a view of the NIC as an advisory and subservient agency in the executive chain of command. Conversely, the NIC's adverse decisions conveyed its members' self-conception as quasi-judicial actors with independent authority. These conflicting views were placed in sharp relief during the NIC President's parliamentary testimony:

> **Member of Parliament [MP] 1**: "Did the NIC at any time contact the Ministry [of Labor] about these issues?"
>
> **NIC President**: "...The NIC issues individual rulings and we hand them to the parties...it is NAV that has the contact with the Ministry about what will happen next. We do not notify the Ministry or the [NAV] Directorate."
>
> **MP 2**: "...did you then consider that this fact was a matter that you should inform upwards about...?"
>
> **NIC President**: "No. I did not do that...It is not going to happen. That is, the Ministry is informed by the Directorate."
>
> **MP 3**: "You said that you did not inform the Ministry. You are an un-

derlying agency in relation to the Ministry, as I perceive it. . . "

NIC President: ". . . We are an underlying agency, but we are independent. And we issue rulings and rulings in line with a court. And it is not in the system that we have to notify the Ministry" (TRAX A.26).

Internal correspondence between the NAV's Directorate and the Ministry of Foreign Affairs confirms that the NAV shared Parliamentarians' view of the NIC as a dependent administrative agency, in contrast to the NIC President's characterization of her institution as a court-like body (TRAX A.16). We unpack this evidence further in the next section.

Faced with an increasingly intractable bureaucratic conflict and the evident failure of "the shadow effect of law," the NIC decided to change tact. On November 19th 2018, the NIC threatened to take matters into its own hands by triggering judicial review. Although under Norwegian law only the NAV could trigger review by a domestic court via a motion for appeal, under the EEA Agreement the NIC could directly solicit the EFTA Court by requesting a preliminary ruling over the domestic application of EEA law. The appeals board thus sent the NAV a letter making it clear that it was seriously considering to ask the EFTA Court to pass judgment over the validity of Norway's social-benefits policy. The letter stated that "in a number of decisions" the NIC held that beneficiaries' EEA free movement rights prevailed over domestic rules requiring Norwegian residency, yet "neither the NAV nor the NAV Appeals Authority appear to have adopted this practice" to comply. Thus the NIC

"is considering to refer the question of whether EEA Regulation 883/2004 also includes short-term stays in EEA countries to the EFTA Court. In this case, an advisory opinion will be requested from the Court. . . it is thus important that this question is clarified" (TRAX, A.12).

The NAV's immediate reaction to this threat of judicial review proved in sharp contrast to its habit of ignoring the NIC's attempts to remind the agency of its EEA obligations.

The Mechanism: Preemptive Reform as a Resistance Strategy

For ten years, the NAV disregarded mounting evidence of noncompliance. Yet in the span of just a couple of weeks, the NIC's letter prompted a sudden inter-agency frenzy to prevent judicial review by the EFTA Court consistent with our theorized mechanism, m_2, undergirding the "shadow effect of courts" in less judicialized contexts (see Table 1). The letter was forwarded to the NAV's Directorate on November 27$^{\text{th}}$, which immediately notified the Ministry of Labor (TRAX, A.13). A few days later on December 7$^{\text{th}}$, the NAV received yet another letter from the NIC conveying that it was considering to refer a second case to the EFTA Court. The NAV alerted the Ministry of Labor concerning the second letter on December 11$^{\text{th}}$ and urgently reminded the Ministry that it needed an opinion on the matter (TRAX, A.14). In the meantime, the NAV secured a deferred deadline of January 31, 2019 for submitting observations to the NIC.

This rush of internal deliberations corresponded with an abrupt suspension of the enforcement of social benefits restrictions. On December 18$^{\text{th}}$, the NAV ceased processing all complaints concerning "exports" of social benefits to EEA countries (TRAX, A.15). Two days later it sent yet another letter to the Ministry of Labor stressing the growing likelihood of referrals to the EFTA Court and underscoring that complying with the NIC's interpretations of EEA law implied a "significant change in policy." The NAV concluded the letter by asking to be summoned for an inter-agency meeting to coordinate an appropriate response "well in advance of the deadline of January 31" (TRAX, A.14). To date, we lack direct evidence concerning how these letters were discussed amongst Ministry of Labor officials. The Ministry did take the NAV's calls seriously and arranged a meeting on January 18$^{\text{th}}$ 2019, but in a deviation from standard procedures no minutes exist from the meeting (Internrevisjonen 2019, 48).

Simultaneously, the NAV scouted for any feasible way to block the NIC from soliciting the EFTA Court. One particularly revealing piece of evidence is an e-mail the NAV sent the Ministry of Foreign Affairs on January 16$^{\text{th}}$, 2019. In the e-mail, the NAV queried if it could argue that the NIC lacked jurisdiction to refer a case to the EFTA Court, since it is "an administrative body" rather than an ordinary court (TRAX, A.16). This view

channeled the NAV's habit of not treating the NIC's decisions as court-like precedents, as well as a broader government strategy of restricting the set of actors capable of soliciting the EFTA Court. According to the EFTA Court's ex-President, it was long apparent that Norway's "goal once again was to keep cases out of the Court," so he and his colleagues adopted "functional approach" to safeguard "broad access," since they "did not want to lose a case" and be denied the ability to "further [the] development of the Court's case law" (Baudenbacher 2019, 100-101). The "Norwegian government [had since] made a big fuss" (Baudenbacher 2019, 100) over the EFTA Court's "broad and liberal" standing requirements (Butler 2020, 324), and the Ministry of Foreign Affairs acknowledged as much in its reply to the NAV: The EFTA Court "had set the bar low" despite Norway arguing "against such an interpretation," and it was all but certain to accept the NIC's referral (TRAX, A.16). As a result, the NAV did not pursue a direct blocking strategy further.

What the NAV ultimately did propose was sufficient policy changes to appease the NIC and cajole it from soliciting the EFTA Court. In a letter to the Ministry of Labor on January 24th, the NAV recommended that "practice should be changed so that, to a greater extent than what has been the case so far, it is in accordance with the NIC's view." In arguing for preemptive reforms, the agency elaborated its motives and desire to avoid adjudication:

> "The NAV has no real opportunity to influence a possible decision by the NIC to submit the case to the EFTA Court. However, it is assumed that a change that brings the NAV's practice closer to the NIC's view will reduce the likelihood that the court will request an opinion from the EFTA Court. The Directorate therefore wishes to adapt future practice... instead of obtaining a decision from the EFTA Court. We consider that, by changing practices, the Norwegian authorities will have a greater opportunity to decide for themselves the importance of temporary stay abroad for the right to the benefits in question than if we receive a decision from the EFTA Court" (TRAX, A.17).

The significance of this letter is evident in light of Norway's historical opposition to US-

style judicial review (Selle and Østerud 2006, Hirschl 2011) and its oftentimes recalcitrant relationship vis-a-vis the EFTA Court (Fredriksen 2014). Norwegian politicians and journalists had long accused the EFTA Court of acting "more Catholic than the Pope" in restricting Norway's policymaking discretion under the EEA Agreement (Magnússon 2011, 517). The NAV's belief that it would be preferable to adopt preemptively reforms over submitting to international adjudication tapped a well-known strategy pioneered by Norway's Attorney General to secure the government's "room for maneuver" and "safeguar[d] national interests" by resisting the EFTA Court's efforts to build a "very far reaching interpretation of the EEA agreement" (TRAX. A.29). The strategy so frustrated the EFTA Court's ex-President that he penned a number of increasingly combative editorials in the Norwegian press and two books lambasting the "room for maneuver" policy (TRAX, A.28; Baudenbacher 2019; 2021).

Indeed, in advocating for preemptive reforms, the NAV proposed the most minor changes possible to placate the NIC while maintaining discretion to restrict social benefits. Unlike the progressive reformers that often drive preemptive policymaking in the shadow of American courts (Epp 2010), NAV officials advocating policy changes were hardly persuaded about the substantive merits of reforming in the shadow of the EFTA Court. Not only did their proposal fail to categorically renounce restrictions on social-benefit "exports," but it embraced reforms that would only affect future cases and avoid compensating individuals who had been unlawfully imprisoned or lost benefits. The letter limited the scope of reform to individuals undertaking short stays abroad, and it did not deem it necessary to terminate criminal prosecutions already underway (Internrevisjonen 2019, 52-53). The desire to contain the scope of policy reform was broadly shared. When the Ministry of Labor approved the NAV's proposal via e-mail on February 22nd and in an official letter on March 5th, it stressed that the NAV should only reform its handling of future cases and continue to seek ways of limiting payments to beneficiaries living abroad (TRAX, A.18).

Shortly after receiving informal approval by the Ministry of Labor, the NAV responded to the NIC. In a letter to the NIC on February 26th, the NAV briefly stated that it would

change those practices that the NIC had found objectionable (TRAX, A.19). Apparently satisfied, the NIC retracted its threat of soliciting the EFTA Court. To be sure, the NIC could have still referred the cases and enabled the EFTA Court to oversee the government's reform efforts. Its choice to not do so suggests that the NIC's objective was ultimately more pragmatic and institutional (to bolster its standing and influence vis-a-vis the NAV) than it was progressive and policy-driven (to partner with the EFTA Court to advance European law) (TRAX, A.27).

Yet even after the NIC abandoned its threat of judicial review, policymakers soon recognized that their efforts to "contain justice" (Conant 2002) and avoid public scrutiny could not be sustained. Initially, the NAV remained committed to minimal changes in practice (TRAX, A.21) and criminal prosecutions continued to be lodged through the summer of 2019, in part to avoid more comprehensive reforms being picked up by the media (Internrevisjonen 2019, 59). By August 2019, however, some NAV bureaucrats started questioning the feasibility of this approach. In an August 30th e-mail to the Ministry of Labor, NAV officials expressed concerns that in their experience "changes in practice [in future cases] lead to calls for reopening old cases" (TRAX, A.22). Eventually, government officials implemented reforms encompassing all stays in the EEA area, committed to reopening old cases, and compensated victims. The archival evidence does not enable us to conclusively identify what motivated ramping up the reforms shortly before publicizing them, since the Attorney General's advisory opinion that allegedly guided this decision has been kept confidential (TRAX, A.29).

What is clear is that publicizing a more comprehensive set of reforms was not without political benefits: Policymakers could more credibly claim to have detected and reformed a problematic policy without it becoming apparent that a court had forced their hand. The NAV Director's press release emphasized that her agency was "taking the initiative," had "made thorough legal assessments" in response to the NIC's decisions, and "changed the practice" (TRAX, A.20) – even though the NAV had defied the NIC for nearly two years. The Attorney General lauded the government's efforts to "clarify EEA law in this field" (TRAX, A.29) since in conducting "lawsuits on various aspects of social security

and the EEA, both before Norwegian and international courts" it had never become apparent "that there was an EEA breach" (TRAX, A.29) – even though his office's lawyers intervened in the 2017 *Tolley* case concerning the illegitimacy of residency restrictions on benefits. And the Minister of Labor promised to spearhead an investigation to "get to the bottom of what has happened, and learn from it for the future" (TRAX A.34) – even though in 2017 the Ministry had persuaded the ESA to drop its investigation on the matter. No high-level government official admitted that what spurred them to "half-heart[edly]" act (Baudenbacher 2021, 3) was the sudden threat of judicial review by the EFTA Court.

Conclusion

This article demonstrates that judges need not adjudicate cases to influence political behavior and that reforms in the shadow of courts can be triggered even where political resistances to judicial review are broadly entrenched. This finding challenges the common presumption that courts that are seldom solicited and decoupled from political enforcement mechanisms have scant influence on policymaking. By challenging this presumption, we significantly expand the temporal and geographic scope of judicial impact research. Temporally, we can focus more efforts on understanding *ex ante* effects of judicial decisions that may never actually be rendered. Geographically, we can pay greater attention to the struggles underlying courts' exercise of constrained authority in less litigious and judicialized settings than those hitherto animating much judicial impact research.

More precisely, three takeaways open avenues for future research. First, preemptive policy reforms need not indicate policymakers' support for court-driven change nor the beginnings of a judicialization process. Rather, these politics can also serve a more subtle strategy to resist judicial authority than the public backlashes and noncompliance campaigns that have hitherto attracted valuable scholarly attention (Madsen, Cebulak and Weibusch 2018, Abebe and Ginsburg 2019, Voeten 2020). Just as courts need not decide cases to exercise policymaking influence, policymakers need not wait for judges to render a ruling to resist judicial interference. If courts are starved of opportunities to

build their case law and adjudicate salient political controversies, they can be precluded from delivering rulings that focalize future litigation (Blauberger and Schmidt 2017). By achieving this end via preemptive policy changes, political actors can further cultivate the perception that judicial oversight is unnecessary to detect and reform problematic policies. A politics of preemptive reform can thus serve as a means to resist precisely the type of "legalized accountability" and "adversarial legalism" (Epp 2010, Kagan 2019) with which it is so closely associated in judicialized settings like the US.

Second, if the prospect of judicial review can spur preemptive reforms, courts can counter political efforts to resist judicial interference by empowering as many actors as possible to credibly threaten judicial review. For instance, judges can expand the scope of justiciable conflicts and invite public actors to trigger adjudication when private or interest group litigation is infeasible or rare. Public standing to sue is already a reality in many countries beyond the US (Hoffman 1973). For instance, in Belgium, Germany, England, France, Italy, Sweden, and Turkey, public agencies or ombudsmen are statutorily permitted to sue each other and to challenge the government in court (Eliantonio et al. 2012, 59-79), while judges in India and South Africa have developed encompassing public-interest doctrines empowering almost any actor to challenge government policies (Cassels 1989, Amar and Tushnet 2009). Supranationally, there are now twelve international courts that can be solicited via preliminary reference procedures by national actors exercising court-like functions (Alter 2014). Amongst these, the EFTA Court exemplifies how expansive interpretations of what constitutes a "court or tribunal" can mobilize a variety of administrative actors into wielding the threat of judicial review (Baudenbacher 2019, 100). Legal scholars may lament the acrobatics that accompany these efforts (Butler 2020), but broadening justiciability and relaxing standing rules can be vital to compensate for the absence of litigation and to combat political efforts to evade judicial oversight.

Finally, when bureaucratic conflicts can trigger adjudication, the shadow effect of courts can serve as an endogenous driver of political development that reconfigures authority relations within the state (Frymer 2008). In particular, public actors who are disaffected with the institutional status-quo can leverage the threat of judicial review to

bolster their independence and policymaking discretion. This conclusion mirrors studies tracing how the proliferation of international judicial review empowered low-level courts to circumvent their national judicial hierarchies and challenge the decisions of their superiors (Alter 2001; 2014, Pavone and Kelemen 2019). In a similar vein, bureaucrats and public agencies can leverage the threat of judicial review to challenge the executive chain of command and build their institutional autonomy. As a result, the prospect of adjudication can transcend individual policy disagreements and contribute to "big, slow-moving... and invisible" processes of institutional change (Pierson 2003).

To be sure, the foregoing conclusions are derived from a causal case study ensconced in the "largely unexplored" context of judicial politics in the Nordic countries (Hirschl 2011, 449). The generalizability of our theory of shadow effects to other relatively non-litigious and judicialized settings merits additional intensive and cross-case analyses (Beach and Pedersen 2019, 21-22). We hope that this article serves as a springboard for future research unmasking the surprising ways that courts impact policymaking in the shadow of the politically visible.

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