The Shadow Effect of Courts:
Judicial Review and the Politics of Preemptive Reform

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Abstract

Political scientists often claim that courts must adjudicate disputes to influence policy. Conversely, we theorize *the shadow effect of courts*: Policymakers preemptively altering policies in anticipation of possible judicial review. While existing American studies tie preemptive reforms to interest-group litigation and political support for judicial policymaking, we elaborate a comparative theory accommodating more hostile contexts for courts. We argue that in less litigious settings, shadow effects can still emerge when bureaucratic conflicts threaten to trigger adjudication and policymakers seek to starve courts of the cases needed to build their caselaw. Recalcitrant policymakers allow preemptive judicial influence to resist direct judicial interference. To assess our theory, we process trace how a sudden welfare reform in Norway, a country with limited litigation and judicial review, was triggered by an administrative conflict and government resistance to an often-overlooked international court. Our findings advance research on judicial impact, resistance to courts, and bureaucratic politics.

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Introduction

A common refrain amongst political scientists is that courts can only impact politics and policy if they are solicited in disputes. 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 must wait for other actors to litigate controversies before them (Becker and Feeley 1973, Keck and Strother 2016, Hall 2017).

We challenge this narrow understanding of judicial impact by investigating the surprising politics behind what we call *the shadow effect of courts*: Policymakers preemptively altering practices or policies in anticipation of possible judicial review. We propose a comparative theory of courts' shadow effects that distinguishes it from other "radiating effects of courts" (Galanter 1983) and significantly broadens the scope for inquiry on "the judicialization of politics" (Shapiro and Stone Sweet 2002, Ferejohn 2002, Hirschl 2007, Alter, Hafner-Burton and Helfer 2019): If judicial review can impact policymaking even where the dogs did not bark, then courts' political influence may be more encompassing than is often presumed.

To date, the most compelling evidence of the shadow effects of courts has been confined to the context where we would most expect them: The litigious and judicialized US. In the prototypical site for "adversarial legalism," policymakers take interest-group litigation for granted and have largely adapted to a judicialized environment (Farhang 2010, Barnes and Burke 2020, Kagan 2019). By adopting preemptive policy changes, American policymakers seldom seek to evade judicial review altogether, but rather to survive litigation and to harness the anticipation of adjudication as an instrument of reform (Melnick 1983, Epp 2010). In comparative terms, the conjunction of vigorous litigation and politicians' embrace of judicial policymaking renders the US a "most likely case" for shadow effects (Rohlfing 2014, 613; Beach and Pedersen 2019, 108). As a result, the existing literature yields insights that may not travel to other countries where litigation and judicial review are subject to greater political constraints, such as civil law and corporatist states (Kagan 1997, Merryman and Perez-Perdomo 2007, Pavone 2018). The prospect of shadow

effects would seem even more remote supranationally, where most international courts are seldom solicited and struggle with frequent government resistance to their authority (Conant 2002, Alter 2014, Martinsen et al. 2019).

Contrary to these expectations, we theorize that courts can catalyze preemptive policy reforms even in more hostile political terrains where interest-group litigation is scant and resistance to judicial review is entrenched. However, both the political *process* likely to generate these effects and the broader *consequences* for judicial policymaking require flipping the presumed link between shadow effects and judicialization on its head.

We argue that when policymakers neither support nor expect judicial interference, noncompliance with legal obligations can fester. In turn, providing judges with an opportunity to legitimate judicial oversight and expose noncompliance can become a powerful threat. Even where interest groups fail to mobilize this threat, an alternative trigger can arise when bureaucratic conflicts within the state push disaffected public officials to consider turning to the courts to gain institutional influence. Government leaders intent on quashing opportunities for courts to exercise judicial review may therefore concede policy changes to placate disaffected officials and make judicial oversight appear unnecessary for detecting and reforming problematic policies. Instead of shadow effects signaling policymakers' acceptance and support for expansive judicial policymaking, they signal policymakers' desire to forestall and resist judicial review. And instead of judges welcoming preemptive reforms in a context where they are swamped by lawsuits (Feeley and Rubin 2000, 75, 101), they may be left lamenting being starved of the cases needed to build their authority in the first place (Baudenbacher 2019, 327-240). Shadow effects expand the spectrum of indirect judicial influence, but they are not necessarily an unqualified good for courts.

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 hostile context for judicial impact: The European Free Trade Association (EFTA) Court. The EFTA Court would seem decidedly ill-positioned to cast any semblance of shadow effects: Not only is it far less active and powerful than higher-profile international courts (Alter 2014),

but the largest member state under its jurisdiction – Norway – shares a history of political opposition to judicial interference with other Nordic countries (Selle and Østerud 2006, Wind 2010, Hirschl 2011). For years, the relationship between Norway and the EFTA Court has been described as "troubled" (Fredriksen 2014). Leveraging this hard case outside the scope of existing theories, we trace the surprising politics behind a recent overhaul of a 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 major reform was catalyzed by a bureaucratic conflict within the Ministry of Labor and a resistance campaign by government officials to thwart opportunities for the EFTA Court to build its caselaw. These findings suggest that the same politics of resistance to judicial review that comparative and international relations scholars have hitherto tied to backlash (Voeten 2020, Madsen, Cebulak and Weibusch 2018, Abebe and Ginsburg 2019, Blauberger and Martinsen 2020) or to legislative and bureaucratic noncompliance campaigns (Rosenberg 2008, Conant 2002, Martinsen 2015, Martinsen et al. 2019) can also catalyze preemptive reforms indicative of a type of judicial impact that is as often overlooked as it may be undesired by judges.

The rest of this article proceeds as follows. We begin by conceptualizing the shadow effect of courts and distinguishing our theory from existing research. We then justify our case selection of Norway and the EFTA Court, outline a process-tracing methodology to test our theoretical claims, and deploy it in an intensive case study leveraging a large corpus of primary sources. We conclude by elaborating how our findings advance comparative 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

Political scientists have tended to adopt a rather restrictive conception of 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). Even impact studies illustrating this definition's narrowness in practice still sometimes embrace it as a theoretical claim (Melnick 1983, 15; Rosenberg 2008, 17; Erkulwater 2006, 143). In truth, the concept of judicial impact also includes how politics and policy are conditioned by the anticipation of adjudication, irrespective of whether a court is solicited and renders a decision.

When policymakers such as executives, legislators, and bureaucrats adopt costly changes in practice or policy because of the mere threat of judicial review, we call this *the shadow effect of courts*. Because this conception bears similarities to other indirect judicial impacts that can be lumped under the umbrella of "radiating," "general," or "feedback" effects (Galanter 1983, Barnes 2019), it is worthwhile to distinguish the shadow effect of courts from related socio-legal concepts, as summarized in Table 1.

Table 1: The Shadow Effect of Courts vs. Related Types of Radiating Effects

	impact of court decisions	**managerial theories of compliance**	**bargaining in the shadow of the law**	**shadow effect of courts**
key actors	private actors / policymakers	policymakers *e.g. bureaucrats, legislators*	private actors *e.g. divorcees, defendants*	policymakers *e.g. bureaucrats, legislators*
actors' motives	comply with legal obligations / avoid costs of noncompliance	comply with legal obligations	avoid costs of litigation	avoid an adverse ruling / resist judicialization
actors behave reactively or preemptively?	reactive	reactive	preemptive	preemptive
ex-ante condition	private dispute / noncompliant policy	noncompliant policy	private dispute	noncompliant policy
trigger of change	court decision	information diffusion	threat of judicial review	threat of judicial review
ex-post outcome	behavior change / policy reform	policy reform *e.g. legislative change, bureaucratic reform*	behavior change *e.g. settlements, plea bargaining*	policy reform *e.g. legislative change, bureaucratic reform*
judicial review is exogenous or endogenous?	exogenous or endogenous *private actors/policymakers take the judicial rules of the game as given or can seek to shape these rules*	exogenous *policymakers take the judicial rules of the game as given*	exogenous *private actors take the judicial rules of the game as given*	endogenous *policymakers can seek to shape the judicial rules of the game*

First, unlike the direct and indirect ripple effects of rendered judicial decisions central to implementation or "gap" studies (Erkulwater 2006, Rosenberg 2008, Blauberger and Schmidt 2017, Schmidt 2018, Barnes 2019, 150-152), we focus on anticipatory actions preceding rulings that may never be rendered. The trigger of change thus shifts from litigation and judicial review to the mere prospect of adjudication. Second, in contrast to how litigation endows private parties with bargaining leverage to negotiate pre-trial settlements – often described as "bargaining in the shadow of the law" (Mnookin and Kornhauser 1979, Stevenson and Wolfers 2006, Barnes and Burke 2020, 481) – our focus is on public policy reforms adopted by political actors. Whereas private parties usually

take laws and judicial review as given and adjust their behavior to avoid litigation costs, policymakers are in a position to shape the judicial rules of the game and the trajectories of lawmaking – including via preemptive reforms, as we will see. Finally, in contrast to managerial theories of compliance probing remedial actions by policymakers who become aware that they are violating the law (Chayes and Chayes 1993), our focus is not on reactions to information acquired independent of judicial review, but on preemptive reforms to anticipate or circumvent adjudication. As we will show, recalcitrant policymakers may try to pass off reforms designed to evade or undermine judicial review as these more benign responses to novel information concerning uncontested legal obligations.

To date, the most compelling evidence for the shadow effect of courts has been confined to the US. This is unsurprising, given the entrenchment of adversarial legalism – "policymaking, policy implementation, and dispute settlement by means of party-and-lawyer dominated means of legal contestation" (Barnes and Burke 2020, Kagan 2019, 3). As a "litigation explosion" and "flood of [judicial] decisions" followed in the wake of the civil-rights movement (Galanter 1986, Frymer 2008, Melnick 1983, 4), an "explosion in the fear of liability" diffused across levels of government (Epp 2010, 3). Policymakers grew accustomed to "prospectively trying to anticipate" judicial rulings on the basis of past precedents (Silverstein 2009, 65), a finding confirmed by case studies of major policy reforms (Melnick 1983; 1994) and econometric studies of bureaucratic and legislative behavior (Canes-Wrone 2003, Langer and Brace 2005). While movement activists and interest groups were the primary catalysts of the threat of judicial review (Epp 1998; 2010, Frymer 2008, Kagan 2019), they exploited favorable political opportunities. Bureaucrats and public managers often "enthusiastically joined with external activists in using the threat of liability as a lever of reform" (Feeley and Rubin 2000, Epp 2010, 3). In turn, legislative and executive actors made "extensive use of litigation to pursue policy" and overcome the constraints of a fragmented policymaking system (Barnes 2019, 148). Congress incentivized interest-group litigation and private enforcement to side-step the executive branch and transfer policy implementation to the judiciary (Farhang 2010). And party leaders and presidents supported courts intervening in controversies to shift

blame or evade legislative obstructions to their agenda (Graber 1993, Whittington 2005).

In short, the existing literature views shadow effects through the prism of the politics of judicialization. American policymakers may *situationally* find themselves opposed to judicial review, but they have largely adapted to a judicialized environment and harnessed the shadow effect of courts for their policymaking advantage. To the extent that policymakers embrace preemptive reforms, it is to survive litigation and influence judicial policymaking rather than to undermine judicial review. This conjunction of interest-group litigation and political support for judicial policymaking makes for "permissive conditions" (Soifer 2012, 1574) highly favorable for shadow effects. However, the resulting insights may not travel to many other polities where some or all attributes of adversarial legalism are lacking (Barnes and Burke 2020, 478). As international relations scholars have shown, international courts oftentimes struggle to build their caselaw (Alter 2014, 108) and are regularly plagued by government efforts to resist or contain their rulings (Conant 2002, Voeten 2020, Martinsen et al. 2019). Moreover, as comparativists have demonstrated, in civil law and corporatist states bureaucratic modes of interest intermediation and political opposition to adversarial legalism significantly constrain litigation and judicial review (Kagan 1997, Merryman and Perez-Perdomo 2007, Kelemen 2011, Pavone 2018, Hofmann and Naurin 2021).

Does the absence of sustained litigation and political support for judicial policymaking constitute a scope condition for the shadow effect of courts? What of courts struggling with limited opportunities to establish precedents and political elites ready to resist judicial policymaking? Contrary to existing expectations, we argue that courts can prompt preemptive reforms even in these more hostile political contexts. Yet to theorize this possibility we cannot view shadow effects through the prism of judicialization. Instead, we must view shadow effects as the processual outcome of a politics of resistance to judicial authority,[1] with profoundly different implications for judicial policymaking.

To wit, in countries where political elites neither support nor regularly expect judicial

[1]We thus claim that there are "equifinal" pathways (Checkel 2015, 90) to courts' shadow effects.

interference, public policies may significantly eschew legal obligations and deviate from how judges would interpret the law. So long as noncompliance is not detected, policymakers can adopt favored policies without procuring courts with an opportunity to exercise oversight. Simultaneously, inviting a court to exercise judicial review and expose noncompliance can become a powerful latent threat. What if interest groups fail to mobilize this threat? Contrary to studies suggesting that the prospect of adjudication would evaporate (Blauberger 2014, Schmidt 2008, 304), we argue that it is hardly eliminated. An alternative trigger can arise when bureaucratic conflicts arise amongst state officials that are potentially justiciable by courts. While bureaucrats have featured in existing impact studies (Rosenberg 2008, Feeley and Rubin 2000, Epp 2010), the presumption remains that they act under pressure from (or in coordination with) outside litigants. But internal conflicts can push disaffected officials to turn to the courts without any outside litigation pressure. While bureaucratic conflicts may be more likely in federal polities (Bednar 2011, 281-282), even unitary states seldom behave as a "single, centrally motivated actor" (Migdal 2001, 22). In practice, they often resemble a "heap of loosely connected parts or fragments" (Migdal 2001, 22) wherein "desires to maintain the status quo co-exist with the same persons with desires for change" (Berger 2009, 397). Bureaucratic conflicts could thus emerge vertically between low-level officials and their superiors or horizontally between public agencies or political appointees and career professionals (Rosenthal, Hart and Kousmin 1991, Christensen 1991). When these tensions arise, officials who lack the leverage to spearhead change may threaten to solicit a court and expose noncompliance to bolster their institutional standing and policy influence. In turn, policymakers previously opposed to reform may placate these officials to avert the outcome they most want to avoid: Providing courts with an opportunity to exercise and legitimate judicial review.

This alternative pathway breaks from existing research in two key ways. First, processually our theory does not rely on the comparatively exigent permissive conditions suggested by US judicial politics research. Even courts who lack a steady caseload and political support for judicial review can prompt preemptive reforms. What matters is that bureaucratic actors can substitute for private or interest-group litigants, and that

policymakers wish to avoid a publicized exercise of judicial oversight. Neither do public officials need to be normatively invested in reform campaigns (Feeley and Rubin 2000, 61; Epp 2010, 3) to wield the threat of judicial review. While these motives may play a role, it suffices that they be sufficiently dissatisfied with the bureaucratic status quo that threatening to solicit a court becomes an expedient means to gain institutional and policy leverage. Finally, politicians who concede preemptive reforms need not do so because they believe that judicial review advances their long-term policy interests (Whittington 2005, Farhang 2010). They can also be driven by the very opposite goal: To resist the institution of judicial review and quash opportunities for a judicialized mode of governance to take root. Figure 1 contrasts this alternative pathway with existing accounts; we unpack both pathways in the next section.

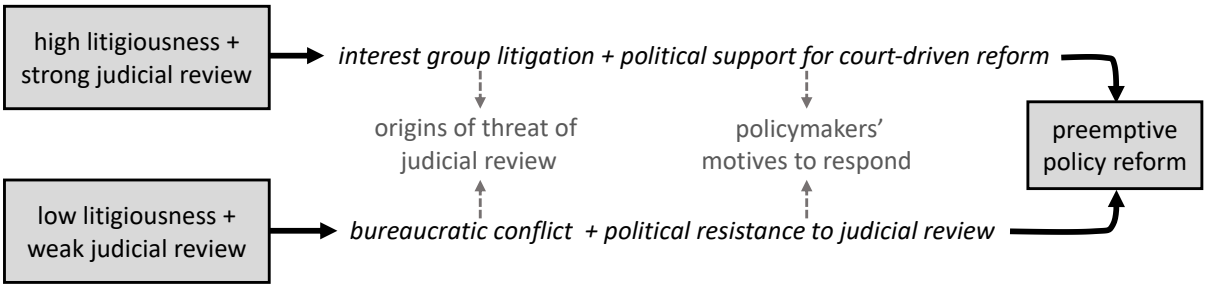

Figure 1: Alternative Pathways for the Shadow Effect of Courts

Second, the consequences for judicial policymaking differ markedly between the two pathways. In litigious settings where courts are swamped by lawsuits, judges may welcome and invite anticipatory reform efforts (Feeley and Rubin 2000, 75,101) – shadow effects *complement* judicial review. But in contexts where courts struggle to build their caselaw, preemptive reforms can starve judges of the opportunities they need to establish their authority as policymakers (Baudenbacher 2019, 327-240) – shadow effects *substitute* for judicial review. In polities characterized by adversarial legalism, policymakers adopting preemptive reforms accept or embrace judicial review as a policymaking tool (Melnick

1983, Epp 2010, Barnes and Burke 2020) – shadow effects become part and parcel of judicialized governance. In less judicialized settings, policymakers can weaponize preemptive reforms to undermine judicial review and contain litigation – shadow effects become part and parcel of political resistance to adversarial legalism (Kagan 1997).

This insight illuminates how the shadow effect of courts can be born from the same defiant politics that comparativists and international relations scholars have hitherto tied to backlash against courts (Voeten 2020, Madsen, Cebulak and Weibusch 2018) and efforts to restrict compliance with their judgments (Conant 2002, Martinsen et al. 2019). Recalcitrant policymakers may find conceding preemptive reforms a reasonable price to avoid the undesired consequences of backlash and noncompliance. As Blauberger (2014, 460) argues, noncompliance with courts is "vulnerable to follow-up challenges and, thus, invite[s] ever more judicial interference in domestic affairs." Adverse rulings, even if contested, enable judges to set precedents that can inspire more litigation (Silverstein 2009, Blauberger and Schmidt 2017, Cichowski 2007, Kagan 2019, 171), and they can also cultivate the public perception that policymakers require judicial oversight, a "worst case scenario" (Blauberger 2014, 461-462) for public officials 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. This strategy mitigates unwanted foreign scrutiny, particularly when states are embedded in international organizations that can monitor, shame, and sanction noncompliance or backlash to courts (Tallberg 2002).

In short, while courts can bear preemptive policy influence even in non-judicialized settings, it may hardly be the influence that judges want or need. For in conceding the battle over preemptive judicial influence to wage a broader war on direct judicial interference, recalcitrant policymakers can forestall judicial review without being detected.

Tracing Shadow Effects: Case Selection and Methods

To empirically assess our 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 for "theory-testing process tracing" (Beach and Pedersen 2018; 2019, 97,160) in which both the threat of judicial review (the theorized cause) and a preemptive policy reform (the outcome of interest) are observed where we would not expect shadow effects given existing research. Because we wish to assess if an alternative mechanism (bureaucratic conflict and political resistance to judicial review) can trigger these 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 political elites oppose judicial policymaking. In these more hostile political settings for courts, it becomes less likely that policy reforms triggered by the anticipation of adjudication would emerge from the same sequence of events and activities as in judicialized settings, given that the mechanisms underlying causal processes are context-bound (Falleti and Lynch 2009, Beach and Pedersen 2018; 2019, 322). By demonstrating the possibility of preemptive reforms in a hard case beyond the scope of existing theories, we show that shadow effects may be more ubiquitous than is presumed, albeit with profoundly different implications for judicial policymaking and comparative 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. While the Nordic countries usually top cross-national indeces of the rule of law and judicial independence (Linzer and Staton 2015), beneath the surface the Nordic countries are prototypical polities that have resisted the spread of adversarial legalism and "American-style high-voltage constitutionalism" (Kagan 1997, Hirschl 2011, 450). First, the Nordic countries lack a tradition of strong judicial review (Lijphart 1999, 225-228; Wind 2010, 1039) and 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 the view that they would "erod[e] representative democracy" (Selle and Østerud 2006). Third, the Nordic countries are exemplary unitary 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 focus on a particularly improbable politics of judicial impact centered on 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, 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 – let alone without being solicited! The EFTA Court is relatively new and has a limited caseload, renders mostly advisory rather than binding rulings,[2] 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). The EFTA Court thus better approximates the limited power of most international courts than its more-studied European counterparts (Staton and Moore 2011). Furthermore, despite rhetorical claims of acceptance of the Court's authority, Norway has a longstanding 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 government officials

[2]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.

would routinely "close ranks" when "defending the 'Norwegian model,' even against clear international law obligations" (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.[3] By scouting this rich paper trail, we reconstruct how Norway's welfare reforms arose in a campaign by top government officials to preclude a bureaucratic conflict within the Ministry of Labor from providing the EFTA Court with an opportunity to build its caselaw and legitimate judicial oversight.

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).[4] 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

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

[4] 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, which is well-suited for causal case studies meant to "better understand policy-making institutions and processes" (Capano, Howlett and Ramesh 2019, 4).

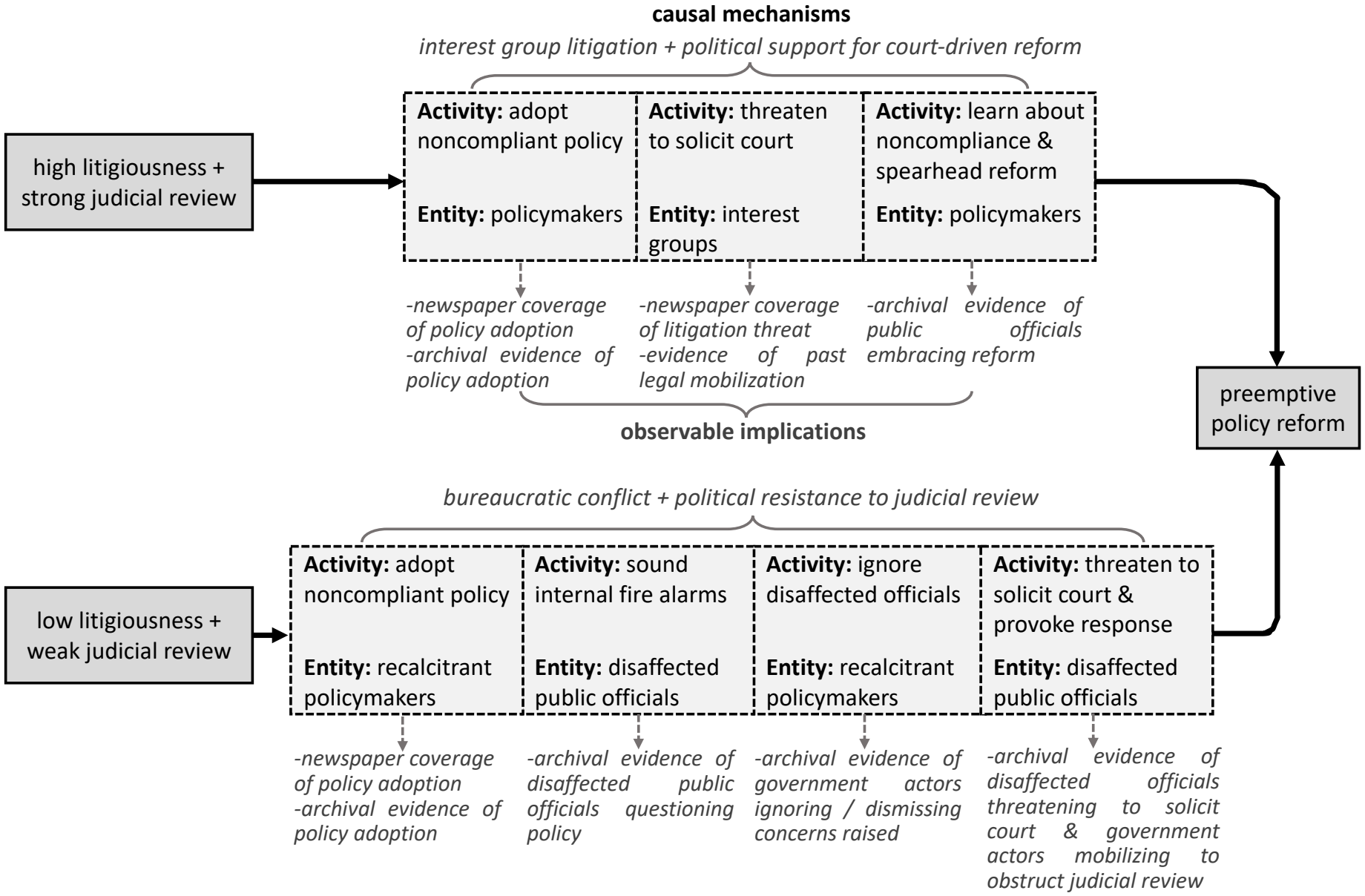

Figure 2: Unpacking Shadow Effects into Entities, Activities, and Observable Implications

mechanism and chronology of events that tends to underlie existing studies focused on a litigious and judicialized setting like the US (the upper pathway). We then proceed likewise for our theory of how bureaucratic conflict and political resistance to judicial review can trigger preemptive reforms in less judicialized contexts (the lower pathway).

Figure 2 includes examples of the types of evidence that can corroborate each part of the pathway(s).[5] 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 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 an advocacy group threatening to sue the NAV would increase confidence in existing theories, whereas government correspondence evidencing disaffected public officials threatening to trigger judicial review in the absence of litigation pressure would increase confidence in our alternative account. Finally, to evaluate whether reforms attenuating noncompliance denote the shadow effects of courts rather than reactive responses to new legal information (as in managerial accounts of compliance; see Table 1), we focus on sequence evidence impinging on the Norwegian government's public claims that it speedily changed policy as soon as policymakers became aware of noncompliance.

Our roadmap for process tracing follows four steps summarized in Table 2. As in most case-based research, we begin with the outcome of interest Y (Norway's welfare-policy

[5]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).

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 2: 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 managerial account – new information about legal obligations (X_1) – & trace whether it prompted a response from policymakers
Step 3	If a managerial account 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 resistance 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, Norway, alongside Iceland and Lichtenstein, has 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 lacking strong enforcement mechanisms, "rules that exist on paper [may be] widely circumvented and ignored" (Helmke and Levitsky 2004, 727). 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 social-benfit "exports" 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), seeking 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).

Despite these international obligations, the Norwegian government enacted and enforced policies severely curtailing social benefits to individuals traveling abroad. For instance, in 2006 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-benefits 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 to Norwegian law or its practice of restricting social-benefit "exports" were required. In fact, when in 2013 Ministry of Labor bureaucrats proposed relaxing the requirement that beneficiaries secure NAV approval before traveling, the Ministry's political leadership blocked cabinet-level consideration of the proposal (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 welfare state became frequent. For instance,

a government white paper stated 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 28th, 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 28th 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).

To counter public criticism, government officials repeatedly invoked a benign account of noncompliance consistent with managerial theories of compliance. 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 managerial accounts (see Table 2))? 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 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, it 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 violated 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.

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."[6]

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

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

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, this explanation cannot account for why reforms were not enacted well before 2019 once information became abundant.

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 efforts. Yet despite the absence of interest-group litigation (m_1 in Table 2), the NAV did suddenly face a threat of judicial review (the cause, X_2, in "shadow effect of courts" accounts (see Table 2)) arising via an alternative mechanism: The escalating tensions between the agency and the Ministry of Labor's quasi-judicial appeals body – the National Insurance Court (NIC) (m_2 in Table 2).

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."[7] It was 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-

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

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-benefit "exports" complied with beneficiaries' free-movement rights under EEA law. Initially, the NIC signaled this skepticism by prodding the NAV to take beneficiaries' EEA rights more seriously. The first of these decisions was 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 (Internrevisjonen 2019, 41–42). In addition to citing the relevant EEA rules, several of these decisions cited the ECJ's *Tolley* judgment, and explicitly held that the NAV was failing to take EEA law into account. Yet the NAV chose to "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).

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 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 underlying 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 a managerial logic of compliance, 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 Politics of Resistance

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 thwart 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 2). 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 referring 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$^{\text{st}}$, 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 social-benefits "exports" 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 took the NAV's calls seriously and arranged a meeting on January 18th 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 16th, 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 (Feeley and Rubin 2000, 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 reform's scope 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 were unsustainable. 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 attracting media attention (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 compensating 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 remains 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 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 begrudgingly act was the sudden threat of judicial review by the EFTA Court.

It is equally clear that the preemptive influence that the Norwegian government conceded the EFTA Court was hardly welcome from the Court's perspective. "The EFTA Court has deliberately been prevented from exercising judicial oversight and giving guidelines for similar cases," lambasted the Court's retired President, who interpreted the NAV reforms as the latest exemplar of a "fierce endeavou[r] to keep cases out of the EFTA Court" (Baudenbacher 2021, 55). Shadow effects may broaden the scope of indirect judicial influence, but in more hostile contexts for judicial review, they can also limit courts to a "shadow existence" (Baudenbacher 2021, 125), forestalling the direct exercises of oversight through which courts establish themselves as authoritative policymakers.

Conclusion

This article demonstrates that judges need not adjudicate cases to influence policymaking – even where political resistances to judicial review are rife – and that courts' shadow effects are not always an unqualified good for judges. These findings significantly expand the temporal and geographic scope of judicial impact research. Temporally, we should focus more efforts on understanding *ex ante* effects of adjudication even when it never materializes. Geographically, we should pay greater attention to the political struggles that preempt and contain judicial impact in less judicialized settings than have animated much existing research.

More precisely, this article advances research on comparative law and politics in three ways. First, in contrast to the existing literature, shadow effects should not be treated as symptomatic of the spread of adversarial legalism or policymakers' embrace of judicial review (Melnick 1983, Silverstein 2009, Epp 2010, Farhang 2010) – at least, not everywhere. In civil law or corporatist states where courts are not established policymakers, political actors can wield a politics of preemptive reform to resist judicialization. By conceding preemptive judicial influence in exchange for starving courts of politically salient cases, policymakers need not undermine formal judicial independence or wage the backlash and noncompliance campaigns that garner scholarly attention (Madsen, Cebulak and Weibusch 2018, Abebe and Ginsburg 2019, Voeten 2020). To the extent that they face little litigation pressure from interest groups, policymakers can thus cultivate the perception that judicial oversight is unnecessary, precluding the legalized accountability that is so central to judicialized governance (Epp 2010, Kagan 2019, Barnes and Burke 2020).

Second, where a politics of preemptive reform precludes courts from exercising direct judicial oversight, judges may adopt compensatory strategies to maximize their preemptive influence. That is, courts can wage an expansive politics of standing that invites as many actors as possible to credibly threaten judicial review, including public officials where private or interest-group litigation is limited. Public standing to sue is already a reality in many civil law countries (Eliantonio et al. 2012, 59-79), and judges in countries like India and South Africa have developed encompassing public-interest doctrines

empowering almost anyone to challenge government policies (Cassels 1989, Amar and Tushnet 2009, 8-14). Internationally, the EFTA Court is one of twelve regional courts that can be solicited by national actors exercising court-like functions (Alter 2014): By adopting a relaxed interpretation of a "court or tribunal," the EFTA Court intentionally tried to cajole a variety of bureaucratic actors into wielding the threat of judicial review (Baudenbacher 2019, 100). Legal scholars may lament these acrobatics (Butler 2020), but broadening justiciability and relaxing standing rules can be vital to partially compensate for the absence of litigation and to counter political efforts to obstruct judicial review.

Finally, even in countries where direct judicial oversight is limited, courts' shadow effects can serve as an endogenous driver of political development that reconfigures authority relations within state bureaucracies. We have shown that when bureaucratic conflicts spur disaffected public officials to challenge the institutional status-quo by threatening to turn to the courts, they can coax government leaders into embracing important institutional and policy reforms. Just like national courts can wield the threat of soliciting an international court to bolster their institutional standing within state judiciaries (Alter 2001; 2014, Pavone and Kelemen 2019), so too can bureaucrats and public agencies leverage the threat of adjudication to challenge the executive chain of command and build their institutional autonomy. Thus even when it does not open the floodgates to judicialization and adversarial legalism, courts' shadow effects can still contribute to "big, slow-moving. . . and invisible" processes of institutional change (Pierson 2003).

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