Judicialization and the Construction of Governance[13]

Alec Stone Sweet

The triad—two contracting parties and a dispute resolver—constitutes a primal social institution, a microcosm of governance. If this is so, in uncovering the institutional dynamics of the triad we uncover an essential logic of government itself. Broadly stated, my objectives are twofold: to defend the validity of these contentions and to demonstrate their centrality to the discipline.

The article proceeds as follows. After introducing key concepts, I present a model of a particular mode of governance. By 'mode of governance' I mean the social mechanism by which the rules in place in any given community are adapted to the experiences and exigencies of those who live under them. The theory integrates, as tightly interdependent factors, the evolution of strategic (utility-maximizing) behaviour and normative (cultural or rule-based) structure. It captures dynamics of change observable at both the micro level, by which I mean the behaviour of individual actors, and the macro level, by which I mean the institutional environment—or social structure—in which this behaviour takes place. In the discussion, the mechanisms of change that are endogenous to the model are specified, and the conditions under which we would expect to see these mechanisms operate, and fail to operate, are identified. I then employ the model to explain two hard cases of systemic change: the international trade regime, established by the 1947 General Agreement on Tariffs and Trade; and the French Fifth Republic, founded in 1958. In the conclusion, I draw out some of the implications of the analysis for our understanding of the complex relationship between strategic behaviour and social structure.

---

[13] Originally published in Comparative Political Studies, 31 (1999), 147. Reproduced by kind permission.

Dyads, Triads, Normative Structure

The model is comprised of three core elements: the *dyad*, the *triad*, and *normative structure*.

The dyad, 'the simplest sociological formation' (Simmel 1950: 122), is any 'pattern of [direct] exchange' between two individuals or groups (see Foster 1977). The dyad alone defines, more or less comprehensively, a wide range of basic human relationships. Examples exist wherever we look for them. In marriage—the union of two people; in feudal polities—the tie between serf and vassal; in parliamentary democracies—the dichotomy of party of government and party of opposition; in industrial production—the interdependence of capital and labour; and in international relations—the network of allies and enemies: dyadic structures constitute core social identities of individual entities. Because dyads bind single units together, they are primordial social institutions. They are both building blocks to society—that is, they can be linked in chains and clusters to form larger social formations—and they develop quite naturally within such constructs.[14]

The normative basis of the dyadic form is reciprocity. Reciprocity is the glue holding the dyad—society—together, which accounts for why it exists in every human community about which we know anything (Gouldner 1977). Stripped to essentials, the norm holds that 'people should help those who help them' (Gouldner 1977: 37). Promises made are to be kept; debts incurred are to be repaid; kindnesses received are to be recognized and returned. Reciprocity, according to Simmel (1950: 123, 135) gives to the dyad 'a special consecration' by linking each party to 'acommon fate'.

The notion that reciprocity is crucial to the maintenance of social systems has been a staple of social science (for example, Hobhouse 1906; Malinowski 1932; Parsons and Shils 1951). With the rise of neo-rationalism in contemporary political science, analytical priorities have shifted from the normative and social contexts of politics to strategic choice contexts within which individuals seek to maximize their utility. Although neo-rationalists also privilege the dyad, they problematize reciprocity in particular and norms in general (for example, Axelrod 1986). Indeed, the paradigmatic metaphors of game theory—Prisoner's Dilemma, chicken, the assurance games—focus our attentions on the fierce difficulties of establishing and maintaining dyadic cooperation. Dyadic forms are inherently

[14] In noticing the ubiquity of relationships organized in twos, I do not mean to imply that dyadic forms are all that matter. I focus on them as a representation of 'the social' for theory-building purposes, namely, to obtain advantages that come with reduction.

unstable, neorationalists tell us, because each party faces powerful incentives to ignore normative obligations, thereby cheating on the other.

I will return to a discussion of neo-rationalism later. For now it is enough to recognize that dyadic forms can accommodate *cooperation*, which can be socially enabling, and *conflict*, which can be socially debilitating.

The triad—two disputants and a dispute resolver—is a universal, if under-theorized, phenomenon (but see D. Black 1998: Ch. 6). I understand the triad to be a primal technique of organizing social authority and, therefore, of governing. The underlying reason for this is simple: the triadic entity is the guarantor of reciprocity. Quite literally rooted in the dyadic form, the triad brings an external presence to the dyad, a presence whose interest is in the fate of 'a common fate', that is, in the durability of social relationships across time. Viewed functionally, triadic dispute resolution (TDR) serves to perpetuate the dyad, given changes in the preferences or identities of the two parties or changes in the environment. As Simmel (1950: 145) puts it: 'the triad indicates transition.' The triadic entity responds to, and is a crucial agent of, social change.

Two ideal types of triadic dispute resolution are relevant to the analysis. The first is *consensual* TDR, triads constituted by the voluntary consent of both disputants, that is, by an ad hoc act of delegation. The act recognizes but also confers social authority, or legitimacy, on the third party. Siblings appeal to parents, classmates to one another or to a teacher, villagers to a shaman, a chief, or a sage. The second type is *compulsory* TDR, triads that are permanently constituted by jurisdiction: dispute resolution processes are triggered by one party to a dispute against the will of the other. In this type, office replaces delegation (Shapiro 1981a: Ch. 1), that is, an initial—constitutional—act of delegation is frozen in place for the life of the polity. Courts are the paradigmatic form of compulsory TDR—but legislative bodies perform similar social functions.

To move from the dyad to the triad is to construct a particular form of governance: the triadic. In dyads, conflict can be debilitating; but conflict is constitutive of the triad. Once activated, TDR performs governmental functions: to generate normative guidance about how one ought to behave, to stabilize one's expectations about the behaviour of others, and to impinge on *ex ante* distributions of values and resources. Stated simply, the social function of TDR—governance—is to regulate behaviour and to maintain social cohesion as circumstances change.

The final element of the model is normative structure: the system of rules—or socially constituted constraints on behaviour—in place in any community. A great deal of controversy surrounds the subject of norms and rules, their status

and explanatoryvalue. Although this paper is partly a response to this controversy, I do not attempt to resolve it here.

What I call normative structure is equivalent to what North (1990: 3–6) calls 'institutions', variously: 'the rules of the game', 'customs and traditions', 'conventions, codes of conduct, norms of behavior, statute law, common law, and contracts'. It is congruent with how Eckstein (1988: 790; see also Wildavsky 1987) conceptualizes 'culture': 'mediating orientations', those 'general dispositions of actors to act in certain ways in sets of situations'. It conforms to March and Olsen's (1989: 22) notion of 'rules': the 'beliefs, paradigms, codes, cultures, and knowledge' that permit us to 'identify the normatively appropriate behavior'. It equates norms, as Taylor (1989: 135) does, with 'ideologies' and 'culture', and it conceives of 'institutionalized rules', in Jepperson's (1991: 145) terms, as 'performance scripts'.[15]

Despite clear differences in how structure is understood, culturalists and at least a few neo-rationalists agree on far more than we might expect. For Eckstein (1988: 791–2), culture allows people to 'decode experience. . . to give it meaning', which 'saves virtually all decision costs'. For North (1990: 6, 17, 25), institutions, a subset of which is 'culture'—'a language-based conceptual framework for encoding and interpreting . . . information'—'exist to reduce the uncertainties involved in human interaction', thus saving 'transaction costs' (see also Johnson 1997; Kreps 1990). Normative structures enable human interaction by simplifying the range of choices available to individuals and by investing those choices with meaning.

Across the social sciences, change in normative structure has proved difficult to theorize (for example, Eckstein 1988; Powell and Dimaggio 1991: Ch. 1; Taylor 1989; Tsebelis 1990: Ch. 4). We better understand the logic of institutional inertia. Rules facilitate exchange between individuals, creating opportunities for collective action. Behaviour that responds to these opportunities, once locked in—for example, in dyadic forms—reinforces normative structure. In culturalist or constructivist terms, because normative structures constitute individual and collective identities, and therefore give meaning to action, they are

[15] I am aware that I have just assembled, in a very small tent, a disparate group of scholars who traditionally do not agree on many first principles, least of all how we ought to think about social structure. I have referenced them together for two reasons. First, I am seeking to build a theory that strips governance down to its constituent elements, structure being one such element. Although the scholars cited disagree for some very good reasons, we can easily identify what each of them means by structure; we can also see that, despite distinctly different approaches to research, structure fulfils more or less equivalent functions. Second, if, as I am claiming, my theory is relevant to the study of governance generally, my audience must be broad not narrow.

difficult to change by way of action without a concomitant change in identities. In either case, it is clear that the reproduction of particular ways of doing things inheres in the organization of human community.

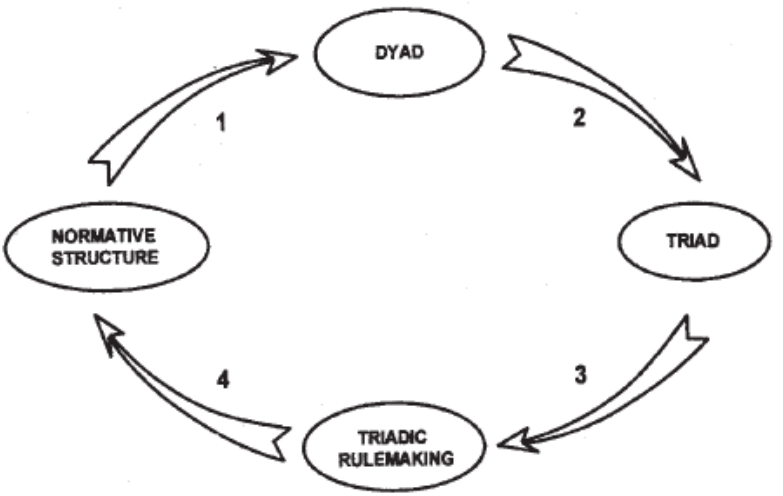
In the next section, I model the transformation of the normative structure, focusing on the dynamics of change that are endogenous to the logic of dyads, triads, and rules.

Constructing Governance

Figure 1.1 depicts a simple model of the process by which systems of governance emerge and evolve. An adequate theory of this process must account for the following:

- strategic behaviour: how individual actors conceive and pursue their interests within any given community;
- policy-making: how values and resources are distributed within any given community; and
- systemic change: how the normative structure in place in any given community is constituted, maintained, and revised.

Fig. 1.1. The Construction Of Governance



The model breaks down this process into four stages, each a chronological shift along a circular path, moving clockwise. Movement is generated by the relative intensity of two relationships: of the dyad and triad, and of normative structure and strategic behaviour. Although each shift is conditioned by what has happened in prior stages, the discussion highlights distinct aspects of these relationships.

Shift 1: Normative Structure to Dyadic Contract

The theory holds that we can move, by virtue of a self-sustaining process, from a single dispute about the terms of a dyadic contract to an elaborate governmental system.

To get to a dyadic contract, we need two individuals and at least a rudimentary normative structure. By 'dyadic contract' I mean the rules of exchange—or those promises—voluntarily entered into between two persons. Contracts can be implicit or explicit. The promises made in an 'implicit dyadic contract' are uncodified and 'lack ritual or legal basis'; the 'explicit dyadic contract' codifies promises that are meant to be legally binding (Foster 1977: 16). Both forms establish reciprocal rights and duties among two contractants.

In contracting, two individuals coordinate their self-interest in terms of some shared view of the future. Such coordination is difficult, if not impossible, without at least a primitive cultural framework: in the form of language—communication—and in the form of the norm of reciprocity, which is embedded in notions of individual commitment, reputation, and responsibility. Reciprocity, a crucial building block of society, enables the construction of the dyadic form; as Gouldner (1977: 39) has it, the norm constitutes a 'starting mechanism' that 'helps to initiate social interaction'.

Normative structure also serves to maintain dyadic contracts by facilitating dispute resolution. It does so in three ways, two of which are relevant at this stage. First, at the level of the single actor, reciprocity—or a relevant rule or established manner of doing things—can prevent disputes to the extent that the norm provides individuals with behavioural guidance and an understanding of the consequences of reneging on a promise, and that individuals constrain their behaviour accordingly. Second, once a dispute has erupted, reciprocity and other relevant rules may provide the contracting parties with the materials for settling the dispute on their own, dyadically. Such norms furnish the bases for evaluating both the disputed behaviour and potential solutions to the conflict. The authority, or legitimacy, of these standards depends heavily on their inherent 'neutrality' with respect to the dispute, in the strict sense that the relevant norms pre-date the dispute.

Shift 2: Dyad to Triad

The legitimacy of dyadic relationships is rooted in the self-interest of the contracting parties; at this point, I exclude from the analysis dyads constituted by coercion.[16] For each party, the contract must be functional in the sense that its existence depends on the perception that the benefits of constructing and maintaining the dyad outweigh the costs, and that the benefits of a particular dyadic form outweigh the benefits of going it alone. The dyadic contract coordinates egoistic motives, in the form of rules—reciprocal rights and duties—for the duration of the contract.

Once formed, rules organize how conflict is identified and understood. As a dyadic relationship proceeds or as circumstances change, the meanings attached to the same set of rules by the contractants may diverge; or the relative value of the dyadic relationship may decline for one or both of the contracting parties; or, having calculated 'best strategies', one or both of the parties may succumb to incentives to renege on obligations—the Prisoner's Dilemma. In any case, the dyadic form generates a massive functional demand for dispute resolution in the form of rule interpretation.

Dyads, aided by rules, often resolve disputes on their own. When they do so, the dyad comprises, in the parlance of legal anthropology, a 'legal level' (Collier 1973: Ch. 1). If disputants fail to resolve their dispute dyadically, they may choose to delegate the matter to a third party, thus constituting a new legal level: the triadic.

This act of delegation can be understood as a simple—and universal—act of 'common sense', as Shapiro (1981a:1) does. It can also be understood in rationalist-utilitarian terms. Delegation is likely when, for each disputant, going to a third party is less costly, or more likely to yield a desired outcome, than either breaking the dyadic contract and going it alone, or attempting to impose a particular settlement against the wishes of the other disputant. For each disputant, the short-run risk of delegation is the prospect of a settlement in favour of the other. In the long run, however, the more two disputants interact with one other—the more a relationship is perceived as beneficial by each party—the less that risk matters. Other things being equal, each contracting party may expect to win some

[16] In excluding coercion from consideration, the model does some violence to reality. Surely all dyadic relationships reflect or organize ongoing power relationships that contain elements of—at least implied—coercion. I nevertheless theorize a consensual rather than a coercive model of governance in order to focus attention on outcomes that result exclusively from the internal logic of rules, dyads, and triads. Put differently, mine is a theory of ideational and normative, not physical or material, power (influence).

disputes and to lose others, over time, against a backdrop of absolute benefit. The social logic of delegation, like that of the dyadic contract, is one of long-range utility: each party must believe that it is better off attempting to resolve a dispute than dissolving the relationship altogether.

Of course, the calculation of costs and benefits need not favour the move from dyad to triad. Both parties may possess a powerful commitment to maintaining, rather than resolving, their conflicts. When the core identities of the parties are constituted in opposition to one another, TDR will be anathema. Examples might include certain conflicts between the United States and the Soviet Union during the cold war, and between the Irish nationalists and the Ulster Unionists in Northern Ireland. Further, in the absence of minimal levels of trust, or lack of information about trustworthiness, the more likely it is that delegation itself will be viewed by one or both of the parties as potentially more costly than beneficial. At a minimum, agreement on a dispute resolver whose impartiality and wisdom is recognized may be a crucial first step, but agreement may elude the parties. Thus, although the move to triadic governance is a means of overcoming low levels of trust and weak behavioral norms, that move itself is not automatic.

These points accepted, dyadic conflict and the delegation of these conflicts to a third party is the fuel that drives the model. If disputants choose not to delegate, or are unable to agree on procedures, or if they are always able to resolve their disputes dyadically, or if one of the disputants is always able to impose a solution on the other, the theory implies, there would be neither TDR nor evolution in governmental forms.

Shift 3: The Crisis of Triadic Legitimacy

Once constituted, the triadic dispute resolver faces a potentially intractable dilemma. On the one hand, the third party's reputation for neutrality is crucial to the social legitimacy of the triad itself (see Shapiro 1981a). Disputants would be loath to delegate disputes if it were otherwise. Yet, in resolving disputes, the third party may compromise her reputation for neutrality by declaring one party the loser. That is, after all, what each of the disputants hopes. We can express the dispute resolver's dilemma as a fundamental interest: her interest is to resolve dyadic conflicts while maintaining the social legitimacy of TDR. In pursuit of this objective, she deploys two main tactics.

First, the dispute resolver seeks to secure legitimacy by defending her behaviour normatively, as meaningfully enabled and constrained by rules embedded in normative structure. Normative structure facilitates TDR, just as it facilitates dyadic dispute resolution, by providing ready-made standards of

appropriate behaviour and solutions to conflicts. Reciprocity—'promises shall be kept'—animates the dyadic form; it also animates the exercise of TDR to the extent that the dispute resolver works to restore substantive fairness and a sense of trust among the parties.

Fig. 1.2. The Dispute Resolver's Calculus

Second, the dispute resolver anticipates the disputants'—or a community's—reactions to her behaviour, especially if she decides or is asked to take a decision. Compliance is a crucial test of the social legitimacy of consensual TDR. Figure 1.2 depicts this calculus. Position A.1 represents the substantive outcome desired by disputant A, and position

B.1 represents the substantive outcome preferred by disputant B. Outcomes situated between positions A.1 and A.2—substitute B.1–B.2 for B—represent outcomes that the dispute resolver believes will not provoke A to refuse compliance. The space between B.2 and A.2 constitutes the dispute resolver's assessment of the range of decisionmaking outcomes that will lead to the resolution of the dispute, to compliance, and—much the same thing—to the re-establishment of a disputed rule. The calculus also helps her to fashion settlements that avoid the declaration of a clear winner or loser: in the area between B.2 and A.2, each disputant achieves a partial victory. For some disputes, the positions of A and B are more polarized, and no B.2–A.2 space exists; in such cases, the dispute resolver is unable to deploy the tactic: she has an interest in creating such a space by, for example, mediating between the parties. These are ‘hard cases’, ones in which the dispute resolver can expect that any decision taken is likely to result in public protests or even non-compliance. If she does attempt to resolve the dispute by rendering a decision, her legitimacy will rest all the more on the persuasiveness of normative justifications.

Shift 4: Triadic Dispute Resolution and Rule-Making

Modes of TDR can be arrayed along a continuum constituted on one pole by mediation and on the other pole by adjudication. In mediation, the dispute resolver helps the disputants arrive at a mutually satisfactory settlement of the conflict. In adjudication, the dispute resolver authoritatively resolves the dispute on her own. In practice, nearly all TDR takes place on intermediate points

between these two poles. Dispute resolvers move back and exposure, and maximize their influence over the disputants. In any move along the continuum toward adjudication, the dispute resolver is led, with increasing precision and formality, to announce her decision and to provide a rule-based justification for it.

In adjudicating, the dispute resolver simultaneously resolves a dyadic dispute and enacts elements of the normative structure. Both are forms of rule-making. First, she makes rules that are concrete, particular, and retrospective: that is, she resolves an existing dispute between two specific parties about the terms of one dyadic contract. Second, in justifying her decision—in telling us why, normatively, a given act should or should not be permitted—she makes rules of an abstract, general, and prospective nature. This is so to the extent that her decision clarifies or alters rules comprising the normative structure.

This latter form of triadic rulemaking constitutes a predictable response to the crisis dispute resolvers face—tactic 1 above. Yet it raises a delicate, second-order legitimacy issue. From the point of view of the disputing parties, it makes evident that the exact content of the rules governing the dispute could not have been ascertained at the time the dispute erupted. The perception of the dispute resolver's neutrality erodes as her capacity to make rules is revealed. The dispute resolver can mitigate, but can never permanently resolve, this problem. Most important, she can work to cast TDR as deliberation about the precise relationship of abstract rules to a concrete dispute, portraying her decision as a record of these deliberations. In doing so, she portrays triadic rule-making as a by-product of TDR rather than an outcome that she desires in and of itself.

In this way, TDR generates a discourse about how people ought to behave. Because rules, reasoning about rules, and the adaptation of rules to specific social needs constitute the core of this discourse—and, I would argue, of the evolution of norms more generally[17]—precedent follows naturally. Precedent helps to legitimize TDR by simultaneously acknowledging rule-making behaviour, while constraining that same behaviour with a rule: that like cases shall be settled likewise. In encapsulating this sequence—dyadic rules–> conflict–> deliberation–> triadic rulemaking–> precedent—TDR organizes discourse about a community's normative structure. In doing so, TDR performs a profoundly

[17] My position is largely congruent with Robert Sugden's. Sugden (1989: 93–6) suggests that norms—he focuses on ‘conventions’—develop in path dependent, selfreinforcing ways, one mechanism of which is the ubiquity and naturalness of normative reasoning itself. Normative structures are inherently expansionary to the extent that they enable people to reason from one situation to another by way of analogy. The move to precedent—and, therefore, to something akin to case law—is one result of analogous reasoning. If this is so, TDR is embedded within, and further reinforces, the path dependent nature of the greater process through which rule systems evolve

governmental function to the extent that dyadic contractors are drawn into this discourse and help to perpetuate it.

Shift 1: (Re)constructing the Dyad

In moving through shifts 1–4, we see how the dyad, the triad, and normative structure can be knotted together. And we see how a single dyadic conflict can generate a process of systemic change, the constitution or reconstitution of a mode of governance. Thus: a dyadic dispute erupts; the disputants delegate the matter to a dispute resolver; the dispute resolver resolves the conflict in a process involving normative reasoning, revising—at least subtly—normative structure. In returning to shift 1, the impact of structure on strategic behaviour, we come full circle to our initial starting point. But we find ourselves in a rather different world this time: the individuals comprising the dyad have learned something about the nature of their relationship—the rules governing their exchange—and about the environment—the normative structure—which sustains it.

Put simply, TDR has reconsecrated the contract and re-enacted the normative structure. The dispute resolver may have done so in a relatively conservative manner, fashioning a partial victory for each disputant and appealing to rules whose prior existence is relatively unquestioned. In so doing, she has reinforced the existing structure while clarifying its domain of relevance and application. The dispute resolver may have done so in a relatively progressive manner, declaring a clear winner and loser while revising an existing rule or crafting a new one. In so doing, she has reshaped normative structure, expanding its domain.

Given two conditions, such rule-making is likely to generate powerful pedagogical—or positive feedback—effects to be registered on subsequent exchange and dispute resolution. First, contractants must perceive that they are better off in a world with TDR than they are in a world without TDR. If they perceive as much, and if they are rational in the sense of being utility-maximizers, they will evaluate the rulefulness of any potential action and anticipate the probable outcome issuing from TDR. Second, the dispute resolver must understand that her decisions have some authoritative—that is, precedential—value.

If these conditions are met, TDR will inexorably become a powerful mechanism of political change, and dyadic exchange will inevitably be placed in the ‘shadow’ of triadic rule-making. As we move around the circle a second time, and then again and again, this shadow will deepen and expand, covering more and more forms of human interaction. A virtuous circle is thereby constructed: to

the extent that TDR is effective, it lowers the costs of dyadic exchange; as dyadic exchanges increase in number and in scope, so does the demand for the authoritative interpretation of rules; as TDR is exercised, the body of rules that constitutes normative structure steadily expands, becoming more elaborate and differentiated; these rules then will feed back onto dyadic relationships, structuring future interactions, conflict, and dispute resolution.

This dynamic, self-reinforcing process can be understood variously. Conceived in economic terms, the process operates according to the logic of increasing returns and path dependence (Arthur 1994; North 1990; Pierson 1997). As it proceeds, dyadic exchange will be channelled down narrower and narrower paths, that is, individuals will continuously adapt their behaviour to increasingly differentiated sets of rules. It is also institutionalization: a process through which specific social contexts will be increasingly defined by specific rules of behaviour: those curated by the triadic entity. Individuals will absorb and act upon these rules, thus (re)making themselves and their community.

Dyadic and Triadic Governance

Dyads and triads organize human community, constituting modes of governance to the extent that they are institutionalized: constructed and maintained by rules. Dyadic forms flourish in hierarchy, often coexisting or symbiotic with triadic forms. Patron-client networks are an ubiquitous example (Landé 1977). When vertically stacked, as in Confucian and military systems, a chain of dyadic relationships links the rulers with the ruled and thus establishes hierarchy. New institutionalist political economy captures such hierarchies in 'principal-agent' models of organization (Moe 1987). Dyadic contracts also give order to anarchy, as they do in international relations (Stone 1994). Examples include the 'balance of terror' system of deterrence (Hoffmann 1991) and the elaborate world constructed by the bilateral treaty.

Triadic governance is institutionalized in one of two basic modes: consensual and compulsory. My model demonstrates how a purely consensual form of triadic governance can evolve. Movement around the circle is driven by the complex mix of harmony and tension that inheres in the relationship between rules and self-interest. Coercive sanctions and enforcement mechanisms are conspicuously absent from the account (see note 3). Instead, movement depends upon specific actors—the dyadic contractants and the triadic dispute resolver—identifying their respective interests in some, rather than in other, ways and behaving accordingly. To capture these requisite conditions, the model is expressed in terms of

statements that begin with ‘when’, ‘if ’, and ‘to the extent that’, statements that apply to specific contexts.

It follows that actors are always capable of blocking movement at crucial points around the circle. Two contractants may choose to dissolve their contract rather than delegate to a third party. The dispute resolver may render capricious decisions without normative justification. After a dispute has been adjudicated, and if a clear winner has been declared, the loser may refuse to comply with the decision. If such behaviour is, or becomes, the normal state of affairs, triadic governance will be stillborn, and social entropy will result. In such a state, reciprocity and other elements of normative structure do not, on their own, sustain social exchange; and triadic dispute resolvers do not function, on their own, to restore reciprocity given dyadic conflict and change in exogenous circumstances.

The function of sanctions is to buttress dyadic and triadic dispute resolution. By sanctions, I mean social provisions that penalize non-compliance with rules and triadic rule-making. To the extent that they operate effectively, sanctions counteract behaviour that blocks the restoration of reciprocity among disputants.

In consensual triadic governance, sanctions are informal but potentially fully effective. Individuals will be led to abandon existing contracts, or avoid entering into future contracts, with a chronic rule-violator, an individual who wilfully disregards obligations imposed by a dyadic contract or by a triadic dispute resolver. To the extent that this occurs, the violator forgoes the benefits associated with social exchange and suffers stigmatization—the loss of reputation. If the violator's behaviour has led all other actors to refuse contractual relations with the violator, social exclusion is the sanction. Banishment, virtual death, is the ultimate penalty associated with consensual governance.

In compulsory triadic governance, explicit rules govern this sequence: dyadic contract–> triadic dispute resolution–> decision–> compliance. Such rules commonly: enable the move from dyad to triad in the absence of the consent of one of the parties; require the triadic dispute resolver to consider the complaint;[18] oblige the parties to comply with the terms of an eventual decision; and organize enforcement measures in cases of non-compliance.

Like the move from dyadic to triadic governance, the transition from consensual to compulsory TDR is inherently the stuff of political development. The move is not automatic because the condition necessary for transition is not sufficient. The condition is that, for any community or pool of potential contractants, existing normative structure fails to provide an adequate framework

[18] If only to decide not to decide.

for social exchange, while the social demand for coordinative rules and dispute resolution has increased. This may occur for a variety of reasons. The potential contractants may be strangers, that is, they do not share a common normative structure; or changes in normative structure may not have kept pace with changes in the nature of social exchange within a given community. A community of neighbours can become a group of strangers as a result of migration, increased social differentiation, or the division of labour. In any case, when existing rules cannot sustain social exchange at an optimal level, people have an interest in developing new ones. The condition is not sufficient because the construction of such rules is a potentially insoluble collective action problem. Thus, the model does not predict that TDR always produces systemic change. On the contrary, when people (1) share a relatively comprehensive normative structure and (2) interact on an ongoing, face-to-face, basis—that is, where information relevant to exchange is virtually perfect and transaction costs are virtually zero—TDR tends to re-enact, rather than to remake, social norms. In such contexts, the existing normative structure is sufficient; informal sanctions are highly effective;[19] and mediation is preferred to adjudication.[20]

As political development has proceeded in the world, so has the ubiquity of compulsory triadic governance. Generating and imposing new normative structures that replace or supplement previously existing structures is perhaps the only, or at least the most efficacious, means of providing a system of governance for individuals who are otherwise strangers to each other. At the extreme, organized coercion reinforces TDR processes, guaranteeing, with force if necessary, social exchange, dispute resolution, and the enforcement of rules. The modern state is the institutionalization of coercive TDR.

---

[19] Game theorists make this point in the guise of the Folk Theorem, developed in the literature on repeated games: for example, Fudenberg and Maskin (1986); Kandori (1992).

[20] Ellickson (1991) tells us that Shasta County ranchers refuse to use, or even educate themselves about, the laws meant to govern and resolve disputes concerning grazing rights, fencing, and stray cattle. Invoking 'good neighbourliness', they prefer to settle such disputes dyadically or by quiet mediation, according to well-established norms. But when a Texas rancher moves into the community and openly disregards these rules, litigation is the result. Collier (1973), in her study of how the various legal levels operate among Mayan Indians in Zinacantan, found a complex blending of dyadic dispute settlement and mediation, and a hostility towards formal Mexican law and courts mitigated only in dealings with outsiders. At the time these books were published, both communities shared relatively stable normative structures possessed of relatively high social legitimacy. If in both communities TDR was ubiquitous, third parties were not used to provoke, nor was dispute resolution expected to result in, normative change.

The Law-Maker and the Judge

With the development of the modern state, the authority to govern—the power to resolve disputes and to make rules—tends to be divided among two separate figures. Separation of powers doctrines notwithstanding, the lawmaker and the judge are not easily detached from one another.

The point can be made in terms of the model. The model demonstrates how a full-blown system of governance can be constituted and maintained by TDR processes alone if shifts 1–4 are iterated ad infinitum. The dispute resolver governs by the pedagogical authority of her decisions. Triadic rule-making is legislative in nature: it adapts, over time, a given normative structure to the demands of dyadic exchange. But TDR is a relatively inefficient means of rule-making since it proceeds on a case-by-case basis. In delegating law-making powers to a legislator, a community establishes a far more efficient means of revising normative structure. Nonetheless, in legislating, the legislator performs a dispute resolution function. As part of normative structure, laws help to prevent conflict from arising in the first place and to facilitate the resolution of conflicts that do arise. Further, because the legislator fixes general rules for an entire community, it generates a crisis of legitimacy no less intractable than that which afflicts the dispute resolver. This crisis animates political life in the form—again—of a quest to construct rules to constrain rule-making.[21]

Even when judicial and legislative functions are separated, comparative institutional advantage produces legislative-judicial interdependence. The law-maker makes rules whose reach, among other things, is *immediately* general and prospective; the judge makes rules whose reach, among other things, is *immediately* particular and retrospective. If the judge is expected to enforce the law-maker's law, and if this law is meant to be binding, coercive TDR is required. If, for reasons elucidated, TDR results in rule-making, then compulsory TDR results in the authoritative reconstruction of the lawmaker's law. The legislator therefore shares rule-making power with the judge.

TDR and Systemic Change

Triadic governance facilitates social exchange and the adaptation of rule systems to the exigencies of those who exchange: hence its social utility.[22] Other things

[21] For example, the constant struggle to establish or to revise constitutions, electoral systems, and legislative and judicial process.

[22] I am not suggesting that the development of a stable mechanism of TDR is the only way to achieve the virtuous circle depicted by the model. Cases in point are Avner Greif's

being equal, it must be that dyadic governance is inherently less flexible and more brittle than triadic governance. Whereas conflict can destroy dyadic contracts, conflict activates TDR and establishes the parameters of a politics that can recast the normative basis of social exchange.

My theory holds that TDR, if exercised on an ongoing and effective basis, is a crucial mechanism of social cohesion and change. To put it in constructivist terms, triadic governance coordinates the complex relationship between structures and agents (Giddens 1984), helping to constitute and reconstitute both over time. In culturalist terms, it serves to counteract forces favouring social 'anomie' or 'entropy' by adjusting general 'guides to action' to 'the relentless particularity of experience' (Eckstein 1988: 795–6) by, among other things, generating normative discourse. In rationalist terms, the move from the dyad to the triad replaces games like the Prisoner's Dilemma or chicken with an entirely different strategic context. Although game theorists have begun to notice the challenge (for example, Calvert 1995), they have had difficulty modeling the kinds of triadic games implied by this article—and by a good deal of judicial politics more generally—not least because, in these games, the evolution of rule structures is endogenized and normative reflection and argumentation are part of the 'game' (see Stone Sweet 1998a; Vanberg 1998b).

In the next section, I demonstrate the power of the model to explain systemic change, by which I mean a fundamental transformation in how normative structure is constituted and sustained in any given human community. The evolution from dyadic to triadic governance, and the transition from consensual to compulsory TDR, are unambiguous examples. To the extent that such evolution occurs, there will be a commensurate change in the social basis of exchange, that is, in how individual actors understand and pursue their interests in coordination with other actors. Systemic change, then, implies the transformation of collective and individual identity.

---

accounts (1989; 1993; 1994) of how other, quasi-triadic mechanisms have performed similar functions. In his analysis of trade relations in the Mediterranean region during the late medieval period, Greif shows that the expansion of overseas commerce depended heavily on the activities of middlemen, organized as the Maghribi Traders' Coalition, operating within a relatively fixed rule system: the Merchant's Law. In Greif's account, and in the theoretical and empirical materials I present here, outcomes depend on the extent to which three factors—(1) social exchange, (2) organizational capacity to manage potential conflict associated with exchange, and (3) rule structures—develop together, thereby constituting a dynamic system of reciprocal influence. A related theoretical framework has been developed to explain the dynamics of European integration (Stone Sweet and Sandholtz 1997; Stone Sweet and Caporaso 1998a).

(Re)constructing the Polity

It would be a relatively simple task to demonstrate the general relevance of the theoretical model to the field of judicial politics. One could, for example, review the now burgeoning political science scholarship on the political impact of judging around the world.[23] For reasons that inhere in the theory, we would learn that, in any given society, the judiciary's share of total governmental authority and influence varies with the degree to which it possesses and exercises the power to review the lawfulness of activity, public and private. The task is simplified by the fact that political scientists generally study courts, which are fully constituted mechanisms of coercive TDR.

I propose, instead, to examine the impact of TDR on two polities in which judicial power had been initially, and by design, excluded. By 'judicial power' I mean the capacity of a triadic dispute resolver to authoritatively determine the content of a community's normative structure. In my two cases—the international trade regime and the French Fifth Republic—new normative structures—an international treaty, a national constitution—established rules governing relations between specific political actors—states in the GATT, elected officials and state institutions in France. The regular use of TDR led to the mutation of these relations, and new polities were thereby constituted.

I will use the term 'judicialization' as shorthand for this mutation, for—the same thing—the construction of judicial power. Judicialization is a process sustained by the interdependence of dyads and triads, and of rules and strategic behaviour. It is observable, and therefore measurable, as modifications in the conduct of dispute resolution and social exchange. The 'judicialization of dispute resolution' is the process through which a TDR mechanism appears, stabilizes, and develops authority over the normative structure governing exchange in a given community. The 'judicialization of politics' is the process by which triadic law-making progressively shapes the strategic behaviour of political actors engaged in interactions with one another.

A full treatment of the cases is beyond the scope of a single paper.[24] Of necessity, my treatment is schematic and abbreviated, focusing on the relationship between specific theoretical predictions and empirical outcomes. The theory asserts that TDR organizes political change so as to facilitate the survival

[23] After decades of neglect, the field of comparative judicial politics now thrives (for example, Shapiro 1981a; Shapiro and Stone 1994; Tate and Vallinder 1995; Volcansek 1992).

[24] I rely heavily on detailed studies of the judicialization of the GATT system (Hudec 1992; 1993; Stone Sweet 1997) and of the French Fifth Republic (Stone 1992a; 1996).

of societies in which individuals interact with each other on a continuous basis. The theory predicts that, as the scope and intensity of these interactions increase, so will the demand for the adaptation of normative structure by way of dispute resolution. If and when dyadic dispute resolution fails to satisfy this demand, there will be pressure to use TDR if a triadic mechanism exists, or to invent such a mechanism if it does not exist. Once individuals have moved to the triadic level, the internal dynamics of TDR will drive processes of judicialization. The dispute resolver will seek to balance the competing claims of disputants, but will also generate precedent to legitimize decisions. Triadic rule-making will gradually reconfigure normative structure and, in so doing, reconstruct social relations.

The Judicialization of the International Trade Regime

When the General Agreement on Tariffs and Trade (GATT) entered into force in 1948 and was institutionalized as an organization, 'anti-legalism' reigned (Long 1985: 70–1; Hudec 1993: 137). Diplomats excluded lawyers from GATT organs and opposed litigating violations of the treaty. In the 1950s, TDR emerged in the form of the Panel System. Panels, composed of between three and five members, usually GATT diplomats, acquired authority through the consent of two disputing states. In the 1970s and 1980s, the system underwent a process of judicialization. States began aggressively litigating disputes; panels began treating the treaty as enforceable law, and their own interpretations of that law as authoritative; jurists and trade specialists replaced diplomats on panels. The process generated the conditions necessary for the emergence of the compulsory system of adjudication now in place in the World Trade Organization (WTO).

Normative Structure and Dispute Resolution

The GATT is the most comprehensive commercial treaty in history, today governing more than five-sixths of world trade. In the 1955–74 period, membership jumped from 34 to 100 states; 124 states signed the Final Act of the Uruguay Round, establishing the WTO, in 1993. The treaty's core provision is a generalized equal treatment rule, the Most Favored Nation (MFN) principle, which rests on reciprocity: each party to the GATT must provide to every other party all the advantages provided to other trading partners. The treaty further prohibits, with some exceptions, import quotas. The organization also supports an inter-state forum for legislating trade law: eight 'rounds' have reduced most tariffs to the point of insignificance and, less successfully, restricted non-tariff barriers to trade.

The treaty exhorts members to settle their disputes dyadically, in accordance with GATT rules. The potential for a trade conflict to move to a triadic stage was implied: if state A could demonstrate that it had suffered damages due to violations of GATT law committed by state B, state A could be authorized by the GATT membership as a whole to withdraw advantages or concessions that it would normally be required to accord state B. Almost immediately, however, member states invented the Panel System to resolve disputes.

As institutionalized in the 1950s, the system blended mediation and consensual adjudication against a backdrop of ongoing dyadic dispute resolution. Defendants could not be compelled to participate in TDR. By denying consent, a state could block the construction of a panel, reject proposed panellists, and refuse to allow a ruling to be reported. Relative to compulsory forms of adjudication, the system appeared grossly inefficient. The original function of panels, however, was to facilitate dyadic conflict resolution, not to punish violators or to make trade law. Diplomats, trade generalists who saw expedience in flexible rules and detriment in rigid ones, sat on panels. When mediation failed, panels could, with the consent of the disputants, resolve conflicts according to relevant treaty provisions.

Before 1970, states did not exploit the connection between TDR and rule-making. But, being both imprecise and rigid, the regime's normative structure proved insufficient to sustain optimal levels of trade over time. The treaty mixes a few hard obligations—the MFN norm and tariff schedules—with a great many statements of principle and aspiration. Despite its flexibility, important GATT provisions could be revised only by unanimous consent. Although the success of the GATT was partly due to normative imprecision—the more vague a rule, the easier it was for states to sign on to it—textual imprecision was often locked in by the unanimity requirement. The tension is obvious. Achieving optimal levels of exchange partly depends on the continuous adaptation of abstract rules to concrete situations, but the GATT legislator was ill-suited to perform this adaptation for the trade regime.

Dyad to Triad

Beginning in 1970, the largest trading states turned to the Panel System not just to resolve their trade conflicts but to make trade policy. Statistics tell part of the story (Appendix). After falling into desuetude in the 1960s—only seven complaints were filed—TDR exploded into prominence afterwards. Of the 207 complaints filed through 1989, 72 per cent were filed after 1969, and 56 per cent after 1979. The four largest trading states—Canada, the European Community

(EC), Japan, and the USA—dominated panel proceedings: in the 1980s, over 80 per cent of all disputes registered involved two of these four states.

The expansion of global exchange, and the domestic political consequences of that expansion, broadly explain the renaissance of TDR. Bilateral exchange among the big four—Canada, the EC, Japan, and the USA—rose from $US15 billion in 1959 to $44 billion in 1969, to $234 billion in 1979, to $592 billion in 1989. As trade redistributed resources and employment across productive sectors within national economies, domestic actors mobilized to protect their interests. And as these economies came to produce virtually the same products for export—for example, electronics, automobiles, food products—trade relations were easily interpreted in zero-sum terms.

By 1970, new forms of protectionism had proliferated, the Gold Standard currency regime was rapidly disintegrating, and the American trade deficit had become chronic. The need for clearer rules and better compliance was acute. At the same time, the GATT legislator had failed to liberalize certain crucial sectors—for example, agriculture—to dismantle the mosaic of non-tariff barriers that had emerged in response to tariff reduction—for example, restrictive licensing policies and production standards—and to regulate other practices that distorted trade—for example, subsidies. Led by the USA, which was also groping for ways to reduce its trade deficit, governments turned to the Panel System.[25]

Three general motivations animated the move to TDR. In the vast majority of instances, states initiated complaints in order to induce other states to modify their domestic trading rules. As we will see, GATT panels proved to be a relatively effective means of doing so. Second, states appealed to panels in order to alter, clarify, or make more effective existing GATT rules. This motivation overlaps the first, since virtually all trade disputes are translatable into a general argument about the meaning and application of specific treaty provisions. Disputants worked to persuade panels to adopt their versions of GATT rules, in order to encourage the spread of practices they considered lawful and to discourage practices they considered unlawful. Third, while difficult to verify, governments sometimes participated in TDR to delegitimize—and thus facilitate the revision of—their own trade practices.[26]

[25] Disputants tend to litigate what diplomats failed to legislate. Conflicts over agriculture and subsidies paralysed trade negotiations, and they also dominated TDR processes after 1970. Of 115 complaints filed in the 1980s, 51, or 44%, concerned trade in agricultural goods. Of the 44 disputes filed citing one of the GATT codes, 21, or 48%, relied on rules found in the subsidies code.

[26] In 1988, the USA instituted proceedings against the EC's payment regime for oil-seed processing. A panel ruled that the programme both discriminated against foreign processors and functioned as an indirect subsidy for EC producers. France, invoking the

To maximize their success, governments had a powerful interest in replacing diplomats and generalists with lawyers and trade specialists. The Americans understood this immediately; the Nixon administration turned GATT litigation over to trade lawyers in 1970. By that year, the enormous complexity of trade disputes—the resolution of which requires determining (1) the extent to which a specific domestic law or administrative practice conforms with treaty provisions, and (2) the extent to which, in cases of non-conformity, such a law or practice had caused, or might cause, trade distortions—was far beyond the capacity of anyone but the lawyer and the expert. Once introduced by the Americans, lawyerly discourse perpetuated itself. Lawyers filed detailed legal briefs attacking or defending particular national policies; faced with detailed questions, panels gave detailed answers; lawyers then understood the reasoning supporting such answers as guidelines for future litigation strategies. The EC and Japan initially resisted the move to legalism; but they became active participants after being bombarded with complaints by the USA and Canada. By the early 1980s, all of the major trading states had armed their Geneva staffs with permanent legal counsels.

Triadic Governance

In activating TDR, GATT members delegated to the Panel System an authority that is inherently governmental. As panels exercised this authority, they generated three sets of political outcomes; these outcomes can be explained only by attending to the dynamics of TDR.

First, panels altered the terms of global exchange by provoking, with their decisions, the modification of national trading rules. If complied with, every decision declaring a national rule or practice inconsistent with GATT rules concretely affects the lives of importers, exporters, consumers, and producers. Statistics (Appendix) show that activating TDR worked in favour of plaintiff states: plaintiffs enjoyed a success rate of 77 per cent in the 1948–89 period, rising to 85 per cent in the 1980s. The rate of compliance with adverse decisions was 74 per cent in the 1980–9 period.

---

consensus norm, sought to suppress the decision but the EC adopted the ruling over France's objection. The EC then replaced the payment system with a new one. In effect, the EC had used TDR to delegitimize an outmoded, costly programme of which France had blocked revision within internal EC law-making processes. Complaint #179, US v. EC (22 April 1988). Complaints have been assembled and numbered chronologically in Hudec (1993: Appendix). I use Hudec's reference system to refer to cases in this and subsequent notes.

To resolve many of the most complex disputes, panels had no choice but to reach far into national jurisdictions. Thus, a panel ruled that a US law providing a special administrative remedy for patent infringement claims involving imported goods violated the GATT since defendants stood a better chance of winning in district courts.[27] To arrive at this decision, panellists investigated US litigation rates and judicial outcomes, concluding that biases in the administrative procedure constituted a discriminatory bias affecting trade. In separate cases, panels required Canada to force provincial governments to remove taxes on foreign gold coins, and to force provincial liquor boards to change regulatory practices favouring domestic alcoholic beverages.[28]

Panels reinforced their influence over policy outcomes by elaborating guidelines for state compliance. In explaining why a given national practice was or was not inconsistent with GATT obligations, panels suggested GATT-consistent versions of the practices in question: such behaviour inheres in triadic rule-making. In 1986, to take just one instance, the EC attacked the Japanese system of taxation for alcoholic beverages.[29] The system, which classified products into dozens of categories corresponding to different tax rates, resulted in importers paying higher taxes than Japanese producers for similar products. The panel declared the system to be inconsistent with the treaty, and announced a general rule: national tax schemes must treat all 'directly competitive' products equally. It then elaborated a hypothetical system based on equal treatment, demonstrating precisely what a lawful system would look like. The Japanese subsequently adopted a system similar to the panel's.

Second, in response to the exploitation of TDR by states for their own political purposes, panels reinvented themselves as judges, the authoritative interpreters of the regime's normative structure. This process, predicted by the model, can be tracked and measured. As the number and complexity of complaints grew, panels produced longer decisions and increasingly precise interpretations of treaty provisions.[30] In complicity with GATT litigators, citations of past decisions became increasingly common and expected.

Once constructed as a precedent-based discourse about the meaning of GATT rules, panel decisions became a fundamental source of those rules. Such rule-

[27] Complaint #162, EC v. US(29 April 1987).
[28] Complaint #132, South Africa v. Canada (3 July 1984); complaint #139, EC v. Canada (12 February 1985).
[29] Complaint #154, EC v. Japan (6 Nov. 1986).
[30] In the 1948–69 period, the average length of reported rulings was 7 pages; in the 1970–9 period, the average length rose to 15 pages; after 1985, the average reached 48 pages (Hudec 1992: 11).

making took place despite the absence of a doctrine of stare decisis in international law, and despite the refusal of the member states to formally recognize the precedential value of decisions. Certain treaty provisions—for example, the MFN norm, rules governing taxation and quotas—emerged as sophisticated, relatively autonomous domains of legal discourse.[31] In these domains, rules can today be understood only in light of a dense and nuanced case law. Although the substance of this law is far beyond the scope of this article, panels ratcheted up national responsibility to justify any claimed exceptions to liberal trading rules which, among other things, served to expand the grounds for future complaints.

Panels also generated rules governing their own jurisdiction (Hudec 1993: 258–65). By the end of the 1980s a stable case law asserted that, among other things, panels could:

- not only review the consistency of national acts with the treaty but could also detail what kinds of similar, if hypothetical, acts might violate GATT rules;
- announce answers to questions not raised by plaintiffs but which were nevertheless relevant to other trade disputes; and
- report a ruling even if the dispute on which it was based had become moot—for example, as a result of prior dyadic settlement—in order to clarify GATT rules and thus facilitate future dyadic and triadic dispute resolution.

Third, judicialization processes reconstructed how states understood the nature of their own regime. States reacted to the development of a rule-oriented mode of governance not by suppressing it but by adjusting to it. Their lawyers filed more and increasingly legalistic complaints, and their diplomats ratified judicialization in official agreements. Thus, the 1979 ‘Understanding’ on dispute settlement placed the GATT's system on legal footing for the first time, codified dispute settlement procedures, and gave legal force to panel reports. In 1981, citing the overwhelming complexity of litigation facing panellists, states permitted the establishment of a Legal Office charged with rationalizing procedures and providing support for panel members. And in the Uruguay Round

[31] Breaking down GATT complaints filed in the 1980s with reference to the article of the Agreement in dispute provides some indication of the relative density of these areas. In 115 filings, disputants invoked specific parts of the Agreement 212 times. Four areas of the law account for 71% of total claims: the MFN norm (Arts 1 and 2, 21%); non-discrimination in taxation and regulation (Art. 3, 10%); elimination of quotas (arts. 11, 13, 34%); and nullification or impairment of benefits (Art. 23, 6%). Of the 66 instances in which the special codes were invoked, the codes on subsidies were involved 41 times (62%). See Stone Sweet (1997).

of 1986–92, states asked an autonomous group of experts to study how TDR could be strengthened. The fruit of their efforts was the legal system of the WTO.

The Final Act of the Uruguay Round transformed the GATT into the WTO. The treaty, which is—implicitly—treated as a form of a constitutional law, provides for a system of compulsory adjudication of disputes. The new rules: automatically confer jurisdiction on panels upon the reception of a complaint; no longer permit unilateral vetoes of any stage by either party; and provide for a broad range of measures to punish non-compliance. An independent appellate body is charged with handling appeals from panels. The body is to be composed of seven members who possess 'demonstrated expertise in law'.

Undeniably, the move from consensual to compulsory TDR could not have taken place without a convergence in the preferences of the most powerful trading states. The US had advocated more efficient dispute settlement since the 1970s. The Americans had even taken measures in domestic law to unilaterally punish those who blocked or refused to comply with GATT decisions; and the move provoked the EU to adopt similar measures. Facing a trading world in which GATT rules might be enforced unilaterally by the most powerful states, the rest of the world joined the USA and Europe in working to strengthen multilateralism.

But, if converging state interests were crucial to the enhancement of TDR in the GATT, judicialization generated the context necessary for that convergence. Judicialization is socialization. As states gained experience with dispute settlement, as panels performed their dispute resolution functions, as a stable case law enhanced legal certainty, GATT members could afford to view triadic rulemaking as a useful, cost-effective guarantor of regime reciprocity. In the 1980s, states did not consider abolishing the Panel System but debated how best to enhance it. By the end of the decade, a collective future without effective TDR was no longer a serious option.

The Judicialization of the Fifth Republic

The 1958 Constitution is France's fifteenth since the Great Revolution. Like its predecessors, the constitution enshrined an official state ideology, the 'general will', the twin corollaries of which are statutory sovereignty and the prohibition of judicial review. In the 1970s, a process of judicialization began. Legislators turned to the Constitutional Council to resolve their disputes about the constitutionality of pending legislation; the Council responded by developing the constitution as a system of substantive rules governing policy-making. As these interactions intensified, the Council became an active participant in the legislative

process; legislators became active participants in the construction of constitutional law; and a new ideology, that of constitutionalism, replaced the ideology of the general will.

Normative Structure and Dispute Resolution

Until the 1970s, the history of French constitutional law was barely more than a chronicle of how state structures were successively remade by the alternation in power of republicans, restored monarchs, emperors, and generals. As normative structures, French constitutions were brittle. They legitimized the authority of those—temporarily—in control of the state, but were incapable of organizing enduring relationships between those who competed for that control. The Fifth Republic, imposed in the midst of virtual civil war, initially appeared just as brittle. A blueprint for Gaullist rule, the constitution was not broadly welcomed or shared by the country's political elites. The political parties of the left voted to reject the document in a parliamentary ballot they lost.

As ratified by popular referendum, the constitution departed from republican traditions in two ways. First, it redistributed law-making power away from parliament—the National Assembly and the Senate—and to the executive—the President of the Republic and the Government, that is, the Prime Minister and ministers of state collectively. Statutes proposed by the government were meant to be ratified by the legislature. Second, it established a new state organ, the Constitutional Council, to police this redistribution. The founders did not conceive of the Council as a judicial body. In contrast to all other European constitutional courts, the Council does not hear appeals from the judiciary or from individuals, and prior legal training or judicial experience is not a requirement for membership.[32] The founders rejected proposals to include in the constitution a bill of rights over which the Council would exercise jurisdiction, for fear of subverting statutory sovereignty.

In its original form, the constitution enabled but narrowly circumscribed TDR. According to these rules, any of four officials—the President, the Prime Minister, the President of the Assembly, or the President of the Senate—may ask the Council to review the constitutionality of a statute but only after that statute has been definitively adopted by Parliament and before its entry into force. If the Council determines that a statute's provisions have been adopted according to

[32] The Council is composed of nine members; the President of the Republic, the President of the Assembly, and the President of the Senate each appoints three members who serve nine-year terms.

procedures that are inconsistent with constitutional rules governing the legislative process, it annuls those provisions, blocking their entry into force. Once a referral has been received, the Council decides within a maximum delay of 30 days. In striking contrast to North American constitutional judicial review, only statutes that have not yet been promulgated are open to review in France; once in force, statutes are immune from judicial scrutiny.

Two constitutional revisions modified the Council's jurisdiction. In a 1971 decision, the Council, prompted by a referral of the President of the Senate and publicly encouraged by law professors and the media, annulled a piece of government-sponsored legislation for the first time. In relying on a rights text, it effectively incorporated a bill of rights, partly unwritten and ill-defined, into the constitution. In 1974, a Constitutional Congress voted to extend to parliamentary oppositions—formally, to any 60 deputies or senators—the power to refer statutes to the Council for review. Combined, these changes radically expanded the rule-making capacities of TDR. Henceforth, any partisan dispute about legislation, once translated into a dispute about constitutional rights, could be used to activate TDR.

Dyad to Triad

In the 1958–70 period, the Council rendered only six decisions, siding each time with the Prime Minister in disputes between the government and parliament over their respective legislative powers.[33] Since 1974, the Council's caseload has been constituted, almost exclusively, by opposition referrals alleging the unconstitutionality of legislation proposed by the government and the parliamentary majority.[34] When in power, parties of the left and the right have decried the Council's growing authority over the law-making processes; and both have threatened to abolish the organ in order to restore 'the sovereignty of the general will'. In opposition, left and right have exploited, without apology, the capacity of TDR to obstruct majority rule.

Oppositions are attracted to TDR for a simple reason: the Council is the only state institution capable of altering legislative outcomes that is not controlled by the government and the parliamentary majority. Referrals extend the legislative process to include another stage: triadic rule-making. The move to TDR alters the strategic context of French policy-making, redistributing political initiative in the

[33] In 1962, the body also refused to rule on a complaint made by the President of the Senate.

[34] By 'parliamentary majority' I mean those parties that support the government in parliamentary votes.

opposition's favour and reducing the influence of the government and the majority over legislative outcomes. When the opposition activates TDR, the government and the majority are placed on the defensive, forced to participate in processes they do not control.

After 1974 referrals quickly became quasi-systematic (Appendix).Since that year, opposition parties have referred every annual budget and, since 1981, virtually every major piece of legislation. In the 1974–80 period, the Giscard presidency, 46 laws were referred to the Council, or 6.6 a year; in the 1981–7 period, the first Mitterrand presidency, 92 laws, 13.1 a year, were referred. The average number of references has remained above 10 per year ever since. Expressed in different terms, since 1981 about 30 per cent of all legislation adopted has been referred,[35] a huge ratio since most legislation is politically non-controversial and does not lead to a formal roll-call vote at the time of adoption. Substantively, the vast majority of referrals allege that the referred law violates one or more constitutional rights capable of being recognized by the Council. Virtually costless, referrals work: since 1981, more than half—57 per cent—-of all referrals resulted in a Council annulment.

As predicted by the model, the regular use of TDR produced a self-sustaining process of judicialization. Referrals provoked the Council to construct the constitution, that is, to justify annulments in terms of an authoritative interpretation of constitutional rules; and the construction of constitutional law provoked more referrals.Also predicted—see the discussion of shift 1, above—triadic rule-making exercised a powerful pedagogical influence on the strategic behaviour of law-makers.

Most important, triadic rule-making generated a stable politics of deterrence and anticipatory reaction. As the web of constitutional constraints on law-making expanded and grew more intricate, the government became susceptible to a kind of constitutional blackmail. The opposition learned that it could enhance its legislative influence by threatening to refer a bill under discussion to the Council unless the government and majority agreed to amend the legislation as the opposition saw fit. In the 1980s, parliament has adopted hundreds of amendments, rewriting dozens of important bills, pursuant to constitutional debates triggered by such threats (Stone 1992a; 1996; formal model in Vanberg 1998a).

As constitutional referrals, threats to refer, annulments, and constitutional blackmail became commonplace elements of legislative process, law-makers had every reason to upgrade their legal expertise.

[35] Excluding the statutory ratification of international agreements.

The government, aided by its legal adviser, the Council of State, began to review the constitutionality of all draft bills before submitting them to parliament.[36] And the major political parties turned to young law professors—specialists in 'the new constitutional law'—to help them draft referrals, respond to referrals, and to attack or defend bills on the floor of parliament.

Triadic Governance

The move to triadic governance generated three sets of outcomes that deserve our attention.

First, the Council evolved into a powerful policy-maker, a kind of adjunct legislative body with the capacity to veto, amend, and even propose legislative provisions. Annulments have blocked or radically altered a score of major legislative initiatives. In 1982, the Council vetoed the left's nationalization bill, ruling that the legislation would not have provided sufficient compensation to expropriated stockholders. In 1984, it vetoed key provisions of the press law, thwarting the left's bid to counter the rapid concentration of the newspaper industry. In 1986, it blocked the right's attempts to deregulate the press and broadcast media. And in 1993, it gutted the right's attempts to restrict immigration and to expand administrative authority to expel asylum seekers.[37]

Further, the Council, in clarifying exactly why a given legislative provision is unconstitutional, provoked new legislative processes designed to 'correct' unconstitutional bills. These processes serve to implement the Council's rule-making. Thus, in its decision on nationalizations, the Council told the government exactly how stockholders must be compensated. The government complained that its legislative authority had been pre-empted, but dutifully incorporated the Council's preferred compensation formula into a new bill. The changes raised the cost of nationalizations by 25 per cent but secured promulgation. In more than 20 decisions on the penal codes—statutes specifying crimes, penalties for committing crimes, and judicial procedures—the Council has vetoed dozens of proposed legislative modifications while laying down precise rules governing how these codes must or must not be revised. The opposition has given agency to these rules by systematically threatening to refer new reforms that do not sufficiently respect the dictates of the Council's case law.

Second, the Council reinvented itself as a court. Systematically implicated in the legislature's policy disputes, the Council worked to portray its decision-

[36] See Stone (1996) for details.
[37] Respectively, Conseil (1982a; 1984b; 1986a, b; 1993).

making as inherently judicial: a formal exercise in reasoning about rules. Council decisions initially took the form of a series of terse syllogisms, containing virtually no argumentation. In the late 1970s the Council began producing longer, more carefully crafted decisions, responding point by point to arguments made in referrals.[38] Predictably, referrals lengthened and became more sophisticated. As decisions accumulated in areas of intensive legislative activity, technical domains of case law inevitably emerged. The Council developed an array of linguistic formulas—one of several functional equivalents of precedent in civil law systems—which it repeated again and again to clarify its positions; and it began to reference, at first subtly, then more overtly, the commentaries of leading legal scholars. In the late 1970s a new autonomous field of legal scholarship emerged, devoted to the doctrinal analysis of the Council's case law.Constitutional law now flourishes in the academy.

Third, triadic rule-making reconstructed the very nature of the French polity. Since the Revolution, the constitution has been understood to be a law that enabled state officials to govern, while unenforceable. Republican constitutions proclaimed statutory supremacy and prohibited judicial review of statute: perhaps a moot point since constitutions did not contain rights provisions, and public liberties that were recognized in statute could be rescinded by majority vote. In the absence of TDR, French constitutional law was static; it developed no dynamic life of its own. Today, the constitution is a living law that binds all public authorities in their interactions with each other and with private individuals.

For the first time in history, French constitutional law is case law: the law is what the Council interprets it to be, despite the formal absence of a doctrine of stare decisis in the civil law tradition. In consequence, French legislative politics, which operated on the basis of majority rule, has been reconstituted as a constitutional politics, which operates as a continuously evolving, rule-based discourse governing the exercise of legislative authority. In this politics, legislators continuously incorporate into the language and practice of policy-making a vocabulary and grammar of constitutional law.Law-makers do so in order to maximize their own political effectiveness. In their interactions with each other, they debate and take authoritative decisions about the constitutionality of statutes before them. This inherently ‘judicial’ behaviour, institutionalized in the

[38] Council decisions consist of numbered paragraphs. In the 1974–9 period, the average length of decisions, calculated annually, was 7 paragraphs, with a high of 8 in 1975.In the 1980–6 period, the average length of decisions, calculated annually, was 23, never falling below 13, with a high of 42 paragraphs in 1983 (Stone 1992a: 101).

1980s, is now a ubiquitous feature of the legislative process.[39] Referrals transfer these constitutional debates to the Council. In this way, legislators participate in the construction of the constitution, providing the legal materials for constitutional adjudication, and legitimizing the Council's political authority.

Last but not least, judicialization also transformed the nature and function of the French judiciary (Cour de Cassation 1995). As constitutional review steadily undermined legislative sovereignty, judges asserted their own authority to interpret statutes and enforce the constitution.In the early 1980s, the supreme court—the Cour de Cassation—developed a rule that requires civil judges to do what traditional constitutional orthodoxy forbids, namely, to rewrite by interpretation statutory provisions so that they conform to constitutional law.[40] Litigants now not only invoke constitutional rights in their arguments, they sometimes win.Recently, France's high administrative court, the Council of State, has begun converting its own 'general principles of law'—a body of judge-made restrictions on administrative action that includes 'individual liberty', 'equality before the law', and 'freedom of conscience'—into equivalent rights developed by the Council.

After two centuries, the French constitution is judicially enforceable law.

Conclusion

One virtue of the model is its inherent capacity to translate between micro-level effects or outcomes and macro-level effects or outcomes, simultaneously.The theory generates testable propositions about behaviour and outcomes at both levels. These propositions can be evaluated by focusing empirical attention—at one point in time, at one level of analysis—on the strategic interaction of individuals, the micro level, or the development of normative structure, the macro level, while holding the other level constant. The theory implies, however, that we will not be able to explain systemic change adequately if we privilege,

[39] In parliament, formalized rituals, in the form of parliamentary 'motions of unconstitutionality', organize deliberations.The motions require the chamber to debate and rule on the bill's constitutionality. The opposition, the government, and the majority support their respective positions by citing constitutional texts, legal scholarship, and the Council's existing case law.If the motion passes, the bill is declared unconstitutional and it is killed.Because votes are governed by party discipline, motions never pass. In the 1981–7 period, the National Assembly debated and voted on 94 motions of unconstitutionality; the Council rendered 93 decisions over the same period (Stone 1996).

[40] In the presence of a law deemed unconstitutional, all that judges can do is correct the law by rewriting it, since a law once promulgated is immune to review.

systematically and a priori, the causal importance of one level vis-à-vis the other.The point deserves elaboration.

I have argued that how systems of governance emerge and evolve has everything to do with the interdependence of rules and strategic behaviour. If I am right, shift 2 is partly the province of neo-rationalism and game theory. Rational individuals maximize utility by adjusting behaviour, including how they reason through and talk about norms, to changes in rules of the game. In clarifying the scope and content of existing constraints, triadic rule-making shapes how players calculate the pay-offs of available strategies.Stage 3—the triadic dispute resolver's response to the dilemma posed by the delegation of political authority—can also be understood in neo-rationalist terms. Her interest in her own survival leads the triadic figure to behave in predictable ways.

The analysis also suggests that neo-rationalism alone is inadequate to the task of explaining systemic change. Game theorists rely heavily on structure, conceived as fixed rules, to provide the conditions necessary for predicting outcomes from strategic interaction. Although the macro level is an integral part of any game-theoretic analysis, all the action that matters actually occurs at the micro level.Game theorists openly admit that they have barely begun to theorize the dynamics of institutional change (see Tsebelis 1990: Ch.4). This article suggest that to the extent that neorationalism does not account for crucial mechanisms of social change, including the relatively autonomous, independent impact of normative discourse, its explanatory scope is limited. Put in terms of my theory, the value of neo-rationalism declines as we move from the right to the left hemisphere of the circle (Fig.1.1).

The social world produces, consolidates, and stabilizes structure in various ways.I have focused here only on the capacity of TDR to generate an iterated, organized, and therefore social process of reasoning about rules.The theory predicts that, once constituted, triadic governance will organize the future by constructing and then managing the causal relationships between social exchange, conflict, and normative development. Once these relationships are established, TDR perpetuates a discourse about the pertinence of rules to behaviour, and this discourse gradually penetrates and is absorbed into those repertoires of reasoning and action that constitute political agency. Read this way, stages 4 and 1 are partly the dominion of students of institutionalization and structuration. Organizational theorists (Powell and Dimaggio 1991), social psychologists (Rosenberg 1995), constructivists (Giddens 1984; Onuf 1989; 1994; Wendt 1992), culturalists (Eckstein 1988), and public law, ‘new institutionalists’ (Smith 1988), reject the neo-rationalist assumption that the essential properties of individual actors, or of rationality itself, are exogenously fixed or inherent.

Instead, individual identity—how actors form, comprehend, express, and pursue their preferences—is understood to be socially constituted and therefore capable of being socially reconstituted.

My theory, in effect, incorporates the constructivist point, without denying that self-conscious, strategic behaviour at the individual level is a permanent fixture of social life. Self-interested behaviour, in fact, animates the model. But the efficacy—or rationality—of this behaviour is heavily conditioned by macro-level structure; and components of this structure are significantly independent of micro-level phenomena.

If I have correctly identified the causal linkages connecting dyadic exchange, TDR, and normative structure, then those who initiate TDR cannot meaningfully control the outcomes produced by triadic rule-making. Viewed over time, from the ex ante perspective of those who contract and delegate, outcomes will not mechanically reflect the distribution of preferences and capabilities among the actors within a given community. Rather, because triadic rule-making secures and enhances the relative autonomy of normative structure—and of normative discourse—vis-à-vis actors, the world it builds is only partly predictable by them, and can therefore be only partly intended. Put differently, the world of triadic governance evolves according to the logic of path dependence, manifested by the increasing dominance of triadic rule-making—for example, case law and precedent—over the content of normative structure, and lock-in, manifested by the institutionalization of those forms of social exchange that best respond to the evolution of this rulemaking (for applications to political analysis, see Pierson 1996a; 1997).

To return to my cases: the theory predicts that, given certain specified conditions, a sustained move to TDR will reconstruct, gradually but inevitably, the nature of governance. In the two polities examined here, and in more formal tests of the theory,[41] this prediction was borne out. States and French politicians began as jealous guardians of their own sovereignty, deeply hostile to judges and to legalism; in pursuit of their own political objectives, they delegated meaningful political authority to triadic dispute resolvers; and triadic rule-making reconfigured the Fifth Republic and the trade regime. The evidence further suggests that the move to triadic governance stabilized and made both polities more resilient in the face of potentially debilitating conflict. Propositions about the future are also suggested. There will be no French Sixth Republic; rather, the

[41] Stone Sweet and Brunell (1998a) and Stone Sweet and Caporaso (1998a, b) test a series of specific hypotheses derived from the theory in their explanation of European legal integration, the process through which a trans-national legal system for the European Community has been constructed.

French are already living in the new, more supple republic institutionalized by triadic governance. And in the WTO a powerful supranational governmental authority will emerge: litigation will steadily rise; and judges will generate an expansive legal discourse that will gradually reshape the inter-state discourse on trade.

To conclude, it bears repeating that systemic change is explained, but not preordained, by the theory.[42] Judicialization processes could have been blocked or reversed; states and parliamentarians could have stopped activating TDR; they could have renegotiated new normative structures to govern their relations; they could have abolished judicial power. But, unwilling to forgo the benefits of TDR and unable to agree on alternative arrangements, they did not.

Instead, they constructed triadic governance and triadic governance reconstructed them.

[42] See note 7 and corresponding text. Further, I have left under-theorized, or ignored altogether, certain patterns of behaviour that are of obvious importance. First, I had little to say about why and how actors negotiate the terms of their exchange in the first place, although the more commitment-based are the rule-structures they build, the more push for judicialization we can expect; I thank Nicholas Onuf for reminding me of this point. Second, the kind of perpetual motion machine theorized, one that produces ever higher levels of legal discourse and triadic authority, has not functioned in most polities in the world, past or present. Two families of negative cases were nonetheless identified. Actors may be willing to tolerate, or even cultivate, dyadic conflict without moving to TDR. In some cases, as when their respective identities are constituted in opposition, disputants may have a higher interest in maintaining the conflict. In other cases like zero-sum situations, for example, no joint gains issuing from dispute resolution are possible; and in still others, neither party may be willing to budge from original, fixed, and radically opposed positions—there is no negotiating space for the triadic entity to exploit. A second class of negative cases concerns instances in which the move to TDR does not tend towards rule-making but to rule-reinforcement and social control. Finally, I provide no theory of judicial rule-making, that is, how the dispute resolver interprets and makes rules.Nonetheless, core elements of such a theory are implied in the 'Constructing Governance' section (Shift 3, and note and corresponding text), and in my treatment of the two case studies.

Appendix

Table 1.1. Dispute Settlement Activity in the GATT, 1948–1989

	1948–59	1960–69	1970–79	1980–89	Totals
Complaints					
Complaints filed	53	7	32	115	207
Settled: conceded by defendant	22	2	12	28	64
Settled: withdrawn by plaintiff	10	0	5	40	55
Settled: panel rulings	21	5	15	47	88
Panel activity					
Panels convened	25	5	22	59	111
Rulings rendered	21	5	15	47	88
Published opinions	9	4	14	19	46
Rulings					
No violation by defendant	6	0	7	7	20
Violation by defendant	15	5	8	40	68

Source: Adapted from data presented in Hudec (1993: Ch. 11).

Table 1.2. Dispute Settlement 1980–1988: Compliance Among Selected States

State	Complaints against	Adverse ruling	Compliance*	Non-compliance**
US	36	9	6	4
EC	30	9	5	3
Canada	9	6	4	2
Japan	14	4	4	0
All other states	14	7	7	0
TOTALS	103	35	26	9

* Includes promises to comply made by defendant state.

** Includes three instances of non-compliance on part of the EC; the disputes were settled to the plaintiff's state's satisfaction after subsequent trade negotiations.

Source: Adapted from data presented in Hudec (1992: 34–5).

Table 1.3. The Review Activities of the French Constitutional Council, 1958–1993

	1959–73	1974–80	1981–7	1988–93
Referrals	9	66	136	98
President	0	0	0	0
Prime Minister	6	2	0	4
President of the Assembly	0	2	0	1
President of the Senate	3	0	2	3
60 deputies, or 60 senators	0	62	134	90
*Decisions**	9	46	92	70
Censuring text	7	14	49	38
Favourable to text	2	32	43	32

* Due to multiple referrals, the number of referrals since 1974 is larger than the number of decisions.

Source: Stone (1996).