

**A Two-Level Framework for Assessing Variations in the Level of Judicialization
across Welfare State Policy Contexts**

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This paper is mainly concerned with how ontology and methodology can be better aligned to serve the demands of research aimed at assessing variations in the level of judicialization across welfare state policy contexts. It draws from on-going debates within the social sciences generally regarding the nature of causality (ontology) and how best to develop hypotheses when dealing with causal complexity (methodology). I begin by making the case for why these debates are relevant to the comparative study of judicialization across policy sectors and why welfare state policy contexts contain especially difficult ontological and methodological challenges. I then provide an example of how one might respond to these difficulties within a “two-level” theoretical framework (Goertz and Mahoney 2005). While the substantive content of this framework will be admittedly speculative, it will hopefully resonate enough with those interested in the sub-field to illustrate the benefits of the overall approach. These benefits are best understood with respect to the objectives of a descriptive social science, but I will end with some thoughts as to how methods for dealing with causal complexity can also contribute to a more nuanced understanding of terms such as “judicial activism” that so often frame normative debates.

Issues of Ontology and Methodology within the Comparative Study of Judicialization and the Welfare State – Dealing with Causal Complexity

While a diverse body of comparative law and politics research now exists exploring the common origins and consequences of the global expansion of the ‘judicialization of politics’¹, relatively few analyses have systematically explored variations in the level of judicial activism across polities, and even fewer have done so across policy sectors. A partial explanation for this could be that evidence appearing to support the premise that a radical and broad-based increase in judicialization has occurred over the last 50 years is so convincing (Tate and Vallinder 1995, Stone Sweet 2000, 2004; Ginsburg 2003, Hirschl 2004, 2006). As Ran Hirschl has recently summarized, judicialization is not only driven by law’s centrality in managing the complexities of social relationships within modern societies, but also by the litigation efforts of rights claimants, as well as by the processes related to the “enforcement of procedural fairness through administrative review”, and even extends as far as the “reliance on courts to deal with core political controversies” or “mega-politics” (2006, 724-727). If judicialization is becoming so pervasive, then research into interesting patterns of variation in the level of judicialization, at least within established western-style democracies, could be viewed as an endeavor with decreasing marginal returns.

Yet while a broad-based denial of judicialization’s transformative effects on polities throughout the world is increasingly hard to sustain, a case may be made that not enough attention has been paid to the response of pre-existing policy-making regimes to the increased awareness of judicial review. Just as “globalization” has been determined to, counter-intuitively in some cases, reinforce rather than eliminate pre-existing

¹ I use judicialization, following the first half of Tate’s (1995) definition, in the sense of “the process by which courts and judges come to make or increasingly dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other government agencies, especially legislatures and executives” (28).

differences in national economic policy regimes (Garrett and Lange 1991, Swank 2002), judicialization's effects may be more variegated than existing general theories supporting its origins and consequences seem to predict. Understanding the sources of these variations may provide new insight into the conditions that tend to limit or enhance judicialization's impact.

Nowhere is this type of analysis more timely than with respect to the cross-polity and cross-sector comparison of the effects of judicialization on welfare state policy regimes. To begin with, rights-based litigation strategies challenging the shape and content of welfare state programs are rapidly evolving within the constitutional contexts of most western democracies. Rights-based claims can now be formed in response to program cuts that lower the quality of benefits to the point that they risk vitiating associated basic rights.² Alternatively, claims can be articulated on the basis of perceived discrimination given the exclusion of certain services for arguably equivalent needs.³ The grounding of claims such as these in less contentious 'negative' rights concepts, such as protecting an individual's right to life and freedom from discrimination, is encouraging even traditionally conservative courts to entertain issues once believed to be purely within the realm of legislatures. Similarly, appeals to the "four freedoms" that define the core of supranational commitments at the EU level have increased the litigation strategies available to policy actors within EU member states, including those with judiciaries that otherwise have relatively limited formal powers of judicial review such as the Netherlands, the U.K., and Sweden.⁴

Second, welfare state policy sectors everywhere currently sit at the centre of a near "perfect storm" of demographic, technological, and fiscal policy trends (Scharpf and Schmidt 2000, Pierson 2001). The "retrenchment" processes these trends help initiate create added incentives for recipients of threatened welfare state programs to explore alternative institutional venues, such as courts, to contest their losses (Shapiro 2005, 285-287). Given retrenchment pressures are likely to persist for the foreseeable future, the judicial response to rights-based claimants could have far-reaching impacts on how welfare state programs evolve to meet these challenges.

Third, welfare state policy regimes vary in interesting and enduring ways across polities (Esping-Anderson 1990; Huber, Ragin, and Stephens 1993). These regime-types each possess their own pre-existing policy-making dynamics that may adapt in unlikely ways to the increasing threat of judicial review. While the first two factors make welfare state policy sectors everywhere appear increasingly vulnerable to judicialization, the third, as was the case for national differences in economic policy regimes vis a vis globalization, makes the impact of judicialization harder to predict.

While enticing, the exploration of the variation in judicialization's effects across welfare policy regimes reveals a number of ontological and methodological challenges.

² This strategy is reviewed extensively within the edited collection provided by Flood, Roach and Sossin (2005), which considers, from various normative and methodological perspectives, the Supreme Court of Canada's decision in *Chaoulli v. Quebec* (2005).

³ See Grechner (2004, 111-121) for examples with respect to health care in Canada and Den Exter and Hermans (1998) for similar examples from a cross-section of European polities.

⁴ The "four freedoms" are generally conceived of as the EU treaty provisions that protect the ability of goods, services, capital, and labour to move freely within the internal EU market. See Paton et al. (2002) for a summary of how these freedoms provide avenues through which litigation strategies that challenge member state welfare program definition can be pursued at the EU level.

These challenges are in many ways endemic to all social science that struggles to find a middle ground between acknowledging diversity and striving for generality (Ragin 2000, 28-30). Analyses that aim at the intersections of law and politics within highly developed policy areas are exposed to a nearly overwhelming complexity of potential inter-relationships that could be important to the understanding of outcomes of interest. Unsurprisingly, most comparative analyses have chosen to focus on how differences in one or two factors such as the formal content of legal traditions, the design of political institutions, the influence of public opinion, or the structure of judicial policy preferences, can be connected to varying levels of judicial activism across what are seen as otherwise similar polities.⁵ While attempts to manage complexity through the controlled comparison of similar cases are undeniably valuable, when extended to core state policy areas these have generally underestimated the potential role of factors within the policy-making process itself.

Courts are primarily reactive institutions that rely on non-judicial actors to bring issues to them in the form of cases before they can influence policy. An analytical distinction should then be drawn between what Cornell Clayton has called the “supply and demand sides of judicial policy making” (2002). This allows the variables that broaden judicial discretion (the “supply side”) to be distinguished from those that encourage or discourage non-judicial actors to move issues to the courts (the “demand side”). While various institutionalist and “strategic” approaches have been applied to explain primarily supply side variations in power relations between legislatures and courts across temporal periods and across polities (Ramseyer 1994, Tate 1995, Vanberg 1998, Ferejohn 2002, Shapiro and Stone-Sweet 2002, Guarnieri and Pederzoli 2003, Ginsburg and Kagan 2005), few have attempted the bifurcated analysis required to augment these theories with an accounting of demand side differences that influence whether or not policy disputes are more or less likely to be directed toward courts.⁶ Yet if the penetration of judicialization can be seen to vary across policy contexts, then differences in demand-side policy dynamics may conceivably be just as significant (if not more so in some cases) as the conditions that determine the level of judicial discretion.

In addition, the construction of a satisfactory explanation of the variations that emerge from cross-sector comparisons of judicial supply and policy demand side interactions also requires an analysis framework⁷ that can reveal potential causal linkages or “conjunctions” between supply and demand side conditions. Recent analyses examining how the “feedback” effects of increased litigation efforts at the EU level cycle back and reinforce social mobilization efforts within member states (Stone Sweet 2004, Cichowski 2007) provide an example of how causal mechanisms linking supply and demand side conditions operate. In these analyses the process of judicialization generally begins with changes in governance, or system-level “rules”, that trigger new litigation

⁵ Indeed much of this work is focused on how change in one of these factors has influenced change in judicial activism within the same polity across temporal periods.

⁶ Mark Graber’s (1993) theorization of “legislative deference to the judiciary” is a notable exception, as well as recent work by Cichowski (2007). See also a special issue of *Comparative Politics* (Vol. 39 No. 1, February 2006) that addresses related concepts.

⁷ I use framework throughout this paper to signify as per Scharpf: “(A)n ordering system that describes the location of, and the potential relationships among, the many partial theories or more limited “causal mechanisms [Little 1991, 15-17] that we could in fact draw upon for the theoretically disciplined reconstruction of our nearly unique cases (1997, 30).”

opportunities, which in turn alter the mobilization strategies of social interests. As initial litigation efforts are undertaken they lead to a gradual expansion in the areas of governance handled by courts and the process becomes self-reinforcing (Cichowski 2007; 20-22). This type of analysis framework delivers a wealth of insight into how certain demand-side conditions reinforce the process of judicialization, but is less useful in isolating those that may serve to counteract it. To account for variations in judicialization at the policy sector level, a more comprehensive framework is required that allows for the possibility that conditions across the supply and demand sides may also interact with each other in ways that serve to mitigate, rather than reinforce, the process of judicialization.

The resulting myriad of potentially relevant variables, when combined with the limited number of real world polities available to control for their potential interaction effects, would appear to significantly weaken any generalizable statements that might emerge from such a framework. In terms of the ontological foundations or “premises about the deep causal structures of the world” (Hall 2003, 374) that dominate much of contemporary comparative social science, we can no longer isolate the impact of each independent variable on the dependent outcome (King et al. 1994). Alternatively, we may have moved so far down the “ladder of abstraction” (Sartori 1970) that the scope of any hypotheses we may generate is very limited – perhaps to the point of only describing the conditions relevant to a single policy sector within a particular polity. The result of such an analysis of supply and demand side interactions of variables affecting judicialization across different polity/policy sector combinations would then be something akin to a typology of descriptive case studies.

While this in itself is not without its merits as a way to organize the growing number of in-depth inductive “small n” comparative analyses within law and politics, I suggest that some of the difficulties discussed above with respect to extracting generalizable statements of interest regarding policy sector level variations in judicialization may be partially overcome if one begins with a movement away from current ontological orthodoxy with respect to causality. As Peter Hall has lucidly argued, many of the causal relationships of interest to social scientists cannot be easily captured within methods that are focused on determining the consistent causal effects exerted by a set of independent variables on an outcome (2003, 383-384). Social realities may be better served by methods that rely on an ontology that instead recognizes what Ragin has referred to as “causal complexity” (2000, 40). Causal complexity allows for the possibility that outcomes of interest to social scientists are often the result of a combination of variables acting together. This shifts the focus of research away from the identification of independent variables and attempting to isolate their relative causal effects on outcome variables, to determining which combination(s) of variables can be mapped to which type of outcomes. This *conjunctural* understanding of causality also allows for *equifinality* or the possibility that “different conditions combine in different and sometimes contradictory ways to produce the same outcome” (Ragin 2000, 40).

Conjunctural approaches to understanding causality are well suited to the task of investigating potentially generalizable causal regularities at the intersections of the supply and demand sides of judicialization. On the supply side, existing theories provide a rich, but varied, source of causal conditions that could potentially influence the scope of judicial discretion within a polity, and hence raise the possibility that the determinants of

judicial discretion across polities are more accurately represented as recurring combinations of causal conditions. For example, a relatively moderate level of judicial discretion could be associated with the existence of extensive provisions for constitutional review (i.e. both concrete and abstract review based on historically significant rights jurisprudence) and a unified (single-party) legislative executive. Alternatively, the same relative level of judicial discretion may in practice exist in polities with more limited provisions for constitutional review (i.e. only abstract and a less significant history of rights jurisprudence), but which frequently experience relatively fragmented (multi-party) legislative executives. Similar complexities may emerge on the demand side with reference to potential conjunctions of variables that could encourage or discourage the shift of contentious issues to courts. A relatively moderate level of policy contestation could be associated with policy sectors that deal with highly divisive issues within a structured “corporatist” policy-making regime, but may also be generally associated with relatively ad hoc policy making regimes within which policy issues generally represent a mix of shared and competitive interests amongst policy participants.

Allowing for the possibility of causal complexity on both the supply and demand sides not only provides for a potentially richer understanding of judicial discretion and policy contention within specific contexts, it may also be helpful to reveal interesting, but otherwise hidden, causal combinations when supply and demand side analyses are synthesized. Working with the elements from the two examples directly above, despite similar overall levels of judicial discretion and policy contention, perhaps courts choose to actually intervene more regularly to influence policy when policy regimes are relatively ad hoc as opposed to when they are highly structured. In other words, across these two cases the critical variable influencing the level of judicial activism may emerge as the structure of the policy-making regime – a variable perhaps otherwise hidden if not for the comparison across supply and demand characteristics.

These types of comparisons require both a shift in ontology toward recognition of causal complexity, as well as a methodological framework that can isolate and validate interesting causal combinations. This framework must also be adaptable to the wide range of policy contexts that exist with diverse welfare state regimes. The outline of such a framework, as well as a preliminary attempt to populate it with substantive elements or “partial theories” (Scharpf 1997; 30-31) relevant to the analysis of welfare state policy sectors, represents the central focus of the remainder of this paper.

A “Two-Level” Framework for the Analysis of Welfare Policy Sector-Level Variations in Judicialization - Aligning ontology with methodology

The framework I propose to construct to respond to the ontological and methodological challenges I have outlined is an amalgam of recent refinements within the toolkit of comparative social science. Each is a response to the concerns of causal complexity I have sketched out above. The overall architecture of the framework represents a variation on Goertz and Mahoney’s method for constructing “two-level theories” (2005). The process of refining conjunctural hypotheses across this framework relies on insights derived from Ragin’s method of “qualitative comparative analysis” or

QCA (1987, 2000). In order to allow for the evaluation of competing causal mechanisms, I incorporate the tools of “process-tracing” (Bennett and George 2005). Throughout I will attempt to provide some practical suggestions as to how to organize research activities to take best advantage of the framework.

Within Goertz and Mahoney’s conception of two-level theories the “basic” level refers to “easily grasped and remembered concepts around which our social science vocabulary is primarily organized” (2005, 497). It also provides a useful level of causal analysis that can potentially subsume variation at the lower or “secondary” level of analysis and allow for the generation of hypotheses with greater parsimony. In my example, the basic level links the level of judicial discretion (the supply side) and the level of policy contestation between policy participants (the demand side) to variations in the level of judicialization within a particular policy sector. I use the term judicial discretion to capture those factors that enable judges to act more or less independently from other government agencies. The level of policy contestation represents the likelihood that non-judicial actors will be encouraged to move contentious issues to the courts rather than be content to work them out within pre-existing policy-making regimes.

The “second” level within two-level theories “focuses on causal variables at a less central level of aggregation,” but that “are also causes of the main outcome under investigation” (Goertz and Mahoney 2005, 497). Within my preliminary framework I have sketched out three secondary variables for both the supply and demand sides of my analysis. These by no means exhaust the list of potentially important variables, but instead represent an initial attempt to extract from existing theories those with potentially the broadest relevance.

Those chosen for the supply side analysis are primarily institutional variables that help to define the zone of discretion available to judges through reference to multiple dimensions of independence. The first secondary variable measures the extent of formal independence as determined by constitutional provisions for judicial review. This is perhaps the most obvious criteria and involves consideration of both the model of judicial review within the polity (concrete versus abstract, decentralized versus centralized) (Vanberg 1998, Stone Sweet 2004, Tushnet 2008) and the extent of constitutionalized formal rights (Stone Sweet 2000), as well as the depth of existing rights-based jurisprudence. The greater the formal provisions for judicial review, the greater the level of discretion available to judges to influence policy outcomes. The next secondary variable addresses the level of political independence, which is measured as a function of the level of power fragmentation within the political branches. Judges are generally seen to be more likely to engage in policy-making when they perceive their decisions are unlikely to be overturned by a fractious parliamentary setting and alternatively have less freedom when they face an executive dominated by a single disciplined party (Cooter and Ginsburg 1996, Ferejohn 2002). The last secondary variable on the supply side of the framework examines the level of organizational independence through consideration of judicial recruitment and advancement policies. Guarnieri and Pederzoli (2003) have argued that different factors operate in common law versus continental legal systems. In the former, the greater the oversight provided by political actors, the greater the likelihood that judges will engage in policy making. Within the latter, the impacts on judicial discretion are related instead to the extent to which “judicial associations” such

as “Higher Councils of the Judiciary” (51) have taken control of judicial advancement processes. The greater the control exercised by Higher Councils as opposed to political agencies, the greater the independence of senior level judges.

On the demand side of the two-level framework the secondary variables represent a mix of actor-based, institutional, and ideational variables. This diversity reflects the fact that negotiating dynamics across policy-making scenarios can vary greatly and can be sensitive to a wide array of factors. The first secondary variable examines the prevailing relationship between policy relevant actors across a range of potential interaction orientations from altruistic to hostile (Scharpf 1997, 84-89). In general, the greater the competitiveness between policy actors, the greater the likelihood that individual actors will choose to transfer an issue to the courts in order to challenge or undermine undesirable policy outcomes. The next variable considers the prevailing form of interest intermediation. These have been conceptualized in general terms for use in a variety of policy sectors (Atkinson and Coleman 1989) and also in terms more specific to welfare state policy areas (Esping-Anderson 1990). The impact of this variable is less obvious and relatively unexplored with respect to issues of judicialization. I suggest that policy sectors within corporatist and social democratic welfare regimes will be less likely to encourage policy actors to transfer their issues to courts given the existence of hierarchically organized negotiation procedures that are either largely accepted or specifically mandated. In addition, relevant policy actors within both types of regimes will be unwilling to risk their ongoing place at the policy-making table by challenging policy losses in other venues. In contrast, within the pluralist policy networks that dominate liberal welfare states, policy actors will be more likely to transfer their issues to courts as “one agency among many” (Shapiro 1964). Actors within pluralist policy networks will choose whether or not to transfer individual issues to courts versus other political venues based on strategic considerations as to which arena offers the greatest potential to deliver favourable policy outcomes. The last variable addresses the level of consensus with respect to existing policy paradigms (Hall 1993). If policy debates within a particular sector are largely focused on reconsidering policy goals as opposed to the means to achieve existing goals, there is a greater likelihood that policy actors may choose to contest policy losses by transferring their objections to the courts. The reconsideration of policy goals can precipitate a shift to new overarching policy paradigms that can redefine policy trajectories for longer-term periods and are therefore likely to be more vigorously contested.

My preliminary sketch of the two-level theoretical framework to account for policy sector level variations in judicialization is below, accompanied by the source of partial theories that inform it:

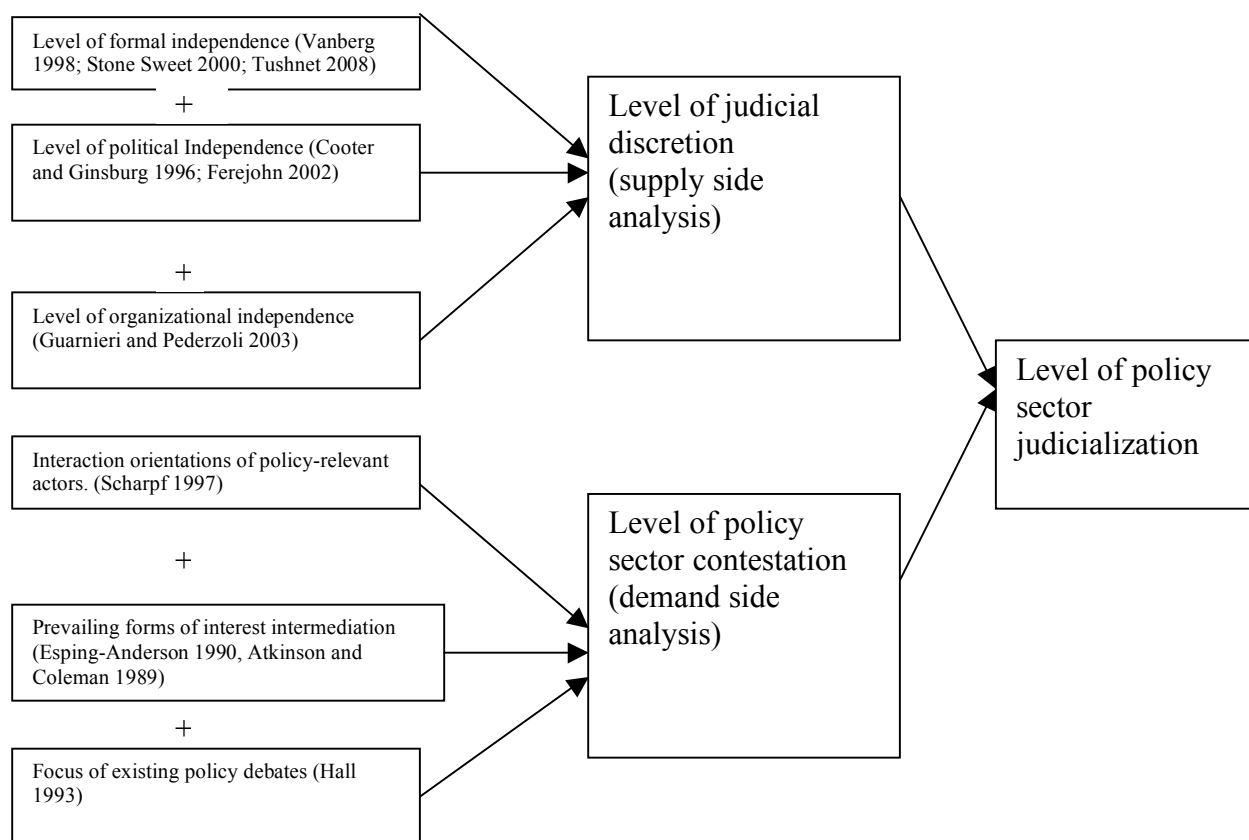


Figure 1. A two-level theoretical framework for the investigation of policy sector level variations in judicialization.

The ‘+’ signs between secondary level variables signifies they are connected by a logical “OR” operand. This indicates that, to start with, the framework makes no distinction between necessary and sufficient causal conditions. In addition, since a unique arrow flows directly from each secondary variable to its associated basic variable, no causal combinations or conjunctions of variables are delineated as of yet. Indeed the framework in this form represents primarily a starting point from which to begin the process of structuring the “property space” (Lazarsfeld 1937) that will organize individual cases into specific configurations or causal combinations.

This process of structuring the property space of relevant cases involves four distinct analytic steps that are adapted from Ragin’s QCA toolset (1987, 2000). Initially each polity/policy sector combination selected is mapped to meaningful values for each secondary variable. In this example, the supply-side secondary variables all lend themselves to ordinal evaluations along the lines of high/medium/low. Those on the demand side can be expressed nominally through proper names, examples of which are mentioned in the description of each above. Translating secondary level variables into ordinal values to be assigned to basic level variables is a relatively straightforward summation process on the supply side, but requires more of a qualitative approach when considering how individual nominal values relate across variables on the demand side.

For instance, if policy actors are seen to be competitively oriented, resident within liberal welfare regimes, and focused on the redefinition of policy goals – then the level of policy contestation is likely to be relatively high. In contrast, if policy actors are generally solidaristic, operating within established corporatist policy regimes, and focused on the recalibration of policy tools to achieve stable policy goals, - then the level of policy contestation is likely relatively low. Variations between these extremes would need to be evaluated with close consideration of the underlying partial theories that support each secondary variable.

For both the supply and demand side analyses this will yield values that can be compared at the basic variable level for each policy sector (level of judicial discretion, level of policy contestation), and yet ensure that similar values encountered for each remain contextually sensitive. A moderate level of judicial discretion at the basic level could be the result of relatively low levels of formal and organizational independence in combination with high levels of political independence or, alternatively, of relatively low levels of political independence in combination with relatively high levels of formal and organizational independence.

The second stage involves the collection of empirical data across an analysis period sufficient to support meaningful appraisals of comparative levels of judicialization across policy sectors. This will generally involve breaking down the basic level outcome variable (level of judicialization) into its own secondary conditions, but in this case the relation between levels will more often be an ontological one. The secondary conditions for the outcome variable will represent the individual indicators (rather than causes) that together will provide a basis for the overall appraisal of the level of judicialization. The most straightforward indicator is the number of decisions handed down by courts that negate or significantly transform the policy outputs of legislative processes. Yet as Stone Sweet has outlined, courts also possess other more “creative techniques of control” wherein judges can attach “strict guidelines of interpretation to otherwise constitutional legislation” (1995, 208). Another relevant indicator would then be the number of cases wherein courts have upheld legislation, but have attached guidelines that significantly alter how associated policy goals are in practice implemented. It may also be beneficial to track the number of cases wherein courts largely upheld existing legislation so that values across all three indicators can be assessed in proportional terms. The total number of cases heard by courts in different sectors may also be useful to assess the validity of demand-side premises and further refine cross-case generalizations.

Within the third stage, regularities observed in the cross-case comparison of the relationships between and across theoretical levels are evaluated. It is at this point that the benefits of a two-level methodological framework for working with causal complexity are most readily apparent. The flexibility it provides to move up, down, and across levels increases the possibility that interesting causal combinations may be revealed. Two examples of hypothetical findings may help illustrate this point.

Example 1: Similar levels of judicial discretion and policy contestation with different levels of judicialization.

Two cases may both be determined to have moderate to high levels of judicial discretion and policy contestation but vary significantly in the level of judicialization

with the first case experiencing high levels of judicialization and the second relatively low levels. At the secondary level of analysis the first case scores high on the level of political independence while in the second the moderate to high level of judicial discretion is more a function of high formal and organizational independence. Within the demand side, both cases represent a hybrid form of corporatist and liberal welfare state interest intermediation wherein policy participants are fairly well entrenched, but lack solidarity and are not formally recognized. The focus of policy debates in both sectors has shifted within the analysis period increasingly toward the evaluation of new policy paradigms to resolve chronic policy dilemmas. Finally, a similar number of cases have been heard by the courts within each sector, but in only the first case have a significant number resulted in decisions that negate or significantly limit the interpretation of existing legislation. One causal hypothesis that then emerges from the comparison of secondary level values across cases is that the level of political independence is a critical determinant of judicialization when policy contestation is primarily driven by the debate over new policy paradigms. A potential causal mechanism that could explain this causal combination is that judges may be less likely to engage in policy-making when the stakes are high given a relatively strong possibility that a unified political executive could effectively negate their decisions. In terms of necessary and sufficient causes, a high level of political independence and policy debates dominated by the evaluation of competing policy paradigms are individually necessary and jointly sufficient causal conditions supporting a high level of judicialization.

Example 2: Similar levels of judicial discretion and policy contestation yield high levels of judicialization in all combinations but one.

Alternatively, high levels of judicialization across a number of policy sectors may appear to be generally related to the presence of at least a moderate to high level score for the level of judicial discretion, regardless of the specific secondary factors which combine/contribute to yield this score, and a high level of policy contestation, but only in the absence of a relatively pure form of corporatist interest intermediation. This would suggest both that policy sectors with corporatist forms of interest intermediation are relatively immune from judicialization, and that all other secondary factors can be subsumed within the representative variables at the basic level yielding a more parsimonious explanation for all other cases. Each of these hypotheses can also be translated into potential causal mechanisms. Perhaps judges are relatively ambivalent with respect to the policy sectors they choose to intrude upon as long as they perceive there to be a significant level of policy paralysis and no officially sanctioned alternative venue for resolving policy disputes. With respect to the relative immunity of corporatist policy sectors, perhaps well-embedded non-judicial policy actors are reluctant to pursue the courts as an alternative venue for fear of losing the trust of other long-term partners at the policy-making table. In this example, moderate to high levels of judicial discretion, high levels of policy contestation, and the absence of corporatist forms of interest intermediation are individually necessary and jointly sufficient to ensure high levels of judicialization. In addition, the presence of corporatist forms of interest intermediation is both a necessary and sufficient cause of low levels of judicialization.

While these findings are only hypothetical, they serve to illustrate how a two-level framework sensitive to causal complexity can serve to make visible interesting causal combinations that may otherwise be overlooked. As actual cases are evaluated via the framework the substantive content can be refined to adapt to anomalies that appear to disrupt previous causal generalizations. These will require the re-evaluation of the hypothesized relations between basic and secondary variables and the search for additional partial theories through which to better incorporate the specific case in question within the range of cases the two-level framework attempts to cover. A new secondary variable may be added as a result, or an existing one refined with respect to its relation to basic level variables.

The fourth stage consists of testing the speculative hypotheses and causal mechanisms derived from the third stage through in-depth case studies utilizing the techniques of “process-tracing” (George and Bennett 2005). Process tracing can be seen as an alternative method for improving upon causal claims when it is not possible to do so through the methods of controlled comparison (213-216). In the example above, various alternative and unspecified causal mechanisms could also potentially account for the observed regularities. Process tracing involves the collection of sufficient qualitative data to verify or disconfirm that the posited causal mechanisms are in fact operating within the cases selected. If previously overlooked variables are uncovered within this process these can then also be integrated back within the two-level framework and their potential impact on other causal combinations evaluated through a revisiting of the analytical process within the third stage.

While the way research tasks are apportioned across these four stages would seem to represent only one of many valid approaches to organizing the activities that go into any research project, its structure contains particular ramifications for the process of hypothesis generation. In contrast to most approaches to small-n comparative case analyses, the process of refining hypotheses with respect to causal relations and causal mechanisms within this framework is on balance more deductive than inductive. Although the substantive content of the partial theories which initially animate the two-level framework may represent a mix of inductively and deductively derived insights, the causal combinations that are derived from the operation of the framework itself are primarily deductive conclusions drawn from the logical comparison of independently assigned values for causal and outcome variables. As a result, the process tracing exercise within the fourth stage is theory-driven and relatively limited in comparison to case studies geared at generating hypotheses inductively through the controlled comparison of a few cases. I suggest that the balance and positioning of deductive and inductive tools within this type of framework can help mitigate the problems related to an excessive reliance on either. Rather than drifting upwards towards highly abstract deductive models that rely too heavily on simplifying assumptions or sinking downward toward rich descriptive histories that cannot be easily translated into generalizable statements of causality, this framework attempts to ensure that the process of deriving and refining causal statements sticks closely to the complex, yet fertile, middle ground between generality and diversity.

Finally, a two-level framework may also be able to provide insight to those who seek to normatively appraise the impact of judicial activism. Certain patterns of judicialization that emerge across policy sectors may also be determined to correspond to

judicial activism with a particular normative character. To determine this, additional qualitative indicators regarding the normative nature of the decisions taken by courts would have to be collected when reviewing the relevant cases within each policy sector. For example, for each case heard by courts, an assessment could be made as to whether the court's decision would likely expand, shrink, or have no effect on the welfare program in question. This appraisal would be independent of whether the decision negated, significantly altered, or upheld existing legislation, given litigants may have different intentions when bringing cases before courts. Comparisons could then be made as to whether specific combinations of conditions relating to judicial discretion and policy contestation corresponded to judicialization that leaned more "left" than "right" or vice versa. Perhaps low levels of policy contestation generally correspond to judicialization with a relatively neutral impact, while high levels of policy contestation leads to judicialization that is relatively expansionary in some cases and regressive in others. The other causal conditions that vary across policy sectors may then provide some basis to explain these differences and lead ultimately to the theorization of various pathologies or "syndromes" that may encourage particularly undesirable forms of judicialization.

There is, of course, no "magic" to the two-level theorization process and actual generalizations may be much harder to discern than these hypothetical examples suggest. What it does provide is an organizing framework that structures the analysis of cases with potentially complex causality so that the extraction of generalities with the broadest possible scope is at least made possible. While these generalities may still be relatively circumscribed and lack the elegance of 'covering laws', a two-level framework such as I have proposed may make visible nuances of considerable interest for both researchers interested in how judicialization may evolve in different welfare state contexts, as well as for those concerned with how best to avoid its more deleterious effects.

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