

Deliberate Discretion?

THE INSTITUTIONAL
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The Design of Laws across Parliamentary Systems

In the previous chapter, we operationalized the abstract explanatory variables in our theory within the context of presidential systems. The important role of all the U.S. states in Medicaid policymaking, along with sudden changes in the Medicaid policymaking environment in the mid-1990s, allowed us to study how a large number of states legislated on the same basic issue. By measuring all relevant legislation on this specific topic, we found that the political and institutional contexts had a significant impact on how legislative majorities designed statutes. Factors like divided government, divided legislatures, legislative professionalism, and legislative vetoes influenced the level of policy details that states included in their legislative statutes.

We now evaluate our theory in parliamentary systems, where there is a melding of legislative and executive powers. Our parliamentary tests must differ from our tests in the U.S. states in two significant respects. The first concerns how we measure discretion. Since our theory concerns how the political context affects the way different political systems design legislation *on the same basic issue*, we must have a means to control for the nature of the issue. Across the 19 parliamentary democracies that we examine, there obviously does not exist the transnational equivalent of the Medicaid program. That is, there is no single issue that all of these different countries had to address at the same time. We therefore cannot proceed by collecting all legislation on the relevant issue, as we did for the U.S. states, and instead must find a different strategy to control for the nature of the policy issue.

The second difference from the U.S. states concerns our explanatory variables. Since parliamentary systems lack the separation of legislative and executive power, we cannot proceed by simply adopting the same variables

used in our examination of the U.S. states. The concept of divided government, for example, is not meaningful in the parliamentary context. In addition, it is not clear that compensation or other indicators of legislative professionalism are the appropriate measures of legislative capacity. And since there is more general institutional variation across the parliamentary systems than across the U.S. states, there is a wider variety of relevant nonstatutory factors.

How, then, do we test our theory in parliamentary systems? More specifically, how do we measure our dependent variable, the amount of discretion in legislation, in a way that permits cross-national comparisons? What creates conflict between the agents who adopt statutes and those who implement them? What influences the capacity of the adopters to include legislative details? And what are the relevant nonstatutory factors that create incentives or disincentives to make policy in legislation itself? We address these questions in this chapter and use our answers to provide an empirical test of our argument.

Policy Constraints in Labor Legislation

We begin by defining how we use the length of legislative statutes to measure discretion. Before discussing how we operationalize this measure, however, it is useful to remind ourselves of how the length of statutes is related to the level of discretion by looking at several examples of labor legislation. As in Chapters 1 and 3, we consider several laws about gender equality in the workplace, focusing here on the language that statutes use to define gender discrimination.

The objective of professional equality laws is typically to ensure that women and men are treated equally in all aspects of employment, including the way job descriptions or job advertisements are written, the way hiring, retention, transfer, pay, and promotion decisions are made, and the way professional training and development opportunities are made available. A standard approach in legislation is to state that discrimination based on sex is prohibited in any of these areas of employment. Legislative majorities recognize, however, that there are problems with attempting to use legislation to make blanket prohibitions of discrimination, especially when sex unavoidably affects the circumstances under which employees can do certain jobs. It is difficult for men to model bikinis, for example, and it is difficult for a woman to play the role of Hamlet in a traditional production of Shakespeare's play. Thus, decisions must be made

in legislation about where exceptions to prohibitions on discrimination can occur.

We see considerable variation across countries in how these exceptions are defined. In France, Article 1 of Law 83-635, enacted in 1983, is very brief. It simply states in one sentence that prohibitions on sex discrimination do not apply to positions in which one's sex is the "condition déterminante" for performing the job. The article also states that the Council of State ("Conseil d'Etat"), in conjunction with representatives of employers and workers, will determine by decree which specific jobs have the worker's sex as the "condition déterminante."

In France, the Council of State is in many respects at the apex of the French civil service, functioning in part as an agency that drafts administrative decrees and in part as an administrative court. Consequently, in delegating to the Council of State, the French statute effectively delegates to the French civil service. One therefore finds the definition of jobs for which gender discrimination is allowable not in legislation but in Article R123-1 of the French Code du Travail (Partie Réglementaire - Décrets en Conseil d'Etat). That article of the Code reveals that the Council of State adopted a decree on May 25, 1984, that states that sex is a determining condition for artists who must interpret a masculine or feminine role and for models. The French legislation, then, does nothing to define specific exceptions to prohibitions on discrimination, but rather only adopts the vague policy regarding the "condition déterminante." Filling in the main policy details is left to civil servants.

The Norwegian approach is similar to the French one. The relevant portions of the legislation can be found in Figure 7.1. As in France, the third clause of the article clearly delegates authority for defining which jobs are excluded from the prohibition on discrimination. But unlike the French law, which delegates a policymaking role to the civil service, the Norwegian clause delegates this power to the "King." The "King" here refers in practice to the cabinet, which meets formally on Friday mornings in the Royal Castle with the king (or crown prince). Although the king formally chairs the meetings, in reality the decisions are made in the governmental offices the day before.¹ Thus, rather than asking the civil service to make policy on exceptions to discrimination laws, the Norwegian legislation asks the government to make policy on these exceptions.

¹ We are grateful to Bjorn-Erik Rasch for clarifying the role of the Norwegian king in actual practice.

Article 2 Subject of the Act

This Act applies to discrimination between men and women in all areas, except for internal conditions within religious communities.

With regard to family life and purely personal matters, this Act is not to be enforced by the authorities mentioned in Art. 10.

In special cases the King may determine that the Act shall not apply, in whole or in part, to certain specific sectors. The opinion of the Board (cf. Art. 10) shall be obtained in such cases.

Article 3 General Clause

[. . .]

The King may issue regulations regarding the kinds of differential treatment which can be accepted pursuant to this Act, including provisions on positive special treatment of men in relation to care for and education of children.

Note: Act no. 45, June 9, 1978.

Figure 7.1. Norway's Gender Equality Act of 1978

We see quite a different approach in Ireland. The text of the relevant Irish legislation, shown in Figure 7.2, is quite lengthy. Article 25(1) is similar to the French and Norwegian legislation – discrimination on the basis of sex is permitted if sex is “an occupational qualification.” But unlike the French and Norwegian laws, the Irish statute goes on to define directly, in subsections (2) through (4), circumstances under which sex is an occupational qualification. Subsection (2), for example, discusses the roles of physiology, strength, stamina, and entertainment in defining such circumstances. Subsection (3) discusses (among other things) the impact of laws or customs in other countries, and subsection (4) discusses (among other things) the decisions that must be made when there are special sleeping or sanitary issues. Article 27 is devoted to issues that arise in connection with the Irish National Guard and prison service. Nowhere in the legislation is there any explicit delegation to civil servants, and only in Article 27 is there any delegation at all, in this case to ministers who must make decisions when there are insufficient numbers of applicants, either male or female.

25. Exclusion of discrimination in certain employments

(1) Nothing in this Part or Part II applies to discrimination against A in respect of employment in a particular post if the discrimination results from preferring B on the ground that, by reference to one or more of subsections (2) to (4) the sex of B is or amounts to an occupational qualification for the post in question.

(2) For the purposes of this section, the sex of B shall be taken to be an occupational qualification for a post where, on grounds of physiology (excluding physical strength or stamina) or on grounds of authenticity for the purpose of entertainment, the nature of the post:

- (a) requires a person of the same sex as B, and
- (b) would be materially different if filled by a person of the same sex as A.

(3) For the purposes of this section, the sex of B shall be taken to be an occupational qualification for a post where it is necessary that the post should be held by B because it is likely to involve the performance of duties outside the State in a place where the laws or customs are such that those duties could not reasonably be performed by a person who is of the same sex as A.

(4) For the purposes of this section, the sex of B shall be taken to be an occupational qualification for a post:

- (a) where the duties of the post involve personal services and it is necessary to have persons of both sexes engaged in such duties, or
- (b) where, because of the nature of the employment it is necessary to provide sleeping and sanitary accommodation for employees on a communal basis and it would be unreasonable to expect the provision of separate accommodation of that nature or impracticable for an employer so to provide.

27. Garda Siochana and prison service

(1) With regard to employment in the Garda Siochana or the prison service, nothing in this Act:

- (a) applies to the assignment of a man or, as the case may require, a woman to a particular post where this is essential:
 - (i) in the interests of privacy or decency,
 - (ii) in order to guard, escort or control violent individuals or quell riots or violent disturbances, or

Figure 7.2. Ireland's Employment Equality Act of 1998

(iii) in order, within the Garda Siochana, to disarm or arrest violent individuals, to control or disperse violent crowds or to effect the rescue of hostages or other persons held unlawfully, or

(b) prevents the application of one criterion as to height for men and another for women, if the criteria chosen are such that the proportion of women in the State likely to meet the criterion for women is approximately the same as the proportion of men in the State likely to meet the criterion for men.

(2) (a) If:

- (i) in the opinion of the Minister there are insufficient numbers of either men or women serving in the Garda Siochana to be assigned to such posts as are for the time being referred to in subsection (1)(a), and
- (ii) the Minister by order under this subsection so provides,

this Act shall not apply to such competitions for recruitment to the Garda Siochana as may be specified in the order.

(b) If:

- (i) in the opinion of the Minister there are insufficient numbers of either men or women serving in the prison service to be assigned to such posts as are for the time being referred to in subsection (1)(a), and
- (ii) the Minister by order under this subsection so provides,

this Act shall not apply to such competitions for recruitment to the prison service as may be specified in the order.

Figure 7.2. (continued)

These examples, then, confirm what we argued in Chapter 3. Longer statutes on the same topic typically have more detailed policy language that places greater constraints on the individuals who implement laws. The challenge that we face is to measure differences in the length of statutes on the same topic, and to do so with a relatively large amount of data.

Measuring Discretion

To test our theory across the 19 parliamentary systems, we created a large data set on labor legislation, using information from the International Labour Organization (ILO). Each year, states belonging to the ILO submit a list of labor-related laws that have been adopted in the previous

100	General provisions
200	Human rights
300	Conditions of employment
400	Conditions of work
500	Economic and social development
600	Employment
700	Industrial relations
800	Labour administration
900	Occupational safety and health
1000	Social security
1100	Training
1200	Special provisions by category of persons
1300	Special provisions by sector of economic activity

Figure 7.3. Natlex policy codes

year. The ILO data contain, among other pieces of information, the law's title, the date it was adopted, its subject matter, and its publication information (which gives the length of the law in pages). Specifically, our dependent variable measures the (standardized) length (in pages) of 4,102 statutes adopted in 19 countries between 1986 and 1998. These laws are included in the ILO's Natlex database.²

Since our general objective is to test the effects of political and institutional variables on statute design, holding the issue type constant, we need statutes that pertain to the same issue across countries. The ILO's coding of labor legislation makes this possible. Each piece of legislation affects labor interests, which means that we are not, for example, comparing legislation on agricultural price supports with legislation on defense spending with legislation on taxes. More importantly, each piece of labor legislation is coded by experts at the ILO into 13 issue categories, which are listed in Figure 7.3. Our tests treat the individual statute as the unit of analysis, and will include policy dummy variables based on these issue categories to control for issue effects. At the conclusion of this section, we discuss the advantages and disadvantages of this approach in comparison with the state data. Before doing so, however, it is important to

² The 19 countries include all advanced parliamentary democracies except Greece and Japan (where we could not accurately measure our dependent variable). The ILO data can be found at <http://natlex.ilo.org/>.

describe precisely how we use the Natlex data to measure our dependent variable.

To create our data set, we obtained a text file from the ILO in Geneva containing all their data through the end of 1998. Although there are many laws from the period before 1986, staff members at the ILO informed us that the data were not collected systematically until 1986, which is why our data set begins in that year. To turn the text file into usable data, we used a text recognition program to create a database entry for each law. We then obtained original documents for entries with relevant missing data, such as page length or date, and for entries that identified documents over 100 pages long (to check for accuracy). We also did random checks on documents that are one page long to check for systematic errors in the reporting from specific countries. We found no such errors.

Table 7.1 describes the data. There are two problems associated with comparing raw page lengths across countries. The first is that languages differ in their efficiency; that is, it takes longer to say the same thing in some languages than in others. To control for this problem, we created a variable that we call the *verbosity multiplier*, which measures the relative efficiency of different languages. To calculate it, we downloaded four different pieces of EU legislation from the European Union's (EU's) Web page. Each of the four laws was downloaded in each of the EU's official languages.³ We then used Microsoft Word to count the number of characters (with spaces) for each law in each language. These character counts were used to calculate the verbosity of the different languages. We found English to be the most efficient, and thus it has the baseline value of 1. The verbosity multiplier for other variables measures how many pages in these languages it takes to say the same thing in 1 page of English. German, for example, is the least efficient language, with a verbosity multiplier of 1.22. Thus, it takes 1.22 pages in German to say exactly the same thing that it takes 1 page to say in English.

The second problem is that the amount of text on a page of the official journal varies across countries (and, in some cases, within countries over time). Canada, for instance, uses a relatively large font, and each page has separate columns for French and English. Portugal, on the other hand, uses a small font and puts a large amount of text in two columns on each page. Thus, 1 page in Portugal contains as much text as 4.69 pages in

³ As noted in Table 7.1, this approach leaves us without estimates for Icelandic (for which we used Danish) and Norwegian (for which we used Swedish).

Table 7.1. *Length of Laws in Natlex Data*

Country	Number of Bills in Sample	Mean Unstandardized Page Length	Verbosity Multiplier	Page Length Multiplier	Mean Standardized Page Length (std. dev.)
Australia	269	44.2	1	1.47	65.0 (117.8)
Austria	215	10.3	1.22	2.79	23.5 (28.4)
Belgium	176	12.4	1.13 (French)	2.42	26.5 (65.0)
Canada	85	34.2	1 (English)	1	34.2 (66.8)
Denmark	373	6.3	1.06	2.73	16.3 (35.0)
Finland	558	2.2	1.04	2.19	4.5 (7.6)
France	178	6.3	1.13	3.87	21.6 (30.9)
Germany	159	14.3	1.22	3.42	40.0 (72.8)
Iceland	94	3.6	1.06 (Danish)	1.39	4.8 (5.9)
Ireland	63	33.6	1	1.6	53.8 (55.4)
Italy	155	12.9	1.14	3.67	41.4 (69.0)
Luxembourg	127	12.8	1.13 (French)	2.08	23.6 (57.5)
Netherlands	324	14.0	1.16	2.04	24.5 (37.9)
New Zealand	147	26.8	1	1.28	34.3 (60.4)
Norway	143	5.3	1.01 (Swedish)	1.27	6.6 (18.6)
Portugal	260	6.6	1.12	4.69	27.6 (128.4)
Spain	145	10.2	1.14	4.27	38.2 (61.7)
Sweden	551	3.0	1.01	1.54	4.5 (8.5)
United Kingdom	80	63.3	1	1986: 1.4 1987-98: 1.98	120.6 (179.1)
	Total bills:				Total sample: 24.6 (66.7)
	4,102				

Canada. Column 4 of Table 7.1 gives the *page length multiplier* for each country.⁴ These numbers represent how many pages in Canada's official journal, which has the fewest words per page, would be needed to print one page in each of the other countries' official journals.

Together, the verbosity multiplier and the page length multiplier can be used to develop a standardized page length, which is given in column 5.⁵ This is the measure of discretion that we use in the random effects regressions to be described. Two important features of the data are rather obvious. First, there is considerable cross-national variation, with countries like Finland and Iceland having, on average, much shorter bills than countries like the United Kingdom or Australia. Second, within each country, there also exists considerable variation, with all countries having a large standard deviation in their means. Our goal is to understand whether, when controlling for issue and country-specific effects, the variables suggested by our model help us to understand the variation in Table 7.1.

Before turning to this task, however, several comments are in order. The first concerns bias in our data that might be created by the membership of some of our countries in the EU. In particular, the Maastricht Treaty for European Union expanded the role of the EU in domestic labor policy through its Social Chapter. The Social Chapter allows the EU to issue directives in labor-related areas. It also revised enforcement policy within the EU, allowing the European Court of Justice to fine states for failure to comply with such directives. Thus, if a large collection of states are implementing the same text from a directive, then perhaps the text in the directive rather than the factors that we study are influencing the level of policy detail in legislation.⁶

In fact, this concern is unwarranted. Following the adoption of a directive in the EU, member states can write the implementation documents as they see fit. We saw this earlier in the considerable differences that exist in the French, German, and Irish statutes that have been adopted to

⁴ To calculate the page length multiplier we collected a random sample of bills from the ILO data, and then counted the number of characters per line and the number of lines per page of these bills to determine how much text was on an average page.

⁵ The standardized page length for a bill is the number of pages* (page length multiplier/verbosity multiplier). We did not standardize one-page bills.

⁶ Although it is impossible to count the number of statutes in our database that implement EU directives, our impression is that they constitute a very minor proportion of our total statutes.

implement an EU directive on gender equality in the workplace. This is part of a more general pattern. We randomly collected information on the implementation of 34 directives and found references in the CELEX database of National Implementing Measures to 1,485 implementing measures.⁷ Since there is far more than one national document per directive, it is obvious that countries do not simply incorporate the language of the directive verbatim into their own national law. Instead, the process is more piecemeal in each country, with some countries reporting numerous measures to implement directives and many countries reporting none. In addition, of 1,485 national measures, only 395 were statutes. The rest were some form of regulation issued in the cabinet. For any given directive, we also found considerable variation across and within countries with respect to the specific implementation instruments used. In particular, we found that in 201 cases, countries used only regulations to implement directives; in 61 cases, they used only statutes; and in the remaining 104 cases, they used a combination of the two instruments. Finally, it is worth noting that 256 of the national implementing measures were adopted *before* the directive was adopted. If the EU adopts a directive that forbids gender discrimination, for example, and member states already have legislation on the books to this effect, then no further action is needed.

One could hardly argue, then, that the issuance of directives influences the language of statutes that are adopted by EU member states. When faced with a directive on a specific issue, member states have a wide range of autonomy with respect to how they actually go about implementing it, and the exercise of this autonomy is evident in the enormous variation we see in implementation instruments. The limited legislation that does implement EU directives should therefore be subject to the same political forces as the legislation that is unrelated to EU activity.⁸

Our second observation concerns the differences that exist between our tests in the U.S. states and our tests in parliamentary democracies. In our state data, the state itself is the unit of analysis, and we are able to identify all relevant legislation on a specific policy during a specific time period. Since this is impossible in the parliamentary systems, we instead use the

⁷ CELEX is a database operated by the EU, which was available to us through Lexis-Nexis.

⁸ A future possibility for testing our theory would be to examine variation in the responses of the EU member states to the same directive. At this time, not enough data are available for this undertaking (because, for any directive, the CELEX data base typically identifies national legislation for only a handful of countries).

legislative statute as the unit of analysis, collect a large number of statutes across a variety of policy areas, and include dummy variables for each policy category.

The parliamentary data have several advantages. One is that they allow us to test our theory across a range of issues, whereas in the U.S. states data we focus narrowly on the health care issue. The parliamentary data thus allow us to gain confidence that the general argument is not one that is narrowly limited with respect to the types of issues to which it applies. A second advantage is that it allows us to bring more data to bear on our theory by allowing us to examine a longer time period. In the U.S. states, we were limited to a two-year cross section.

The parliamentary data also have some potential disadvantages in comparison with the U.S. state data. One is that although we can include the policy dummy variables to control for issue type in the parliamentary systems, we cannot, with such a large number of statutes and diversity of languages, be as certain as in the state data about the quality of our control for issue type. This would be of particular concern if the policy dummy variables were not estimated accurately (which, as we show, turns out not to be the case). A second concern is about the unit of analysis. By aggregating across all relevant statutes in the U.S. states, we need not worry whether different states have different tendencies with respect to the *bundling* of legislation. It does not matter in the state data whether a state writes 10 short bills or 1 long one. All the words count the same.

In the parliamentary data, we must treat the statute as the unit of analysis, and Table 7.1 suggests reasons to be concerned that some countries may write a few long bills and others may write a lot of short ones. Sweden and Finland are the most obvious examples that raise concern. Both countries have very short bills, on average, and they have a very large number of bills in our sample. Overall, the correlation across the 19 countries between standardized page length and the number of bills is $-.44$ ($p = .06$).

It is not clear to us, however, whether this is a significant problem. These patterns could be a function of legislative bundling patterns, or they could simply be a function of variation in the number of statutes adopted or of reporting patterns to the ILO.⁹ After all, we see very long laws in all countries, even those with low average page length. Both Finland and Sweden, for example, have statutes that exceed 100 pages. And there are

⁹ The staff at the ILO told us that the completeness of reporting varies both across countries and within countries over time.

other countries, such as Iceland, with small numbers of bills and low page length. In fact, the correlation between page length and number of bills is much smaller and insignificant when we exclude Finland and Sweden ($r = -.28$, $p = .28$). We therefore take this potential relationship between page length and bundling practices as an issue to be explored through the statistical tests that we perform. Later, we describe our approach in this regard.

Policy Conflict in Parliamentary Systems

We now turn to the task of operationalizing the variables in our theory. We begin by discussing the concept of policy conflict between the authors and implementers of legislation. As in the previous chapter, our tests are based on the assumption that there exists a political actor who enjoys a privileged position with respect to influencing bureaucrats during policy implementation. In the U.S. states, this privileged actor was obviously the governor, and we followed previous research in focusing on the importance of divided government.

Now consider this issue in parliamentary systems. We argued in Chapter 2 that parliamentary government is typically cabinet government with cohesive parties. There is no clear separation of power between the legislative and executive branches, and party leaders become cabinet ministers, with significant opportunities to influence policy. We therefore assume that individual cabinet ministers are the relevant privileged actors in the policy implementation process. In what follows, we discuss this assumption and its implications for the specific hypotheses that emerge from our theory.

The cabinet minister has a privileged position during policy formulation and implementation. The process of adopting new legislation begins with the individual ministers overseeing preparation of the initial drafts of bills. If a bill concerns reform of agricultural programs, for example, the agriculture minister will take a leading role. And whenever bills have strong financial implications, the minister of finance will be actively involved. Individual ministers are constrained at this stage of the policy-making process by other members of the cabinet. Usually there is considerable discussion of the bill at this time, both within and across parties that support the government. And usually, important legislative deals by members of the governing majority are struck before a bill comes to the floor of parliament. The collective cabinet must approve a minister's bill,