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2002

Book (OUP): On Law, Politics, and Judicialization: Path Dependence, Precedent, and Judicial Power

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Available at: https://works.bepress.com/alec_stone_sweet/8/
Path Dependence, Precedent, and Judicial Power

Alec Stone Sweet

Given certain conditions, legal institutions will evolve in path dependent ways: that is, the social processes that link litigation and judicial law-making will exhibit increasing returns. Once under way, these processes will build the discursive techniques and modes of decision-making specific to the exercise of judicial power; they will enhance the capriciousness of judicial rule-making vis-à-vis other processes; and they will, periodically but routinely, reconfigure those sites of governance constituted by rules subject to intensive litigation.

The paper follows a line of research on how new legal systems emerge, mutate, and mature, and with what political consequences (for example, Stone 1992a; Stone Sweet 1997; 2000). The concepts of path dependence and increasing returns have at times been deployed and given empirical content (especially Stone Sweet, Chapters 1 and 4); still William Stone Sweet and Capozza 1998a); nonetheless, they were used to complement other theoretical materials and priorities, and were left under-theorized. Here I provide explicit theoretical foundations for the path dependence of legal institutions, and an argument as to why this should matter to social scientists and to lawyers.

A much longer version of this paper, co-authored by Margeret McCown, was presented at the Colloquium on Law, Economics, and Politics, the Law School, New York University, October 2000. The first part, presented here, provided a template for collecting and analyzing data on the use of precedent in the European legal system, analyses that comprised the second part of the original paper (Stone Sweet and McCown 2000). Margeret McCown, a graduate student in political Oxford, and Stone Sweet continue their collaboration on the recording stage of the project. McCown's contributions to this chapter were invaluable, but Stone Sweet is alone responsible for what is written herein. He also benefited from discussions with James Capozza, Paul David, John Fortunato, Ronald Jepperson, Louis Kornhauser, Paul Pierson, Martin Skidelsky, and Mark Thacker.

Legal institutions are path dependent to the extent that how litigation and judicial rule-making proceeds, in any given area of the law at any given point in time, is fundamentally conditioned by how earlier legal disputes in that area of the law have been sequenced and resolved. The paper elaborates a model of 'judicication in which institutional development and decision-making are linked through highly organized discursive choice-contexts, meso structures called 'argumentation frameworks'. Argumentation frameworks are curated by judges as legal precedents. Litigants and judges are assumed to be rational utility-maximizers; but they are also actors who pursue their self-interest in discursive ways, through argumentation and analogic reasoning. Sustained, precedent-based adjudication leads to outcomes that are both indeterminate and incremental: that is, they are path dependent. I conclude by addressing various implications of the argument which taken together define an agenda for research.

Theoretical Issues

To invoke the metaphor of path dependence as a shorthand summary of why a particular state of affairs emerges, changes, or persists may be a useful theoretical device, but it can also be an empty one. Both proponents and critics of path dependence approaches to social institutions are right to insist on the need for clearer theoretical exposition and rigor (Goldstone 1998, Pierson 2000). Path dependent explanations are compelling only to the extent that they elucidate how effects and outcomes that operate and are observable at a systemic—micro—level, are linked, across time, to effects and outcomes that operate and are observable at the domain of the individual decision-maker: the micro level. Such linkages develop through a positive feedback mechanism: a nascent, or maturing, standard of behavioural does increasingly larger, and better networked, individuals to behave similarly, that is, in ways that adapt to, and thus reinforce, that standard. In the sections that follow, I introduce basic concepts, and then discuss the conditions under which I expect legal institutions, especially judicially-constructed argumentation frameworks—what Americans call 'doctrine'—to develop in path dependent ways. And I specify the kinds of outcomes that mechanisms of positive feedback are likely to generate at both macro and micro levels.

Path Dependence and Feedback

The idea that certain kinds of processes and outcomes are better explained by a logic of path dependence and increasing returns rather than a logic
of path independence and decreasing returns has gained more adherents across the social sciences, while remaining controversial. Long a staple of evolutionary economics (for example, Ayres 1966, the work of Brian Arthur (1994), Paul David (1985: 1994: 1997), and Douglass North (1990) has brought the idea to the forefront, provoking important discussions about its nature, scope, and applicability (for example, Goldstone 1996; Libswathub and Margolis 1995). The idea is controversial because it is "fundamentally hostile to a predictable, equilibrium economics" (Goodstein 1995: 5209), wherein the interplay of dichotomous forces—for example, supply and demand—will push systems—for example, markets—to stability through mechanisms triggered by decreasing returns. And, unlike a natural selection approach to say, the choice of technological standards, the path dependence approach does not assume the superiority of the choice ultimately made relative to other options. Indeed, economic historians have produced a long series of compelling empirical studies to bolster the claim that it is often "only the sequence of choices—driven by chance and trivial circumstances—that will eventually give one technology the attributes of the fittest" (David and Greenstein 1990; Foray 1997: 755).

Increasing returns approaches are at least presumptively applicable to research on the evolution of political institutions, that is, to the study of how bodies of law—policy—are chosen through the activities of governmental organizations. I understand Pieron's (2000) argument on this point to be more or less definitive, and will not rehearse them here. Instead, I take up two standard reference points for any general discussion of the topic: Arthur's (1994: Chs 2, 4) and David's (1994: 1997) summaries of their own ideas and findings.

Arthur identifies the basic characteristics of social processes driven by increasing returns dynamics. First, initial conditions do not determine outcomes. Second, precisely because, at the ex ante moment, end points are unpredictable, the analogy will be able to explain any subsequently constituted state of affairs only in relation to a particular sequence of choices. The outcomes of intermediate events [that have taken place] between initial conditions and the endpoint (Goldstone 1996: 83). Third, to the extent that any intermediate choices determine the sequence and content of subsequent choices, the observed process will exhibit non-ergodic properties. Small historical events can become durable effects (Baumann et al. 1996: 160) through positive feedback: "The micro behaviour of the system—for example, the relevant decisions taken by individuals in the second instance—will amplify the 'distribution of choices produced during the first period' (Foray 1997: 743). Fourth, in so far as outcomes are embedded as aggregate social choices or, investments, the cost of transition away from the new standard will be high, even pre-emptively so. Last, these processes possess a common structure. At a beginning point, a range of choices, formats, or templates for a particular form of behavior are available; at one or several critical junctures two of these choices gain an advantage, however slight, and this advantage is continuously reinforced through positive feedback. Ultimately, the choice becomes dominant, or 'locked in', as a relatively taken-for-granted state of affairs.

Systems become path dependent through positive feedback, essentially adaptation and network effects that are gradually institutionalized as stable practices. David 1 and Arthur showed that some kinds of situations would be more conducive to producing feedback than would others, especially those featuring positive network externalities. Because the adoption of a technical standard or certain kinds of social norms reduces uncertainty and enables large numbers of individuals to construct productive relationships with one another, the marginal benefits of adoption will rise with each decision by other actors to adopt. Snowballing effects, which institutionalizes, or 'locks in', the choice. David (for example, David 1990) and Arthur also argued that increasing returns dynamics would be particularly prevalent in knowledge-based industries: localized learning mixes with network effects to produce path dependent dynamics and systemic inflexibility. Where certain fixed costs are associated with adoption, such as investments in infrastructure or training, the costs of reversing course or adjusting to a different or presumptively better standard is correspondingly higher.

Some elements of David's work (see especially David 1994) connect to more sociological views of institutions. Institutions—from conventions to formal rules—structure social settings, by "aligning individuals' expectations and pass on us ways that enable coordination, given cognitive limitations and the existence of multiple solutions to any given cooperation game (David 1994: 209-210), a standard formalization. Pushing further, David 2

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1 A path dependent process is "non-ergodic"; systems possessing this property cannot behave of the effects of past events, and do not have a limiting, favorable probability distribution that is independent of the entire state space (David 1995: 22).

2 Critical junctures are not necessarily events that actors understand as "big or important" when they took place. Their importance may become clear only after an event. Consider Merlot vs. Malome (UBC 1968) or the European Court of Justice's decision on direct effect and supremacy (see Chapters 6, 8).
suggests that it is the dynamic, and path dependent, interplay between institutions, organisations, and agency that generates complex institutional arrangements (see also North 1990). For our purposes, the critical issues are how such arrangements are selected and how domains, once organized through rule structures, reproduce themselves. As sociologists have long understood, organizations not only become possible on the basis of rule structures but also serve to reinforce and to evolve new institutions, allowing actors to respond incrementally and more or less predictably to changes in the environment.

Simplifying, David argues that the more any organization—or linked clusters of institutions and organizations, an organizational field—possesses effective procedures for processing information, adapting rules to situations, and monitoring the activities and performance of individuals, the more likely it is that the domain of action governed by that organization will evolve in path dependent ways. Organizations develop and instil 'codes' that socialize actors into relatively coherent, 'ideal-type' roles (following Arrow 1974; cited in David 1994: 212-13). Socialization, of course, is a ubiquitous form of positive feedback, and therefore is easily understood in terms familiar to students of path dependence more generally. The codes, heuristics, ideal-type roles, or 'performance scripts' (Jepperson 1992)—that guide action in any field typically exhibit some measure of non-ergodicity and irreversibility. Whether borrowed and adapted wholesale or gradually developed through trial and error, such codes:

... are not instantly created and learned, and so constitute a form of 'durable capital' whose costs are ' sunk'; they become more reflexed and ... ingrained through repeated use, rather than eventually wearing out, [in contrast to] most tangible forms of productive capital. (David 1994: 213-13)

With use, institutions supporting the domain typically become more differentiated and the codes more increasingly articulated. In so far as they do, actors will, in order to access and exploit the organization's resources, specialize 'in the information capable of being transmitted by the codes'. Although specialization enables productive activity, it also imposes costs, to the extent that actors, over time, 'become less efficient in acquiring and transmitting information not easily fitted into the code' (Arrow 1974: 57).

Specialization provokes branching within the codes and vice versa; branching is a prototypical path dependent mode of institutionalization; and institutionalization proceeds through feedback mechanisms (see also Stone Sweet, Chapter 6, this volume).

The similarity between these ideas and those of the 'new institutionalists' in sociology (for example, Powell and DiMaggio 1991) and particularly the John Meyer group at Stanford (research surveyed by Jepperson 2003) should be obvious. In myriad ways, organizations function as gatekeepers to discrete domains or fields. They recruit, instruct, and credential actors and they authorize certain kinds of political activities while discouraging others.

The Path Dependence of Legal Institutions

Theoretical interest in the process through which judicial authority emerges and evolves over time seems never to have been widespread or sustained in the social sciences. Law is commonly presumed to be relatively stable feature of the social environment; and the sources and consequences of judicial rule-making are often ignored or explained away. Game theorists assume fixed rules in order, among other things, to assess the likely impact of different legal regimes (for example, Braith, Centener, and Picket 1994), and they have not resolved problems associated with modelling the dynamics of judicial rule-making (see the exchange between Vanberg 1997a and Stone Sweet 1999b). Constitutional political economy focuses almost exclusively on institutional design, as if institutions do not evolve meaningfully once they enter into force and as if constitutional adjudication and rule-making did not exist (for example, Brennan and Buchanan 1985; Voigt 1999). The field of law and economics generally seeks 'to explain and to evaluate the content of legal rules rather than the process by which they are created' (Kornhauser 1992: 169). And in much of the world where a formalist legal positivism still reigns as orthodoxy, scholars typically depict the law as a self-contained system that determines outcomes (Menynast 1985; Schlink 1993).

There are some obvious reasons why the processes through which legal institutions evolve ought to be subject to the dynamics that typify the evolution of non-ergodic dynamical systems more generally. Legal rules are, after all, standards of behaviour that judges select, enforce, and revise. Judicial rule-making, being more or less authoritative, should function to reduce uncertainty about the nature and scope of the standard, and also to provoke and reinforce feedback effects: there is rarely an analog to judicial authority

1 David himself does not make these connections explicitly.
2 braith has grown substantially in recent years, for example: Dawson and Garth (1995); Groff (1999); Milliron, North, and Weingast (1990); Stone Sweet (1999b); Staplton (1988).
in accounts of how technological standards are selected or discarded in a
decentralized market. If judges begin to construct contracts in ways that
impose one type of risk allocation on parties rather than another, then future
contractants will have an interest in adapting to this rule-making to the
extent that risk allocation is basic to commercial exchange and given that
the parties know that a legal dispute between them is always possible. Judges
help actors to discern: their activities increase the confidence, among those
contemplating adoption, that a sufficient number of others will make the same choice (see Gillette 1998: 819–20). Further, if
the judicially censored standard becomes the actual standard, then it is all
the more likely that disputes that arise under it will be resolved through
subsequent adjudication.

Some institutionalists, concerned more with identifying basic mechan-
isms of institutional change rather than with the work of law and courts per
so, give judicial rule-making pride of place. North (1990), for example,
arises that courts, by enforcing property rights and adapting the law to
changing circumstances, reduce the transaction costs associated with imper-
sonal exchange, helping societies expand markets and wealth (see also Stone
Sweet and Woolhandler 1986, 1990). The incremental tech-
niques of common law adjudication comprise a paradigmatic mechanism
for generating, and then continuously revising, the norms and 'logics of
appropriateness' that organize human community. In the legal literature, a
handful of important articles explicitly take, or argue for, a path-dependence
perspective on the development of legal institutions (for example, Gillette
1998; Kornhauser 1992a, b; Roe 1996; Stearns 1995). It is
for varied purposes.

In the rest of the paper, I seek to push this agenda forward by
specifying the theoretical foundations of a path dependent model of
adjudication.

Organizational Factors

Legal institutions—for example, substantive law, rules of standing and
jurisdiction, doctrinal principles, canons of construction, and so on—
are partially evolve through adjudication. I argue here that certain common
features of adjudication favour the path dependence of these institutions.
If some minimally robust conception of precedent exists, I do not claim that
these features are essential characteristics of all legal systems, or that they
exert the same effect everywhere. Indeed, where these features are not
present, or where the effects of the factors discussed are mitigated by other
unspecified factors, I expect the path dependence of legal institutions to be
commensurably weaker.

First, courts typically do not control the temporal order of cases that come
before them. In any legal domain, judicial rulings on cases that come first
will exert influence on subsequent litigation and judicial decision-making.
This will be so to the extent that courts frame their decisions in light of
prior decisions and litigants adapt their claims to the courts' rule-making
(see below). Where a judicial decision itself provokes a stream of cases, such
as when a ruling expands the opportunities for, or enhances the benefits of
litigating for some class of individuals, increasing returns properties are most
obvious. In any event, in the overall process of selecting a legal rule, or in
clarifying its meaning over time, there are likely to be significant 'first mover
advantages' not unlike those identified by economists (see Mueller 1997). In
negative terms, the claim is that, if one could run a sequence of cases
differently, one would find that judicial outcomes too would be different,
and they would trace a different path.

Second, adjudication constitutes a dichotomous discursive field in which
specific legal questions are typically asked in a 'yes–no' format (Kornhauser
1992a: 291). Each party seeks different answers from the judge, and each
party makes counter-arguments in light of the other's claims. In the next section,
I draw out some of the consequences of this structure for how legal actors
are likely to behave. For now, it is enough to note that judges not only answer
at least some of the questions posed to them but also give reasons for
why they have chosen one result over another.6 Dispositive answers
given to yes-no questions possess the inherent capacity to block one path of
development while encouraging another. Further, when judges justify their
rulings with reasons, they at least implicitly announce prospective rules
which subsequent litigants will understand and use as templates for future
argumentation in cases that are similar in some salient way. If this is so, the
path independence of legal institutions will be unlikely or exceptional.

Third, adaptation and network effects, to be registered on the behaviour of
judges, lawyers, and professionals, are facilitated by the fact that records of
judicial activity are heavily documented. Published decisions typically include
a description of the relevant or settled fact context of the case, a survey
of the main arguments and counter-arguments, the dispositive decision, and
the justification. The lawyers' briefs and the other summaries of the parties' argu-
ments are also usually available. Lawyers, who through training and practice

6 In some politics, some courts are legally required to provide written legal justifications for rulings made.
learn to take their cues from these materials, are commonly organized into relatively autonomous groups that roughly map onto relatively autonomous domains of the law. If distances of law develop along separate path-dependent lines, then the processes that serve to construct various networks of legal professionals will also be path dependent.

Fourth, judicial rule-making is typically embedded in these matrices of legal rules, some of the properties of which will favor, agitate, increasing returns logic. As noted, the pre-existing records of relevant judicial activity will heavily condition the work of lawyers and judges, given almost any conception of precedent. Further, at any given point in time, the existing law relevant to any specific dispute may itself be relatively indeterminate and path dependent in the sense of being more or less immune to change through adjudication. This point applies to bodies of substantive law—particular distributions of rights and obligations governing interactions in a specific social context—but also to procedure and to principles of standing and jurisdiction. Last, but not least, modern legal systems typically organize legal acts hierarchically, and this fact has consequences for system inflexibility, that is, for the capacity of other political actors to alter or reverse judicial outcomes.

To take a concrete example, the German Basic Law centers upon the Federal Constitutional Court the authority to defend constitutional rights, and declares the primacy of those rights over any other conflicting legal provision. Any German statute can be attacked for violating rights provisions by almost any actor in society, public or private, if the German Court agrees with the petitioner and strikes down a statute, reversal is virtually impossible, except through a subsequent decision of the Court. This is because the Basic Law protects basic rights from substantial change through constitutional amendments. More generally, whereas constitutional judicial review operates in a routine and minimally elective manner, the path dependence of constitutional law, because of its normative supremacy vis-à-vis other legal means, will be assured. Given network effects, the relative indeterminacy of any body of law will be largely determined by two factors: (1) the density of judicial rule-making in that area, and (2) the relative ease or difficulty of overturning the law-making effects of judicial decisions through non-judicial means (see Stone Sweet 2000: Chs 2, 7).

In summary, how courts typically operate and how legal actors typically behave are likely to provoke and then sustain the path dependent development of litigation and judicial rule-making. Given some underlying notion of precedent, these processes can be expected to exhibit some significant degree of randomness—through the vagaries of sequencing—and non-ergodicity—through the survival of rules announced to past rulings and judicial rule-making can be expected to provoke positive feedback effects—more litigation and the construction of litigation networks—and to move the law along paths that are relatively inflexible—that is, costly or impossible to reverse.

Judging and Precedent

Precedent is basic to the path dependence of the legal system. It is at the heart of the organizational role that judges carve out for themselves. If courts did not justify their decisions with reasons, or if legal communities did not consider the records of those justifications to be relevant to the conduct of future litigation, then there would be no increasing returns to this code. In this section, I stipulate the micro-foundations of precedent, and then elaborate a very specific view of the phenomenon. As with any such stipulation, I will surely leave out elements that others consider to be crucial.

I note beforehand the existence of a dense, if disjointed, literature on precedent and the doctrine of stare decisis. The orthodox view, continuously reiterated in traditional academic discourse, has it that precedent and stare decisis perform a set of linked functions. They help judges discover and to apply rules of law presumed to be discoverable; they enhance legal certainty for the law's subjects; and they help judicial law-making—an intrinsically decentralized mode of governance—achieve a semblance of centralization and systemic coherence. Others take perspectives external to the law per sé. For Stone Sweet (1998b) and Chapman (1984), precedent follows naturally from giving reasons for decisions, which is one of the basic techniques judges have to convey the permanent "essence of legitimacy" in which they find themselves (see also Shapiro 1980 and Chapter 4). Shapiro (this Chapter) argues that it enables courts to evolve and to emit clearer signals in the face of an "expert noise problem", the sheer quantity and richness of litigation that confront judges.4 Busnerness (1994) argues that the doctrine that precedents are binding serves to enhance each judge's power with respect to future judges, their accounting for its popularity. For Sturm (1997: 1537), stare decisis allows courts to escape "cycling problems"—majority voting situations in which there is no Nash equilibrium—being the "social choice equivalent" of the prescription on reconsideration of a rejected position that one finds in legislatures (see also Rothbard 1984). Each of these logics has merit, and I draw connections with some of them in the discussion that follows.

4 Herein (2016) specifies the problem as one of uncertainty and imperfect information.
Further, since the advent of legal realism, there has been a long-running debate on the question of whether, why, and how precedents are binding (recent expressions include: Calabresi, Knight and Simester, 1993; Legal and Speth 1996). Empirically, we know that legal actors routinely behave as if the legal materials contained in past court decisions were directly relevant to their purposes in the present; but we also know that judicial outcomes regularly depart from the parameters that pre-existing law would fix. Although this may mean my central objective, this paper responds to this controversy. Most important, I reconceptualize the relationship between precedent and judicial rule-making as one in which the former enables the latter.

**Precedent: Analogic Reasoning and Argumentation**

Two basic claims about law and judges underlie my conception of precedent. First, judicial outcomes are fundamentally indeterminate. The generic source of the law’s indeterminacy lies in the essential tension between the abstract nature of the social norm on the one hand, and the concrete nature of human experience on the other. Any particular social situation is in some meaningful sense unique, whereas norms are specified in light of an existing or evolving typology of fact contexts, an abstraction that deprives situations of some of their richness. One could imagine a world in which this tension did not exist. In a community governed by what Neil MacCormick (1989: 1) has called the ‘special providence model of law’, for example, a perfect normative system clearly specifies, for every individual in every possible situation, the rights and duties necessary for the community to achieve optimal collective goods. In such a community, the law would constitute a ‘complete’ social contract (see Milgrom and Roberts 1992: 127–32). In the world we know, all bodies of law are imperfect and incomplete, hence one of the basic social functions of courts: to adapt norms of behaviour to the needs of those who live under them, over time, given changing circumstances.8

Second, judging, far from being a neutral activity, is instead a manifestation of a deeply rooted human penchant for using analogic reasoning to make sense of, and to manage, the complexity of the environment. For cognitive psychologists, analogical reasoning is the process through which people ‘reason and learn about a new situation (the target analog) by relating it to a familiar situation or source analog that can be viewed as structurally parallel’ (Holyoak and Thagard 1997). The ability to construct analogies is widely considered to be an innate part of thinking (Keane 1988; 81).

If judges are expected to recognize legal disputes in light of the dictates of the law, then they will have little choice but to ‘complete’ the law on an incremental basis. That is, judges will become law makers.

8 I have quite consciously not referred to the scholarly literature in law and philosophy on the uses and abuses of analogy in reasoning. My point is that analogical reasoning is part of the deep structure of legal reasoning, regardless of how legal actors actually use it. In legal scholarship, analogical reasoning is more or less taken for granted as one of the mechanisms through which case law develops. Minsky (1986: 232) calls it ‘a vital tool in legal reasoning’ and Sunstein (1985: 74n) states that ‘reasoning by analogy is the most familiar form of legal reasoning’, but both lament the lack of serious attention given to its actual role in producing legal outcomes. I am aware of only two studies that relate the cognitive psychology of analogical reasoning to precedence-based legal reasoning (Irwin et al. 1993; 1999), both report experiments using subjects untrained in the law, and neither examines litigation or judicial outcomes.
Researc( has shown that, at any given moment in time, people have some discretion in their assessment choices, over which analogous cases gets mapped into unfamiliar situations and how, but the set of available analogues is finite, having been determined by prior events and choices. In adjudication, analogical reasoning has been institutionalized as a set of relatively stable practices. Lawyers and judges use it selfsciously, and the results of their deliberations are, I repeat, heavily documented, which facilitates the identification and mapping of appropriate analogies. Of course, in crafting their arguments and decisions, litigants and judges also work to achieve logical or systemic coherence through other methods, such as deduction and abduction.

Although analogical reasoning induces the organizational codes that structures the domain of law and adjudication, it is also a functional instrument of decision. Legal reasoning does make essential choices concerning which and how legal norms are to be applied to concrete situations, and with what social consequences. Judges will answer these questions in light of how they have answered questions raised with respect to prior, analogous situations rather than merely the problem of deciding the analogical reasoning is not only one of the skills action requires, as the judges' own legal legitimacy. By formalizing the results of analogical reasoning into precedents, say through abdication, judges give the legal system a measure of "relative determinacy" (see Sartor 1994: 265-6). In providing analogues to other actors, they enhance the coherence of the litigation environment, thus reducing randomness and noise. And by grounding judicial rule-making in decisions present in existing case law, the judges mitigate the problem that the precise content of the law governing a particular social situation could not have been known to the parties at the time their dispute erupted (see Stone Sweet, Chapter 1, this volume). None of these points is incompatible with the view that these s who litigate and those who judge are goal-oriented. Indeed, the argument is that legal actors will sharpen the analogical reasoning we through training and use, precisely because they are rational, strategic actors, operating within an organizational code that requires such skills of them.

I now turn to precedent or, more precisely, to argumentation frameworks. Prior legal decisions and materials that enable the construction of such frameworks. Legal systems are webs or clusters of relatively autonomous argumentation frameworks. Argumentation frameworks are discursive structures that organize: (1) how parties in legal disputes understand the options that judges and engage in a given exercise, and (2) how court frame their decisions. 10

10 Due to space limitations, only the main features of such frameworks are discussed here.

Sartor (1994a), can be analyzed as a series of inference steps represented by a statement justified by reasons or inference rules that lead to a conclusion. Such frameworks typically embody inconsistency to the extent that they offer, for each inference step, both a defendable argument and a counter-argument from which contradictory—but defensible—conclusions can be reached. In resolving disputes within these structures, judges choose from a menu of those conclusions.

In practice, legal argumentation, unlike purer forms of logical deduction, tends to be "non-monotonic." In a monoatomic reasoning, "no logical consequence gets lost by extending the premises from which it has been deduced" (Sartor 1994: 265). The primary source of non-monotonicity in legal discourse is the dialectic relationship between new facts or information about the context of the dispute, and the existing premises that underlie normative conclusions. Particularly susceptible to this dialetic are those argumentation frameworks that contain normative statements that (1) announce general rules and then justified exceptions to those rules, and (2) govern how conflicting legal interests ought to be balanced, or how the conflict between two otherwise applicable norms is to be resolved (for example, when two rights provisions conflict). In balancing situations, which are ubiquitous in constitutional and administrative law, "only the particular circumstances of a case allow a choice to be made," while any new situation may render new arguments possible, which may defeat previously valid cases (Sartor 1994a: 265, 267).

We have returned to the point made earlier: that legal systems and judicial outcomes are indeterminate. Nonetheless, argumentation frameworks provide a measure of at least short-term systemic stability to the extent that they condition how litigants and judges perceive their self-interest, social justice, or other values through adjudication. To be effective, legal actors have to be able to identify the type of dispute in which they are involved, reason through the range of legal norms that are potentially applicable, and assess available remedies and their consequences. Such frameworks, being formalized analogues, help actors do all of these things and more. They require actors to engage not only in analogical reasoning but in argumentation. Considered in more sociological terms, they are highly developed, meso-level structures that connect institutions—the law—to the domain of individual agency by sustaining deliberation about the norms, scope, and application of norms. In cultural terms, they enable specifically placed social actors to adjust existing if abstract "guides to action" to the "relentless particularity of experience" (Eckstein 1988: 735-6) on a continuous basis. Precedent is basic to judicial governance, allowing it to proceed incrementally from pre-existing institutional materials.
An Example

One can expect to find argumentation frameworks wherever one finds sustained litigation, irrespective of standard distinctions made in comparative law.15 The basic elements of argumentation frameworks are legal norms—normative statements—16 as these norms have been interpreted and applied by judges in past disputes. Such structures amalgamate normative materials for the purposes of solving particular legal problems. In tort litigation, for example, judges resolve the problem 'is the defendant responsible for damages allegedly suffered by the plaintiff?' on the basis of how a set of lower-level questions has been argued and answered. These include questions concerning the definition and measurement of negligence, risk assumption, and so on, as well as how chains of causality are to be constructed from the facts. Clusters of rules assembled from different streams of case law typically organize how these different questions are posed and answered. The precise mix of questions and the amalgamated clusters of normative statements that enable legal actors to respond to any given set of questions constitute the relevant argumentation framework.

It may be useful at this point to provide an example of the development of one such argumentation framework, that governing the question 'is flag burning a form of symbolic speech that is protected by the first amendment?' Simplifying, the framework is designed to handle two kinds of lower-order questions. First, what constitutes symbolic speech? Second, to what extent does government have a legitimate, constitutionally recognized interest in limiting rights to symbolic speech?

The analysis of this question took place in O'Brien, where the US Supreme Court overturned a state statute. The Court ruled that the constitution's protection against prior restraint against the publication of offensive materials, as long as the materials in question were 'indecent' (American law), would be protected against government interference. The Court held that the First Amendment protects symbolic speech if certain criteria had been met. O'Brien had burned his draft card, in violation of a federal statute, in protest against the Vietnam War and military conscription. The Court thus held his conviction on the grounds that the statute's purposes were substantially beyond the mere stifling of speech. The statute's purposes were substantially beyond the mere stifling of speech. The

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15 The best systematic, comparative research has shown that there are no great differences in the use of precedent between the so-called common law and civil law systems (Schneider and Zuckert 1992; Zuckert 1995). A case can thus be cited from either body of law, the second from German constitutional law.

16 All statements (obligations, permissions, authorizations, applicability rules, interpretation criteria, preference evaluations, definitions, etc.) susceptible to being used in justifying legal conclusions are fully entitled legal norms; not least because they 'inhere reciprocally in the game of argument and receiver argument' (Kamn 1994: 207).

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draft card fulfilled a variety of administrative functions, such as communicating the rights and duties of the bearer. In deciding the case, the Court was led to formulate the following 'test':

*a government regulation is invalid if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government's interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms in no greater than is essential to the furtherance of that interest.*

Announced in this general and provocative way, this rule could be expected to induce argumentation and deliberation of a specific kind, in light of specific fact contexts.

In subsequent cases, the Court gave the concept of 'symbolic speech' a name and conferred on it the protection of the First Amendment (for example, U.S. v. Eichman 1969). In Spence (U.S. v. Eichman 1974), the Court defined symbolic speech as those words in acts in which 'an intent to convey a particularized message is present' and that 'the surrounding circumstances the likelihood that the message would be understood by those who witnessed it. Hence, those who would claim First Amendment protections for symbolic speech will have to convince the Court that their acts 'pass' the Spence test. They do so in full knowledge that the government will argue the contrary.

By the time of the Texas flag burning case (U.S. v. Eichman), the argumentation framework governing symbolic speech was sufficiently developed to structure, more or less completely, the proceedings. The Court, working through the Spence test, agreed with Johnson that his act of burning the flag, on public grounds during the 1984 National Republican Convention, constituted symbolic speech. Proceeding to balancing, the Court rejected Texas' assertion that the State's interest in protecting the flag—because Texans 'venerate' it—outweighed Johnson's speech rights. After all, to the extent that the flag actually did function as a symbolic repository of collective meaning, Johnson's act could not but be collectively understood (Spence). Given its declared function, the State's prohibition of flag burning could not be disassociated from the direct suppression of speech, and it therefore failed the third prong of the O'Brien test.

In Texas v. Johnson, the law governing symbolic speech was extended to flag burning, with spectacular political effects. But the decision, from the point of view of the argumentation framework, broke no new ground. Instead it reinforced the centrality of a specific cluster of normative statements, found in O'Brien and Spence, to these types of situations. Further,
the outcome in Texas is a path dependent one, proceeding from a particular sequence of accumulated judicial refinements of answers to questions that serve to specify the legal interests of those who would litigate symbolic speech cases. It bears mention in this regard that the law of symbolic speech is relatively indeterminate, as defined above, and will likely remain so as long as the framework remains stable. At the same time, like any balancing framework, this structure provides courts with a great deal of flexibility in that it allows them to justify a ruling for either the speaker or the government: the fact context, not the law, will vary.

Precedent: Rationality and Adaptation
I assume that all legal actors are rational in the sense of being utility-maximizers. I assume that judges seek to maximize, in addition to private interests, at least two corporate values (see also Stone Sweet 2000: 139-50). First, they work to enhance their legitimacy vis-à-vis all potential disputants by portraying their own rule-making as meaningfully constrained by, and reflecting the current state of, the law. Second, they work to enhance the salience of judicial modes of reasoning vis-à-vis disputes that may arise in the future. Propagating argumentation frameworks allows them to pursue both interests simultaneously. Judges may also seek to enact their own policy preferences through their decisions. Yet the more they do so, or the more that other actors understand them to be doing so, the more likely judges will be to attempt to hide their policy behaviour in legal doctrine. Once policy is packaged as doctrine, it will operate as a constraint on future judicial reasoning to the extent that doctrine narrows the range of arguments and justifications that are available to litigants and judges, and to the extent that the law is path dependent.

I assume that litigators are seeking to shape the law in ways that will most benefit their clients, at the moment and in the future. Given the costs of litigation, non-judicial actors will pursue their interests through adjudication only so long as expected returns exceed those costs. In public law litigation, this calculation will be partly conditioned by perceptions of the relative cost and likelihood of achieving the same policy change through other means, such as lobbying for legislative reform. They will do so only in full knowledge that there will be others who will work to block legal change. But in any given domain of law, rationality means deploying those litigation strategies best adapted to achieving desired legal outcomes, given the current state of the law, as that law is constituted by argumentation frameworks. Those who litigate more frequently in any given domain will invest more heavily in mastering the intricacies of relevant frameworks, the organization of field’s codes, and in charting their evolution over time. This is another way of saying that the more the law is path dependent the more we can expect it to branch, and the more incentives legal actors will have to specialize, not least in order to participate in the development of the law.

Implications
If the law is path dependent for the reasons identified, then a range of complex issues are raised. It may also be that, at some times and in some areas, legal institutions are relatively path independent. This possibility, too, raises a set of important and unanswered questions.

The Indeterminate Norm and Judicial Discretion
Figure 2.1 helps to simplify and summarize the argument made thus far, namely, that adjudication functions to reduce the indeterminacy of legal norms through (1) use, that is, argumentation, interpretation, application, and (2) the propagation of argumentation frameworks. The line between

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13 In response to the decision, the US Congress adopted a statute to protect the flag, a law later annulled by the federal courts. A constitutional amendment designed for the same purpose was proposed but never adopted.
point ID—absolute indeterminacy—and point AD—absolute determinacy—
defines the extent to which any given rule can vary along one dimension, that of determinacy. Point ID represents a theoretical pole at which there
exist no stable, collective understandings of the meaning and scope of
application of the rule. Point AD represents the opposite theoretical pole, at
which the collective understandings of the meaning and scope of applica-
tion of the norm are given, rather ID or AD is realistic. For any given
norm, indeterminacy is a relative condition; it will vary in context and over
time. If the law is path dependent, for the reasons given, the position of the
norm on this continuum will move from left to right over time, as the rule is
adjudicated. The broken lines, spreading from point AD define the range
of defensible arguments available for how a rule must be applied to resolve
disputes arising within that rule’s purview. The space constitutes the judge’s
zone of discretion within which the judge chooses among available options
and justifications. If the law is path dependent, this zone will narrow over
time, as the rule is adjudicated. That is, argumentation frameworks that
appear will move from left to right: choice narrows; and frameworks become
more articulated. As this space narrows, so does the discretion of the judge.
The argument made here bears directly on certain debates within contem-
porary legal theory. In so far as legal institutions are in fact path dependent,
certain strains of positive legal theory must be considered at least pre-
sumptively right or supportive of the theory presented here, and other
strains of legal theory must be preemptively wrong. In the former category
we find the positive legal theory of H.L. A Hart and his heirs. Hart (1964;
especially 124–41), understood judicial discretion to be inversely propor-
tional to normative indeterminacy so long as judges did their jobs in an
‘adequate’ or ‘reasonably defensible’ manner. The essence of Hart’s
‘irracional’ manner of judicial law-making—the use of discretion—is defensible
rather than arbitrary to the extent that it proceeds through analogic reason-
ing, in light of precedent, and to the extent that it renders legal rules ‘more
determinate.’ The underlying criteria governing a justified extension of the
law into the ‘vagueness and looseness’ of the new situation to a pre-existing, norm-governed situation.

For Neil MacCormick (1998), a close student of Hart’s, the primary object-
ive of legal theory is the development of standards for evaluating judicial
decisions as ‘good or bad’, ‘acceptable or not acceptable’, ‘rational or arbi-
trary’. Bad decisions are those that cannot, ultimately, be packaged as a
deduction, that is, where the justification given does not proceed logically
from explicated norms and principles. Bad decisions also fail to adhere to the
‘principle of formal justice’ defined as like cases shall be decided in like

[Note 14: In short, rules can be ambiguous in given contexts, and can be applied in one way or
the other only after the ambiguity is resolved. But solving the ambiguity to effect involves choosing
between rival versions of the rule... note that choice is made, a simple deductive justification
of a particular decision follows. But a complete justification of that decision must hinge on
how the choice between the competing versions of the rule is justified.'MacCormick 1998: 62]

[Note 15: (The requirement upon a litigant’s lawyer to file his case as a legal claim or defense
instead of—a two limits on the formulation of the case: first, it must be so formulated as to avoid
conflict with existing, i.e., the possibility of ‘expunging’ and shaming unavailing precedents...
must not be too wide, and secondly, it must be formulated in such a way that it
may be shown to be supported by analogies... have existing law.... preferably authoritatively
stated by judges. Or... by respectable legal writers... or have been newly stated by court-
se as an explaining and rationalizing some relevant group of well-known rules ‘MacCormick
1998: 121.)

[Note 16: The ordinary legal profession is constituted to be in a position in which it, quite apart from any doctrine
of stare decisis or any official in binding sense, the contrast of formal justice obliges a court to adhere to the
need for general rulings on points of law, and their strictness is generally rulings, in essential to the justifications of particular decisions’ (MacCormick 1998: 86).]
no reason to assume, a priori, that the world constructed is an optimally efficient one.

Efficiency and Rigidity

The allocational efficiency of any institution is not determined by the degree to which that institution was the outcome of a path dependent process. As David (1997: 22) puts it, 'Path dependence is not a sufficient condition for market failure'; the two questions are analytically distinct. The account of legal institutions offered here does not need the assumption that the law is at least as 'efficient' as all other possible institutional arrangements, only that such institutions are relatively functional for actors and make them better off than they would be in a world without such arrangements. Put differently, between some theorized optimality point or curve and a situation in which there is no rule structure at all, there exists a huge range of possible outcomes that may become institutionalized through sequencing and feedback of judicial rulings.

The issue of institutional rigidity or inflexibility is potentially more embarrassing. The concepts of path dependence, positive feedback, and increasing returns are all variables, yet this variance is rarely operationalized, let alone explained. Economic historians have produced persuasive, perhaps definitive, explanations of specific episodes of the path dependent development of technology, production standards, and networked systems. Taken as a whole, these explanations add up to something suggestive of a common framework of analysis. But little attention has been paid to path dependence as a dependent variable. If the argument of this paper is right, then ongoing intensive adjudication will produce relatively discrete, path dependent lines of case law. There would seem to be no good reason to think that all argumentation frameworks, let alone the legal rules supported by case law, should be equally path dependent to the sense of being indivisible or locked in. After all, courts may abandon precedent and start over; they may borrow doctrinal materials from other lines of case law considered more successful in some way; and the rule of incrementalism may be violated by dramatic new rulings. Likewise, there would also seem to be no good reason to assume that legal elites should be networked similarly across time and domain. These are empirical issues that deserve sustained empirical attention.

Increasing Returns: To What, for Whom?

In this paper, the phrase 'increasing returns to legal institutions' is suggestive shorthand for the ways in which positive feedback, as managed by judges, generates network effects, helps to spread and entrench organizational codes, and produces path dependent legal outcomes. Yet increasing returns is technically a function, a measurable relation among variables: for example, the relationship of costs, or investments, to profits. It may turn out to be quite difficult for political scientists to produce compelling increasing returns explanations of political institutions if problems associated with ex post evaluation and measurement or variables are not overcome. Where the law directly imposes transaction costs and conditions the exercise of property rights—for example, economic regulation, product liability—calculating the marginal benefits of adjustment to a nascent standard may be relatively straightforward. Yet, in many salient areas of law and politics, calculating marginal costs and benefits is not straightforward, including in the example given above on symbolic speech.

I notice the problem but do not pretend to have resolved it. It is worth emphasizing that the argument developed here is that argumentation frameworks are subject to increasing returns. I do not deny that specific, distributive legal outcomes can be produced through increasing returns dynamics, and may even become 'locked in' in any norm or standard of behaviour might be locked in. But my focus is on the development of argumentation frameworks, not on the specific rule governing the situation; the orientation flows in part from the assumption that legal rules are indeterminate. The production of argumentation frameworks is best modelled as a coordination game in so far as all legal elites—litigants, law professors, and judges—code such codes and are better off with than they would be without such frameworks. Such codes may have distributive consequences in and of themselves, but they also help to define and network the field of adjudication. They are thus basic to the social power of legal elites. The struggle, through litigation, to resolve specific disputes and to make rules to govern specific situations falls outside of cooperative game theory. Argumentation frameworks are the meta-rules that govern this struggle, and meta-rules are probably more easily produced and sustained than are outcomes pursuant to litigation, which is 'play within the meta-rules'. That said, the stability of judicially curated rules heavily depends upon the stability of doctrinal structures.
Conclusion

I have argued that certain characteristics of judging and of courts will favour the path-dependent development of argumentation frameworks, which are the basic codes that define adjudication as an organizational field. At any given point in time, existing argumentation frameworks, and the substantive legal outcomes they help to sustain, will constitute the necessary causal conditions for the emergence of new frameworks, and thus for new extensions of the law.

In principle, the analyst should be able to chart the development of frameworks which should, in principle, chart the evolution of the legal system more broadly. The development of legal institutions will provoke the development of networks of legal actors specializing in that area of the law. For these actors, existing argumentation frameworks establish the basic parameters for action.

The basic unit of observation is the doctrinal or argumentation framework. If a legal system exhibits path-dependent qualities, then the following expectations will be met: and will be causally related to one another.

First, argumentation frameworks will link, through feedback loops, the activities of litigants and judges over time. Litigation will provide opportunities for judges to construct such frameworks, and subsequent litigants will take their cues from judicial rule-making. If such frameworks are path dependent, the sequence litigation → judicial rule-making → subsequent litigation → subsequent rule-making will tend to reproduce itself as a self-reinforcing process sustained by a mix of analogous reasoning and the self-interest of legal actors, that is, potential litigants and judges.

Second, legal outcomes will be both indeterminate and incremental. By ‘indeterminate’ I mean that, the further downstream we are from any given point in the process of selecting or defining legal institutions through adjudication, the more unpredictable will be the content of the rule selected. By ‘incremental’ I mean that the substantive law and argumentation frameworks produced through this process will be predicated on outcomes and frameworks that had emerged upstream. Stated differently, how cases are sequenced and decided will organize the future.

Third, legal institutions will produce network effects that embed them in wider social practices and interests. Substantive legal outcomes and argumentation frameworks will become parameters for, local points of, social action. They will be referenced and used by an increasing numbers of individuals and groups operating in an increasing number of arenas, including those not otherwise directly associated with adjudication.

Fourth, legal institutions will be relatively resistant to reversal or de-institutionalization. This outcome will be governed partly by the decision-making rules that govern reversal of the judicial law-making and partly by the relative embeddedness, through positive feedback, of outcomes over time.