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4 INTERLOCKING JUDGES:
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6 ON JOINT EXOGENOUS AND
7
8 SELF-GOVERNANCE OF MARKETS
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10
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14
15 **ABSTRACT**
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17 *This study stresses the importance of considering a “joint” governance of inter-*
18 *firm relations as an alternative to external governance and self-governance*
19 *of these relations. We argue that a broadly-conceived structural and orga-*
20 *nizational approach to economic institutions provides insights into this joint*
21 *governance because it shows how such a system spreads the costs of control*
22 *among several kinds of stakeholders. We look at how transactions between any*
23 *two firms are regulated through jurisdiction by “consular” judges (i.e. judges*
24 *elected through the local Chamber of Commerce) who indirectly represent*
25 *other firms and industries in that market, and are therefore considered to be at*
26 *the same time third parties and potential levers of influence acting on behalf of*
27 *corporate interests. We study an empirical case of such joint governance: The*
28 *Tribunal of Commerce of Paris (TCP). Following previous work on lateral*
29 *control and leverage, we hypothesize that industries and/or companies that*
30 *have a strong stake in the conflict resolution process will be more represented*
31 *among the judges of this court than other industries and/or companies, and*
32 *that judges who are socially active in the court will be sought out for advice*
33 *more than other judges, and thus gain influence on their peers by suggest-*
34 *ing specific outcomes. The analyses of the composition of the bench and of*
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1 *the advice network data collected in this court display an influence structure*
 2 *that confirms these hypotheses and that is likely to affect conflict resolution*
 3 *between businesses. It thus characterizes joint governance of markets as a*
 4 *complex set of social processes worthy of economic sociologists' attention.*

7 INTRODUCTION

9 Businesses usually try as much as they can to participate in the governance of
 10 their markets. They try to shape their opportunity structure, to structure their
 11 environment, and to uphold the social mechanisms allowing them to cooperate.
 12 At the interorganizational level, at least two different sociological traditions deal
 13 with the issue of governance of markets, stressing either the formal and often
 14 exogenous aspects of this governance, or the informal and often endogenous
 15 character of self-governance.

16 For the first tradition, a socio-legal one, exogenous governance or “regulation”
 17 (Ayres & Braithwaite, 1992; Hawkins, 1984; Hawkins & Thomas, 1984; Shapiro,
 18 1984; Weaver, 1977) is provided by government agencies backed up by courts.
 19 These studies focus, for example, on the decision by government agencies to prosec-
 20 cute deviant companies. Such decisions are not obvious and they often come out
 21 of tradeoffs between official inspectors and company managers. This is especially
 22 the case when they face risks such as large-scale losses and layoffs, and sometimes
 23 bankruptcy, should the law be strictly enforced. The second tradition focuses on
 24 interfirm arrangements promoting self-governance benefits for firms in their intero-
 25 rganizational transactions and more informal conflict resolution mechanisms.¹ Pre-
 26 cisely because litigation is costly, firms prefer informal dispute resolution whenever
 27 possible, especially when they have long term continuing relationships (Macaulay,
 28 1963; Raub & Weesie, 2000). Here the focus is on pressures to conform by one orga-
 29 nization on the other. Pressures are based on resource dependencies and reputation
 30 (Raub & Weesie, 1993; see also Batenburg et al. as well as Voss, in this volume).
 31 Thus, each tradition focuses on a different kind of actor intervening in governance
 32 and incurring the largest share of costs of control: mainly the State and/or compa-
 33 nies themselves – the latter sometimes through industry representatives or through
 34 selection of partners (Blumberg, 1997; see also Buskens et al. in this volume).

35 In reality, the two governance, or conflict resolution, systems combine in
 36 various ways. One example of combination is provided by Ayres and Braithwaite
 37 in their analysis of “responsive self-regulation.” This analysis shows the existence
 38 of “enforcement pyramids” that exist between State regulatory agencies and cor-
 39 porate actors. Such pyramids express the possibility, for industry representatives
 40 and for law enforcement, to escalate from persuasion to warning letters to civil

1 penalties to criminal penalties to license suspension and revocation. Actors know
2 that such enforcement pyramids exist. They know that each way of enforcing
3 contracts is only one way among several others, and that an escalation can be
4 triggered. This is why, in spite of the costs of litigation, firms do use formal
5 institutional litigation both as plaintiffs and as defendant (Cheit & Gersen, 2000;
6 Dunworth & Rogers, 1996; Galanter & Epp, 1992) and conflicts do follow the
7 disputing pyramid transforming informal complaints into court filings and formal
8 judiciary decisions (Felstiner et al., 1980).

9 Following the idea that the two forms of conflict resolution are connected, we
10 further explore this connection. We think that it is possible to identify a form of
11 “joint” governance or a combined regime of endogenous and exogenous conflict
12 resolution in markets. We use the label “joint” because we argue that the gover-
13 nance mechanism is a combination of self-regulation and exogenous regulation,
14 a combination in which costs of control are shared. The combinations of the two
15 can take many hybrid forms. We can define the joint element in “joint governance”
16 as the coexistence of several sources of constraint, both external and internal, that
17 weigh on the actors in charge of solving the conflicts and enforcing the rules.
18 These actors can be identified as third parties when they sit in judgment and make
19 decisions about how to solve conflicts related to market activities between a first
20 and a second party. Saying that such third parties are constrained by external and
21 internal forces is equivalent to saying that they have to deal with influences com-
22 ing from various stakeholders in the conflict resolution process, especially from
23 stakeholders who share the costs of control.

24 Thinking about joint governance in those terms follows both an organizational
25 and a broadly conceived structural approach to economic institutions (Lazega &
26 Mounier, 2002).² Here we use these organizational and structural perspectives
27 to build on this approach and to contribute to the study of economic and legal
28 institutions that represent a combination of exogenous and self-governance of
29 markets. Since the focus is on judges as third parties, courts are natural places
30 to examine in order to identify joint forms of governance. Courts are indeed a
31 locus of joint governance. They are not static institutions making a-temporal and
32 purely rational decisions (Heydebrand & Seron, 1990; Wheeler et al., 1988). They
33 are contested terrain, the prizes or objects of broader economic competition and
34 conflicts that occur outside courthouses (Flemming, 1998). This is especially the
35 case in courts in which judges are themselves business people elected by their local
36 business community.

37 In this paper, we use such a case to focus on how organized interests try to shape
38 the forum in which disputes between businesses are processed. In such “consular”
39 commercial courts, we look at judges as both official third parties upholding le-
40 gal rules and procedures in the conflict resolution process, and as unofficial and

1 potential levers of influence representing their industry of origin, thus possibly
2 favoring outcomes that do not hurt the interests of this industry. As levers, they
3 could be in a position to weigh directly on judicial decisions, or indirectly if
4 they can influence the other judges sitting with them and gain their consent for
5 specific outcomes. We use the fact that courts are usually organized in ways that
6 stress collegial procedures among judges: for example three or five judges sit to-
7 gether in judgment of ongoing flows of cases, deliberating as equals and making
8 judicial decisions. Previous structural work on leverage and allocation of costs of
9 control in a collegial organization has shown that levers of influence are expected
10 to be efficient if they concentrate large amounts of stakeholder expectations and
11 investments on themselves, and if they are socially close to their targets.³ Concen-
12 tration of stakeholder expectations creates a specific form of status that is particu-
13 larly efficient in indirect control and conflict resolution. Social closeness increases
14 access to the target and the lever's chances of being listened to by the target, of
15 gaining his/her consent for specific outcomes. Extending this previous work, our
16 hypothesis is that joint governance is embedded in the formal structure and the so-
17 cial life of the organization that enforces it. We argue that the strongest the external
18 stakeholders' interests and expectations, the more they invest in shaping the court-
19 house, especially in selecting the judges. We also argue that the closer the judges
20 (as levers of influence) are to other judges (as targets of influence) in the same court,
21 the more influence they are likely to have on these other judges (i.e. on their targets).

22 In other words, we hypothesize that industries and/or companies that have a
23 strong stake in the conflict resolution process will be more represented among the
24 judges than other industries and/or companies, and that judges who are socially
25 active in the court will be sought out for advice more than other judges, and
26 thus gain influence on their peers by suggesting specific outcomes. This structural
27 approach to governance is applied to a case study, that of a consular commercial
28 court, i.e. a court in which judges are elected by the local Chamber of Commerce
29 and to which the State has delegated conflict resolution among businesses. To test
30 this hypothesis, we use data on how the business community of Paris participates in
31 operating its commercial court. In France, commercial courts are the main formal
32 conflict resolution mechanism made available by French law to business people.
33 We argue that using this organizational and structural approach is important to
34 understand, ultimately, who wins, what and when.⁴

37 **JUDGES AS THIRD PARTIES AND POTENTIAL LEVERS**

38
39 With this organizational and structural approach to joint governance, it is possible
40 to look at commercial courts as representing combined regulation. For example,

1 when judges are elected from among business people (“consular” judges), they can
2 be thought of as third parties representing the State as well as representatives of
3 their business community. They may not accept this idea of being “representatives”
4 with a mandate from the industry that helped them become judges. But they are
5 still expected to speak on behalf of this industry and its customs by the members
6 of this industry. In a combined regime, the parties involved in the conflict attempt
7 to influence judicial decision making by influencing this third party. This is what
8 occurs normally when judges listen to the arguments of lawyers representing each
9 (first and second) party. But here judges represent not only the power and interests
10 of the State but may sometimes represent that of other stakeholders sharing the
11 cost of justice, including industries or companies, and may thus find themselves
12 closer to either the first or the second party.

13 Attempts at influencing what goes on in court from outside the court come
14 through various angles. [Flemming \(1998\)](#) lists five such angles: external stake-
15 holders can try to influence jurisdiction (the range of disputes over which the
16 court has authority), positions (actors formally authorized to participate in the
17 disposition of cases), resources (the capacity to influence the decisions of other
18 actors), discretion (the range of choices available to actors), and procedures
19 (rules governing courtroom processes). Parties involved in that contest may not
20 be directly concerned by all the conflicts that are dealt with by the court, but they
21 may have indirect concerns, material or symbolic, in the decisions of the court,
22 and thus attempt to influence what goes on.

23 Flemming’s categorizations are useful at this early stage of research. They help
24 focusing on specific processes of influence, including ways of putting constraints
25 on judges as third parties. In this paper, we limit ourselves to the study of two such
26 processes: position and resources (in Flemming’s vocabulary) and the relationship
27 between the forms of influence they represent. By this we mean that we look at
28 who is allowed to become a third party (or judge) and what kind of resources are
29 made available to such third parties when sitting in judgment and participating
30 in governance while solving conflicts between businesses. Looking at judges as
31 constrained third parties will help in understanding the relationship between the
32 two forms of influence.

33 Indeed, collective actors involved in conflicts on markets, such as companies,
34 whole industries (in class actions, for example) and even State administrations,⁵
35 may have strong incentives to influence who becomes a judge and what resources
36 are available to these judges. For example, the more litigious these sectors are,
37 the stronger their incentives to share the costs of conflict resolution. These collec-
38 tive actors are usually conceived of as external actors. Their incentives to influence
39 the jurisdiction of the court are to protect their interests in the long run. They may
40 do this by helping some of their own selected members in becoming a judge. The

1 stronger their incentives, the more they can be expected to take care of their rep-
2 resentation among the judges. Such judges, once in a position to solve conflicts
3 between first and second parties, may have combined incentives to influence the
4 jurisdiction of the court: on the one hand, they are supposed to represent the law
5 and to proceed in all independence; on the other hand, they may represent, and
6 therefore protect the interests of the organizations that supported their becoming
7 a judge.

8 Influencing who becomes a judge and what resources are available to these
9 judges can be a very strong, although indirect, way of influencing the outcome
10 of judicial decision making. In effect, collegial deliberation among judges is built
11 into the jurisdictional institution. This deliberation relies heavily on knowledge
12 management by the court. This brings us to the second process (in Flemming's
13 list above) by which influence characterizing joint governance is exercised in such
14 organizations. One way to influence the behavior of judges is to try to set the
15 premises of their decisions by attempting to control the information available to
16 them while sitting in judgment.

17 Knowledge management that helps the judges in their work relies on formal
18 and informal quality control of decision making among judges. Formal quality
19 control is organized by the procedural rules of adversarial building of the case,
20 but also by collegiality of the committee of the judges sitting in judgment, and
21 ultimately by resort to the President of the Chamber when there is a doubt. Informal
22 quality control happens in the informal knowledge management, itself based on
23 micro-politics of knowledge (Lazega, 1992). Judges coming from one sector of
24 the economy may thus, as "judicial entrepreneurs" (McIntosh & Cates, 1997),
25 attempt to keep particular definitions of problems alive, or promote the ideas,
26 customs, rules, and interests that are commonplace in their sector, although not
27 in others. Control over the premises of decisions can be assumed to influence the
28 probability of who wins even if this framing control by players is almost invisible
29 to outside observers.

30 The law and the courts are aware of the fact that different types of actors in
31 the environment of the court are involved in such influence attempts. Anticipating
32 that the court will be the object of external attempts at influence, the legal system
33 helps the judges in protecting themselves from such influences. It can do so, first,
34 either by providing them with tenure (thus lowering their level of dependence upon
35 external sources of influence) or, if judges are elected, by trying to diversify the
36 sources of influence so that they cancel each other out (Friesen et al., 1971). Second,
37 if differences in access to resources exist between judges, the legal system tries to
38 protect the court from the effects of such differences by providing each judge with
39 the resources that he or she needs to make decisions. Example of such protections
40 include a procedurally well defined filing system, or institutionalized collegiality

1 of deliberation that helps judges in confronting their different definitions of the
2 situation and reach a common frame of reference. Third, there are rules concerning
3 conflicts of interests for judges: when they are too close to one of the parties, for
4 example, when they sit in judgment of a competitor, sometimes even of a business
5 in the same industry as their industry of origin, they must self-disqualify or, if this
6 is discovered, be removed from the case by their hierarchy.

7 However, a structural approach to joint governance raises the issue of the success
8 of such procedural attempts in neutralizing external influences, especially when the
9 judges are elected. Indeed, and to summarize, given the incentives identified above,
10 we can expect influence on judges (as third parties) to take a form identified in the
11 following hypotheses. First, the stronger the external stakeholders' interests and
12 expectations, the more likely they are to invest in shaping the courthouse, especially
13 in selecting the judges. Second, the closer the judges (as levers of influence) are
14 to other judges (as targets of influence) in the same court, the more influence they
15 have on these other judges (i.e. on their targets). In other words, being active in the
16 social life of the courthouse multiplies opportunities to meet, discuss decisions,
17 and therefore of being sought out for advice, thus increasing one's influence on
18 other judges as targets.

19 In this paper we test these hypotheses using a case study of the Commercial
20 Court of Paris, the TCP. We do not have access to all the data that would be
21 necessary for testing the efficiency of the influence structure that we expect. But
22 we do have enough data to test, at least in part, the existence and shape of this
23 influence structure.

24
25 **FRENCH COMMERCIAL COURTS AS JOINT**
26 **GOVERNANCE SYSTEMS SPREADING**
27 **COSTS OF CONTROL**
28
29

30 In France, the role of commercial courts is to solve conflicts between economic
31 actors, mainly businesses, and to exercise a form of discipline on market entry
32 and exchanges. Institutional solutions found for such problems vary within and
33 between countries. Data on French commercial courts are particularly useful to
34 test our hypotheses because a specific form of combined governance of markets
35 has existed in France for five centuries.⁶ The State has long been sharing its own
36 judiciary power with the local business community. In effect, a special jurisdic-
37 tion exists for commerce, and these commercial courts are operated by consular
38 judges, the third parties in our vocabulary. Each judge acts both as an individual
39 judge, and as a representative (but without any specific mandate) of the business
40 community. They are unpaid judges elected for two or four years (for a maximum

1 total of fourteen years) by the members of the Chamber of Commerce of their
2 local jurisdiction. Today, judges at the local Tribunal de Commerce have exactly
3 the same constituency as the local Chamber of Commerce. The two economic in-
4 stitutions support each other and maintain close ties. In this institutional solution,
5 the State, the industries or companies, and the individual judges share the costs of
6 control.

7 These judges sit in judgment one day a week, on a voluntary basis, to enforce
8 the law among their peers, both in matters of commercial litigation (between
9 consumers and businesses, or between businesses) and of bankruptcies. This court
10 is thus both a formal legal institution and a social mechanism in its enforcement of
11 the law and sanctioning of deviant behavior in the business community.⁷ Decisions
12 made by the court can be challenged, as in any court, and be brought to the Court of
13 Appeal. At the Court of Appeal, judges are no longer business people, but highly
14 selected professional judges coming out of the very official *Ecole Nationale de*
15 *la Magistrature*. A very small percentage of cases (around 5%), compared to
16 other jurisdictions, is challenged by the parties in French commercial courts. Thus
17 this system represents a particular and efficient combination of external and self-
18 governance of local business communities.

19 In such a system, there are at least two broad types of such unpaid, voluntary,
20 and consular judges: first, retired business people looking for status, an interest-
21 ing activity and social integration;⁸ and second, younger professionals, whether
22 bankers, lawyers, or consultants, who look for experience, status, and social con-
23 tacts, sometimes on behalf of their employer (who keeps paying their salary one
24 day a week while they are practicing as a judge at the Tribunal). If the individual
25 judge is young enough, this can help build a relational capital (as explicitly stated
26 in the flyers trying to attract new judges to the job) and open doors for future
27 positions in economic institutions such as the *Chambre de Commerce* itself, arbit-
28 ration courts, the *Conseil Economique et Social* (an advisory board to the Prime
29 Minister), and other honors dispensed by the State apparatus. Indeed, for younger
30 professionals, sitting as a judge at the TCP has traditionally been considered a
31 “chore” that would be rewarded later on with seats on prestigious committees in
32 economic institutions of the country (Lemercier, 2001). Various types of lucrative
33 contracts and missions may also be awarded, on a discretionary basis, by the acting
34 President of the *Tribunal de Commerce* to former judges to advise companies on a
35 “prevention” basis.

36 There are several justifications for this joint regime. First, it is a cheaper and
37 faster form of justice than a system with professional judges. Business bears more
38 of the costs of its own regulation, and backlogs and waiting time are much smaller
39 than in traditional High Courts. For example, there is no jurisprudence. Second,
40 inexperienced professional judges – who are civil servants – have been considered

1 notoriously unable to understand the problems of the companies and to monitor
2 satisfactorily the behavior of company directors, particularly in the insolvency and
3 bankruptcy mine fields (Carruthers & Halliday, 1998, p. 431). Third, business law
4 often ignores idiosyncratic norms and customs (called *usages* in French commer-
5 cial courts) based on industry traditional subcultures characterizing whole sectors.
6 The argument is that efficient conflict resolution cannot ignore these bodies of
7 rules and conventions (Favereau, 1994) that organize business practice differently
8 in each traditional sector. Judges at the Tribunal de Commerce, since they are
9 supposed to be experienced business people, are thus said to be specialized in
10 their professional field and in a better position than tenured civil servants to know
11 about these customs; to adjust them more quickly to unstable or changing business
12 environments; and to be in a better position to foster regulatory innovations.

13 Thus the French *Tribunal de Commerce* has specific features that make some
14 aspects of the link between legal (exogenous) and social (endogenous) mecha-
15 nisms in the governance of business more visible. The State alone does not, by
16 itself, enforce and sanction. It needs the participation and investments by specific
17 individual and corporate actors prepared to do their share and bear some of the
18 costs of control. In effect, in this case, elected representatives (who may represent
19 corporatist interests) perform a function usually considered to be a State function.
20 This a rather special case of joint governance (or “co-regulation”), understood
21 as industry-associations self-regulation with some oversight and/or ratification by
22 the State (Grabosky & Braithwaite, 1986, p. 83). In this system, the difficulty with
23 representing general and particularistic interests has always been the predicament
24 of these judges.⁹ The public has always suspected that patronage appointments
25 lead to politicized elections of judges, who then fail to distance themselves from
26 their virtual “constituency,” i.e. the industry that endorsed their candidacy for the
27 job. Especially in small town commercial courts, litigants’ confidence in the im-
28 partiality of the tribunal’s decision is often impaired. They fear that judicial control
29 can be exercised by competitors. The institution, however, assumes that zealous
30 judges will be entirely virtuous in spite of the short distance between regulator and
31 regulatee (Black, 1984).¹⁰

32 In general, the business community wants speed and decisiveness from modern
33 commercial courts, a low level of appeals, sharp segregation of politics and per-
34 sonal patronage from judicial decision making, and as much neutrality as possible.
35 But with consular courts, entire sectors of this business community, as represented
36 by their *syndicats patronaux*, may think that they sometimes have the possibility of
37 preventing damage to the interests of their industry. Indeed, the *syndicat*’s interest
38 is to be represented at the court for several reasons. First, this is a way of defending
39 the customs of their occupation or profession. For example, consistent with the
40 interests identified above, the financial industry sees arrangements for corporate

1 liquidation or administration as very important to its practice of commercial lending. Bankers could handle their affairs concerning corporate rehabilitation outside
2 of the courts if they perceive these courts to be incompetent or opposed to their interests. The courts must often conform to the expectations of the financial industry
3 or lose much of their business (Carruthers & Halliday, 1998, p. 488). The “quality
4 of justice” as defined by the financial industry (limit risk and permit failures, or
5 extend credit and aid reconstruction) is a significant factor in the strategy of this
6 industry. Second, it signals to the constituency that the leaders of their *syndicat* are
7 working hard at promoting the interests of the profession. Increases in the number
8 of judges sent to the commercial court makes the apparatchiks look good.
9

10
11 Thus, from the perspective of each industry, consular judges are more than
12 simple judges. They are judicial entrepreneurs representing the sensitivity of the
13 *syndicats patronaux* and organized interests that helped them into the courthouse
14 in the first place by endorsing their candidacy. This is true in spite of the fact
15 that judges are now managers in medium sized or large companies. They rarely
16 own many shares in their employer. Large banks sometimes control their group.
17 They are no longer the baker, or the jeweler who owned a shop around the corner.
18 They are entrepreneurs because they should identify problems and push for solutions
19 that make sense in their own business community.¹¹ As seen above, having
20 judges of one’s sector sitting in judgment may represent minimally a guarantee that
21 one’s way of doing business will be respected, if not a leverage or a damage control
22 instrument. The judges themselves do not entirely share this view. Officially, in
23 our interview, they declare that – once a judge – they are independent, without any
24 mandate from their industry of origin, and think of themselves as entirely impartial.
25 Nevertheless, the system itself represents a typical joint governance regime in
26 which institutions, the business community, and individual citizens accept to share
27 the costs of control for the reasons outlined above.
28

29 **FIELDWORK AT THE *TRIBUNAL DE COMMERCE*** 30 ***DE PARIS (TCP)*** 31

32
33 Fieldwork was conducted at the TCP. This court is one of the four large commercial
34 courts in the Paris region (along with the courts of Nanterre, Bobigny
35 and Créteil), where around 220,000 businesses are officially registered. The court
36 includes twenty generalist and specialized chambers (such as bankruptcy, unfair
37 competition, company law, European community law, international law, multimedia
38 and new technologies, etc.) which handle around 12% of all the commercial
39 litigation in France, including large and complex cases (that do not go to arbitration
40 courts). The list of judges included 157 names, that of the 147 judges that were

1 active at the end of 2000, plus 10 “wisemen,” i.e. former judges who asked to re-
2 main in the tribunal as advisers after they decided to resign as judges; they are thus
3 former judges to whom sitting judges can turn for advice in complex cases. Socio-
4 demographic characteristics of the judges show that 87% of the judges are men.
5 Average age is 59 (minimum 36, maximum 78, standard deviation eight years). On
6 average, women judges are slightly younger than their male colleagues (53 versus
7 60). 52% of the judges have been with the Tribunal for ten years or more; 36%
8 were elected between 1991 and 1995; 12% since 1996. 38% are retired.

9 Positions occupied by judges in their industry and occupation of origin (or
10 former occupation) include CEOs (25%), vice-presidents, and top executives of all
11 kinds. Among the youngest judges, there are more professionals such as company
12 counsels, accountants, and consultants. Most of the time, they work for large
13 business groups¹² or medium-sized companies (that the judges do not like to
14 name); they prefer to be discreet about their professional affiliation. Most judges
15 have diplomas from top French business schools (HEC, ESSEC, ESC, INSEAD,
16 IAE, etc.), law schools, elite engineering schools (specialized or generalist).

17 Fieldwork was carried out in two phases. A first phase during which we col-
18 lected ethnographic information and observations on the operations of the court.
19 We attended court hearings and even a couple of normally closed deliberations
20 about bankruptcy cases. We also interviewed representatives of all the professions
21 operating such courts (mainly judges, but also lawyers, representatives of the at-
22 torney general, liquidators, bailiffs, etc.). Several judges and “wisemen” accepted
23 in depth interviews. The ethnography of this court included looking at the ties
24 between the TCP and economic institutions of the city: there is, for example, an
25 annual common golf tournament between the TCP and the *Chambre de Commerce*
26 *de Paris*. And *Hautes Etudes Commerciales* (HEC), the top French business school,
27 in which a sizable proportion of judges in large commercial courts were trained,
28 is also managed by the *Chambre de Commerce de Paris*.

29 A second phase allowed us to interview all the judges about various issues
30 of interest to the presidency of the court, and to include a name generator about
31 advice seeking in a twenty-minute questionnaire. This phase lasted three weeks,
32 with the President’s team helping with scheduling the interviews with the judges.
33 A letter signed by the President of the Court helped in persuading the judges
34 to answer our questions. Response rate reached 97%. We were well received
35 by the judges who were interested in talking about their voluntary participation
36 in running a State institution. This in spite of, or because of, a controversial
37 reform of commercial courts that was discussed in Parliament at the time ([Jean,](#)
38 [2000](#)). Almost all the active judges were thus interviewed. Additional research
39 allowed us to reconstitute the professional biography of 137 of these active
40 judges.

1 The organizational functioning of the TCP is complex. It is not our purpose to
2 describe it here in more detail. As mentioned above, several kinds of professionals
3 operate these courts together: consular judges, clerks, business lawyers, representa-
4 tives of the attorney general, bailiffs, experts of all kind, professional liquidators
5 and/or administrators (for companies that are on the brink of bankruptcy but could
6 perhaps be brought back to life). Judges are allocated across the large number of
7 generalist and specialized chambers. The minimal distinction in terms of special-
8 ties is between bankruptcy and litigation. Different procedural rules are legally
9 attached to each. But the litigation bench is then subdivided in many types of sub-
10 specialties mentioned above. There is a president of each chamber who reports to
11 the president of the Tribunal. In each chamber, three – sometimes five – judges sit
12 together in judgment, processing cases collegially while listening to the conflicting
13 parties, a series of clerks, lawyers, and other professionals, as in any other court.
14

15 ANALYSES

16 *Over-Representation of the Financial Industry Among the Judges*

17
18
19
20 Recall that, according to the justification of this system of joint governance, the
21 selection of judges should produce a representation including as many sectors as
22 possible, especially in large commercial courts such as that of Paris. At the time of
23 the study, economic sectors represented by the judges (i.e. in which they work or
24 in which they used to work) were indeed very diverse. Thus, in complex cases, in-
25 telligence about one specialty could be made available to the court from the judges
26 coming from that specialty. We hypothesized, however, that some industries or
27 companies would invest more than others in judicial entrepreneurship and incur a
28 larger share of the costs of control because they have an interest in doing so. Anal-
29 yses show that this hypothesis is confirmed. Although in theory all the syndicats
30 patronaux can present candidates to the elections of consular judges on an annual
31 basis to fill in the vacancies created by a 10% turnover at the court, in reality all
32 did not. Some did so much more systematically than others. Twenty-nine percent
33 of the judges came from the financial industry.¹³ Forty-four consular judges were
34 currently employed by the financial industry or had been employed by it in the
35 past. This industry promotes several candidates for election to the job each year.¹⁴

36 The financial industry is clearly over-represented, in relative terms, at the TCP.
37 In effect, the sector of financial activities represents 3% of the active population
38 in France¹⁵ and 5.1% in Paris where the services industries are over-represented
39 compared to the rest of France.¹⁶ In terms of value added to the economy per
40 branch (chained prices for previous year, 1995 basis), the share of the financial

1 services industry in the total value added to the French economy was 5.3%.¹⁷ These
2 descriptive results show that judges coming from the financial industry are clearly
3 potential levers of that industry and that influence over other judges (targets) in
4 the court would mean that the financial industry is the biggest threat to this court's
5 independence.

6 This industry is traditionally a very litigious sector (Cheit & Gersen, 2000). The
7 business docket in France, as probably in most countries, is dominated by contract
8 disputes and debt collection issues. A sizable portion of this docket involves the
9 financial industry for obvious reasons, which provides a strong incentive to invest in
10 judicial entrepreneurship – for example to ensure damage control in cases involving
11 high levels of credit. An example can be provided to illustrate the interests of this
12 industry in incurring a larger than average share of the costs of control. In 1985,
13 French bankruptcy law was modified by France's Socialist government in order to
14 give priority to employees' interests over that of creditors. The new law required
15 judges to make a decision about the possible survival of the company, were it
16 to be better managed (Guérout et al., 1993). If they decided that the company –
17 and its jobs – could be saved, they would name an administrator to run it and
18 bring it back to life within a given time frame. If they decided that the company
19 could not be saved, they would order it to be liquidated. When judges choose an
20 administrator over a liquidator, creditors are in danger of losing even more money
21 than if the company were simply liquidated. Bank and financial institutions are
22 often creditors themselves and they stood to lose enormous amounts when the new
23 law was passed. For nine years, the French financial sector tried to lobby for a
24 change in the law. In 1994, a failed attempt at such legal changes pushed the sector
25 to change its strategy, invest in penetrating the courts, and increase the number of
26 consular judges coming from its ranks.

27 Thus the financial industry has high amounts of resources at stake in commercial
28 litigation and bankruptcy. It is willing to play for the rules and has an interest in
29 trying to shape the court and impose its industry norms and practices over those of
30 other industries. The priorities of the financial sector (such as preserving high value
31 of assets, high level of claims, and high sensitivity to the impact of corporate failures
32 on the economy) can thus be defended in both the litigation and the bankruptcy
33 bench.

34 One of the likely influence processes that characterize joint governance is
35 thus detected in the selection of judges themselves (i.e. the “positional” effect in
36 Flemming's vocabulary). In spite of the French business community's attempts at
37 diversifying the origins of judges through a complex election procedure, only a
38 few industries actually invest in judicial entrepreneurship. Why do others neglect
39 it – in spite of their incentives to exercise influence on judges sitting as third
40 parties and potentially used as levers? The answer may be that large companies go

1 to arbitrage (no publicity) and no longer care about public commercial courts. Or
2 perhaps that small *syndicats* do not have the necessary clout to lobby effectively,
3 nor enough resources to share the costs of control. All sectors of the business
4 community cannot participate equally actively in the contests and attempts to
5 shape the courthouse from outside. The potential influence of each in the struggle
6 over this kind of contested terrain varies with the resources available to promote
7 candidates for the jobs of consular judge. Resources available are not the same in
8 the banking industry and in less well organized sectors, such as retail.

10 *Advice Networks and Selective Premise Setting*

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12
13 Using this information about “positional” influence, we can now test our hypothesis
14 by looking at the extent to which (a) judges socially close to their targets have more
15 influence than others, i.e. control resources necessary to other judges’ work; and
16 (b) judges coming from this over-represented financial industry are in a position to
17 exercise this influence. We examine this form of control of resources by looking
18 at centrality in the advice network among all the judges of the court.

19 Indeed, an indirect way of looking at this kind of influence is to focus on advice
20 interactions between judges, which we assume to be equivalent to interactions
21 setting the premises of judicial decisions. The advice network among judges, and
22 its premise-setting efficiency, are considered to be a bridge between structure and
23 decision making (Lazega, 1992). In effect, patterns of advice seeking in the court
24 show who is prepared to listen to whom when framing and defining problems at
25 hand in the judicial decision making process. Therefore, we look at the ways in
26 which these judges transfer and exchange advice, then try to appreciate the ways in
27 which contextual factors can influence this process. We can measure the capacity
28 of an industry to set the premises of such decisions by looking at the centrality
29 of its representatives in the advice network among all the judges, and then at the
30 determinants of this centrality.

31 Data on advice seeking among judges were collected using the following name
32 generator: “Here is the list of all your colleagues at this Tribunal, including the
33 President and Vice-Presidents of the Tribunal, the Presidents of the Chambers,
34 the judges, and ‘wisemen.’ Using this list, could you check the names of col-
35 leagues whom you have asked for advice during the last two years concerning
36 a complex case, or with whom you have had basic discussions, outside formal
37 deliberations, in order to get a different point of view on this case.” Our high re-
38 sponse rate allowed us to reconstitute the complete advice network (outside formal
39 deliberations) among judges at this courthouse, and thus to measure each judge’s
40 centrality in this network.¹⁸

1 Given that only 10% of all choices in this network are reciprocal, the existence of
2 an informal pecking order and an informal hierarchy among judges is very likely.
3 [Table 1](#) presents simple correlations between the judges' centrality scores and
4 other attributes showing that being socially active in the organization and coming
5 from the financial industry are clearly not correlated to high centrality in the advice
6 network. Thus, apparently, our hypothesis is not confirmed.

7 However, in order to control for other possible effects on centrality, we included
8 these attributes along with several other characteristics of the judges in a regres-
9 sion model predicting centrality in the advice network among judges. In addition
10 to two main variables representing the judges sector of origin (having worked in
11 the financial industry, having worked in a large business group), a series of control
12 variables were added to the model. Seniority, measured by the number of years
13 an individual has served as a judge, can be understood as "experience" and help
14 a judge wield influence independent of the sector of origin. Specialty could also
15 have an effect on premise setting; for example, secrecy is usually more strongly
16 required from judges sitting on the bankruptcy bench. In addition, the other judges
17 in the commercial court may not be the single source of advice and influence.
18 Being well connected and open to the business community can attract colleagues
19 who need economic advice. The same is true for being well connected and open
20 to professional judges in other courts (High Courts, Court of Appeal). Such ex-
21 ternal ties can attract colleagues who need legal advice. The same is not true with
22 being well connected and open to the office of the attorney general; surveillance
23 and influence by the Ministry are not always welcome in consular courts. Being
24 in activity (as opposed to retired) may also have an effect on centrality in the ad-
25 vice network since retired judges may have more time and be more available than
26 professionally active ones to discuss issues at length. Being member of the State
27 elite (the "*noblesse d'Etat*," i.e. coming from the elite French engineering and ad-
28 ministration *grandes écoles*, having been trained at *ENA* or *Polytechnique*) means
29 that one has connections in high places and thus might wield some authority and
30 influence among fellow consular judges. [Table 2](#) presents the analysis controlling
31 for these effects.¹⁹

32 Results of this analysis provide a picture different from that of the simple cor-
33 relation table. They show that our hypothesis is confirmed. Controlling for the
34 other variables, being active in the social life of the court does have a robust effect
35 (which remains significant in most models) on centrality in the advice network,
36 and thus on the capacity to set the premises of other judges' (targets) decisions.
37 The sector of origin of a judge, particularly coming from the banking industry,
38 has no effect on being central. Bankers may be over-represented at this court,
39 but they do not exercise strong indirect influence through premise setting in this
40 organization. In effect, in order to exercise such indirect influence, judges should

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Table 1. Correlations Between Independent Variables Characterizing the Judges of the *Tribunal de Commerce de Paris* in Table 2.

	1	2	3	4	5	6	7	8	9	10	11
1. Centrality in advice network	–										
2. Number of years as a judge	0.49	–									
3. President of Chamber	0.34	0.50	–								
4. Bankruptcy (vs. litigation)	–0.02	0.13	–0.02	–							
5. Coming from financial sector	0.06	0.09	–0.03	0.03	–						
6. Coming from non-financial large groups	–0.08	–0.18	–0.17	–0.08	0.01	–					
7. Seeking advice from business community	0.15	0.00	–0.00	–0.00	–0.02	–0.06	–				
8. Seeking advice from professional judges	0.20	–0.03	–0.08	–0.09	–0.11	0.01	0.08	–			
9. Seeking advice from attorney general	0.02	0.28	0.01	0.22	0.09	0.00	0.18	0.05	–		
10. Professionally active (vs. retired)	–0.18	–0.27	–0.12	0.05	–0.17	–0.06	0.18	–0.02	0.15	–	
11. “Noblesse d’Etat”	0.16	–0.00	–0.11	–0.13	0.08	0.09	0.03	0.07	–0.06	–0.05	–
12. Active in intra-TCP social life	0.08	–0.13	–0.09	–0.04	–0.03	–0.02	0.16	0.07	0.20	0.33	0.10

Pearson correlation coefficients, $N = 146$.

1 **Table 2.** Who Sets Whose Premises? Linear Regression Model Measuring the
 2 Effect of the Judges’ Characteristics on their Centrality in the Advice Network.

3	Variables	Parameter Estimate	Standardized Estimate
4			
5	Intercept	-3.24 (1.16)	0.00
6	Number of years as a judge	0.67 (0.09)	0.55
7	Specialty (Bankruptcy vs. litigation)	-0.17 (0.78)	-0.01
8	Past employment in financial sector	0.40 (0.69)	0.04
9	Past employment in large business groups	0.11 (0.59)	0.01
10	Seeks advice in business community	1.47 (0.64)	0.15
11	Seeks advice from professional judges	4.19 (1.47)	0.19
12	Seeks advice from attorney general’s office	-1.64 (0.68)	-0.18
13	Currently employed	-0.66 (0.66)	-0.07
14	Member of the <i>noblesse d’Etat</i> (ENA, X)	1.70 (1.11)	0.10
15	Active in the social life of the court	2.29 (0.96)	0.17

16 Standard deviations in parenthesis; $N = 145$; $R^2 = 0.38$.

17 also be strongly integrated in the courthouse, in its social life, have and use ties
 18 outside the courthouse, consult with professional judges. We know from [Table 1](#)
 19 that they do not do so more than other judges, which explains in part their lack of
 20 potential influence. Notice that, in addition to being socially active in the court,
 21 being senior and seeking advice from other sources (in the business community
 22 and among professional judges) are also good predictors of potential influence in
 23 this court. Notoriety of consular judges can be built inside the small microcosm
 24 of the courthouse by investments in ties to other judges whether within or out-
 25 side this specific courthouse. However, seeking advice from the attorney general
 26 (who represents the State directly inside the TCP) is significant and negative: the
 27 more contact judges have with the attorney general and its representatives, the less
 28 these judges are sought out for advice by their peers. In sum, the more socially
 29 active the judges within the court, the more open to discussions with the business
 30 community and with the legal environment – but the less open to discussions with
 31 representatives of the State – the more influential these judges are at the TCP.

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 33
 34 *“Les Commerçants Détestent la Banque”*

35
 36 The bankers’ lack of detectable potential influence may thus be explained by at least
 37 two factors. First, seniority measured by the number of years spent as a judge is the
 38 strongest determinant of centrality in the advice network. This is partly correlated
 39 with being a *Président de Chambre*, which explains the strength of this effect. Most
 40 senior judges, i.e. often also retired ones, tend not to be from the financial sector.

1 Professionally active judges, often bankers, may have less seniority at the court,
2 less time to interact with other judges, socialize with them, and thus less centrality
3 as advisors. But, second, the social integration of bankers at the court is relatively
4 weaker than that of judges coming from other industries precisely because the
5 banking industry has so many representatives on the bench. Being perceived to be
6 so strong in terms of “position” may be counterproductive in terms of influence.
7 The banking industry is defensively perceived either as defending its corporatist
8 interests – not the general interests – or to try substitute for the State, once the
9 latter has withdrawn from direct control of the economy. This was illustrated to us
10 by a judge (No. 128) who is himself a former banker: “*Les commerçants détestent*
11 *la banque*” (shopkeepers hate bankers). Another indicator is that judges coming
12 from the financial sector are almost systematically those elected with the smallest
13 number of votes.

14
15
16 *Bankers Do Not Seem to Coordinate with One Another*
17

18 One reason that may account for the lack of positive relationship between
19 Flemming’s two forms of influence (the more control of “position,” the more control
20 of “resources”) may be that, at the TCP, the judges coming from the financial
21 sector did not coordinate their activities. First, homophilous choices among these
22 judges are not more frequent than choices of advisors among colleagues from other
23 specialties. Second, the set of judges coming from the financial industry does not
24 seem to be very organized, but rather segmented and dispersed. This shows in the
25 picture representing a reduction of the advice network at the TCP. An analysis of
26 the same advice network approximating structural equivalence among judges pro-
27 vides a simplified overview of the system. [Figure 1](#) presents this reduced network.
28 The density table from which it is derived is presented in the [appendix](#).

29 The network breaks down into six positions of approximately structurally equiv-
30 alent judges in this Tribunal. Four of these (positions One, Two, Three and Five)
31 include relatively small proportions of judges coming from the financial sector.
32 The last two (positions Four and Six) include larger proportions of such judges.
33 We therefore examine these two positions separately.

34 To simplify, position One was made up of 20 judges, 25% of whom came from
35 the financial sector; the others belonged to large, non-financial business groups,
36 were recently elected although not necessarily young, and did not participate in
37 the social life of the courthouse. Members of this position did not seek advice from
38 anybody in the other positions and were not sought out. Position Two included 25
39 judges, 16% of whom bankers. The position included four *Présidents de Chambre*,
40 and its members, coming from various sectors, had less than average centrality

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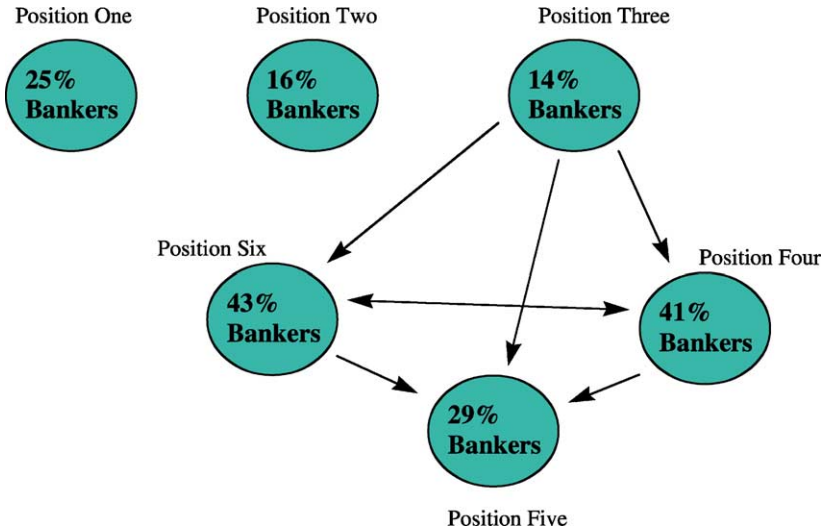


Fig. 1. Advice Seeking Among Judges: The Reduced Network. Note: Pattern of relationships between positions of approximately structurally equivalent judges in the advice network for all members. Position One includes 20 judges, position Two 25 judges, position Three 51 judges, position Four 7 judges, position Five 21 judges, and position Six 22 judges. One banker was lost to the “residual” category. The most central positions (Four, Five, and Six) are the positions including a high proportion of bankers and other representatives of the financial industry. Members of positions Four and Six (internal densities of 0.26 and 0.41 respectively), overall, tend to consult each other. The density table from which this representation of the structure is derived (using a high cutoff of 2.5) is presented in the [appendix](#). Densities for each position are included in the diagonal of this table.

scores in the advice network. They tended not to seek advice from anybody in the other positions. They were more recent judges than members of position One, but they were also more sociable. They were sought out slightly more than position One members. Position Three was the largest in the courthouse. It was made up of 50 judges (among whom 14% were bankers), a third of whom with a diploma from *Hautes Etudes Commerciales*, the top French business school, and a career in large French business groups. They tended to be the youngest judges on average, consulted a lot with the outside economic world, had an intense social activity within the courthouse, but weak centrality scores as advisors. Members of this position tended to seek advice from positions Four, Five, and Six. Position Five included 21 judges (30% of whom were bankers), who were the most central and senior advisers in the organization, and included eight *Présidents de Chambre*. They had been judges for nine years on average, had high average centrality scores

1 in the advice network. Their difference with position Six is that they did not
2 participate in the social life of the courthouse, did not consult with the business
3 community, and did not seek advice from anyone.

4 Positions Four and Six also included judges from the financial sector. Position
5 Four included 22 judges (41% of whom were bankers), the oldest of the court on
6 average, the most senior, and with high centrality scores in the advice network. This
7 position included six *Présidents de Chambre*. They were more active than average
8 in the courthouse's social life. They included also four members of the French
9 *noblesse d'Etat*. Members of this position tended to seek advice from positions
10 Five and Six. Position Six included seven medium seniority judges (43% of whom
11 were bankers) with, on average, medium-level centrality scores. Members of this
12 position tended to seek advice from positions Four and Five.

13 This picture suggests that, at the TCP, judges coming from the financial in-
14 dustry are spread across different and often low-density positions. Assuming that
15 there were coordinated influence efforts among these judges, these efforts did not
16 systematically succeed in placing bankers at the heart of the indirect influence
17 structure. Even if they did coordinate in an invisible way, they had to share their
18 influence with other influential judges such as former high-level, non-banking busi-
19 ness executives and industrialists, as well as representatives of the *noblesse d'Etat*.
20 High internal densities are rare in positions in which the financial sector is most
21 strongly represented. Status competition and the social discipline characterizing
22 this organization seem to have defused, in part, the bankers' threat to this court's
23 independence.

24 25 26 **DISCUSSION AND CONCLUSION** 27

28 In sum, this paper identifies a joint level of governance by using a broadly
29 conceived structural and organizational approach to conflict resolution in markets.
30 Joint governance is defined as a form of conflict resolution in which external
31 stakeholders attempt to control commercial courts indirectly by using judges in
32 official courts – i.e. traditional third parties in conflict resolution – as levers of
33 influence to further their interests. Relying on structural theories of leverage, we
34 assume that indirect control of that type requires a two-step leverage system.
35 In the first step, first or second parties (or their representatives) must be elected
36 judges in this court; in the second step these judges must influence other judges
37 so as to gain their consent for specific decisions.

38 The two steps that we use to reason about joint governance and the sharing
39 of costs of control are equivalent to two dimensions of influence that organized
40 business interests try to exercise control on commercial courts. First, the selection

1 of actors formally authorized to participate in the disposition of cases, particularly
2 the judges. And second, the capacity to set the premises of other judges' decisions.
3 Premise setting for judicial decision making is key to our approach. Solutions to
4 problems depend on how problems are defined or framed. Framing highlights cer-
5 tain dimensions of a problem and downplays others (Lazega, 1992). Definitions of
6 a problem that gain early acceptance among members of an organization, includ-
7 ing judges in a courthouse, are likely to subsequently dominate in the definition
8 of a solution. Sentencing is often about the kind of information that should be
9 included in presence reports, i.e. about definition of the situation and reframing of
10 problems. Events reported in these files are interpreted and judges attach meaning
11 to them. Some of these judges have the authority or position to have their views
12 taken seriously, and their views can be decisive with respect to who is likely to
13 win.

14 We hypothesized, first, that the strongest the external stakeholders' interests
15 and expectations, the more likely they are to invest in shaping the courthouse,
16 especially in selecting the judges; and, second, that the closer the judges (as levers
17 of influence) are to other judges (as targets of influence) in the same court, the
18 more influence they have on these other judges (i.e. on their targets). Based on
19 the case of a contemporary French commercial court, we examined the nature
20 of joint governance and confirmed these hypotheses. In effect, we can measure
21 investments by an industry by looking at the number of consular judges that it
22 has sponsored; we can measure the capacity of an industry to set the premises of
23 judicial decisions by looking at the centrality of its representatives in the advice
24 network among the judges, and then at the determinants of this centrality. We find
25 that the financial industry is clearly over-represented on the bench and that judges
26 with potential influence on judicial decision making in that court are judges who
27 have spent more years on the bench than other judges, who are active in the social
28 life of their court – in addition to having ties to judges in other courts and to people
29 with responsibilities in the economy at large.

30 We also show that, in spite of its interests and efforts, the financial and banking
31 sector which places on the bench a high proportion of judges coming from its
32 ranks, tries and seems to fail to exercise indirect control on commercial courts and
33 thus on conflict resolution in markets. Consular judges coming from this sector
34 are not more central than judges coming from other sectors in the advice network
35 connecting the judges in this court. Thus they are not able to reach a position
36 in which they can systematically set the premises of other judges' decisions and
37 to perform the second step of the control mechanism. Investments made by this
38 highly organized economic sector for the promotion of consular judges in this
39 specific *Tribunal de Commerce* are not supplemented with relational investments
40 by these individual judges within the courthouse. Attempts to control the *Tribunal*

1 *de Commerce* by the financial industry is thus both evident and challenged from
2 within the court.

3 Our broadly conceived structural approach is limited in two ways. First, we
4 only have indirect evidence of member judges' influential status. Direct observa-
5 tion of such challenges and conflicting influences was not accessible to us since
6 deliberation among judges (as for a jury) is secret. Being sought out for advice by
7 one's peers is certainly an indicator of potential influence, but not an indicator of
8 actual influence. Conflicts of definition of the situation between representatives of
9 different industries are not captured. This is a partial test for our hypotheses, but
10 one for which we were able to collect data. Second, social closeness of judges was
11 not measured by reconstitution of a complete friendship network, only by eliciting
12 information about participation in the social life of the court as a whole. More pre-
13 cise data on friendship ties in the organization would have been more conclusive.
14 Finally, bankers who seem disorganized may actually be so organized that they
15 *look* disorganized. There are many characteristics of the judge's activities within
16 and outside the court that we do not know about and which could be the basis
17 of coordination. One example is membership in the Free Masonry, which is not
18 public information available to us. Identifying the effects of such variables would
19 also be important to understand how the business community shares the costs of
20 control, affects the operations of the court and thus structures the probability of
21 who wins in conflict resolution and joint governance.

22 Indeed, it is difficult, without a systematic analysis of cases and their outcome
23 (i.e. data that are not accessible at this stage of the research), to test the extent to
24 which social relations affect actual conflict resolution or to understand who actually
25 wins, what and when. We do not have docket data on the outcome of judicial
26 decisions made by judges whose industry of origin is identified. Constraints on
27 data collection prevented us from extracting from this case study a clearer view
28 of the truly original mechanism of joint conflict resolution that characterizes this
29 business community. Also, lack of litigation rates by industry and lack of access
30 to court statistics prevent us from providing a conclusive test for our hypotheses.
31 More information should be collected in order to understand more deeply this
32 combination of external and self-governance of business.

33 In addition, our results, at this stage, raise questions of generalizability. First, if
34 the proportion of bankers is the same in most large commercial courts and if their
35 lack of centrality as advisers is not confirmed, then the divide and tension between
36 finance and the rest of the French business community can be said to structure
37 the kind of joint governance observed here. Second, other kinds of "courts," such
38 as independent administrative authorities (Frison-Roche, 1999) or alternative
39 dispute-resolution organizations such as arbitration courts (Dezalay & Garth,
40 1996) also belong to a scene in which civil society participates in the operations

1 of State institutions or institutions endowed with official power. They should be
 2 examined in the same way to confirm or disconfirm the generalizability of our re-
 3 sults. Obviously more research is needed to characterize the various combinations
 4 of external and self governance of business. Further docket research should be able
 5 to reconsider the effect obtained here and shed more light on joint governance.

6 Nevertheless, we believe that our approach adds value to current studies of mar-
 7 ket governance, particularly to conflict resolution in markets. External governance
 8 and self-governance are usually studied separately. Here we look at a system in
 9 which the two are combined. This joint governance can take forms that are dif-
 10 ferent from the much heralded Anglo-Saxon responsive self-regulation (see [Ayres](#)
 11 [& Braithwaite, 1992](#), “Benign Big Gun”). In France, a complex system of coop-
 12 eration between the State, local Chambers of commerce, and citizens, produces
 13 consular commercial courts and specific ways of sharing the costs of control. The
 14 latter are likely to operate under many influences coming from the business com-
 15 munity in ways that reflect the importance of specific actors (for example, the
 16 financial industry), but also in ways that point to a variety of leverage processes.
 17 The important actors have the resources to incur the costs of placing many consular
 18 judges on the bench. But staying capacity is not everything. The existence of long
 19 term investments in ties to other judges coming from other sectors of the economy
 20 shows that additional influence mechanisms must be examined to understand joint
 21 governance.

22 In conclusion, economic actors such as interdependent firms spend time and
 23 resources trying to structure their environment, their opportunity structure, and
 24 the governance mechanisms that constrain them.²⁰ These efforts are often built
 25 into the operations of economic institutions, especially institutions representing
 26 joint governance. Institutional economics and sociology have looked at contexts
 27 in which economic activities and competition take place as legally and culturally
 28 defined ([Fligstein, forthcoming](#); [Milgrom et al., 1990](#); [North, 1990](#); [Reynaud, 1989](#);
 29 [Swedberg, 1993](#); [Williamson, 1985, 1996](#)). Work presented in this paper also sug-
 30 gests that economic sociology could benefit more systematically from organiza-
 31 tional and structural studies of joint governance by looking at economic institutions
 32 such as Chambers of commerce, commercial courts, and many others – just as
 33 economic history does ([Hirsch, 1985](#); [Lemercier, 2001](#)).

Please update the
 reference
 Fligstein.

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 36 **NOTES**
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38 1. See also [Lazega \(1994\)](#) and [Lazega and Mounier \(2002\)](#) on some of the social and
 39 organizational mechanisms of this self-regulation. About new arbitration courts and the
 40 role of corporate law firms in their promotion, see [Dezalay and Garth \(1999\)](#). In the big

1 international business, to find a quick and discrete solution to a conflict, large multinationals
2 prefer arbitration in most countries, including France.

3 2. Since Max Weber's 1924 study of the German 19th century *Börse* (Weber, 2000),
4 many organizational sociologists' work on economic institutions have greatly contributed
5 to economic sociology. A few researchers, such as Baker (1984) in his study of the Chicago
6 Options Exchange, have added a structural spin to such organizational approaches to economic
7 institutions (for a theoretical basis, see White, 2002; for a summary, see Swedberg,
8 1994).

9 3. But not too close to their targets, in which case other processes are triggered by the
10 organizational control regime (Lazega, 2000, 2001; Lazega & Krackhardt, 2000; Lazega &
11 Lebeaux, 1995; Wittek, 1999).

12 4. We also follow here the tradition of structural analyses of business such as that of
13 interlocking directorates (Stokman et al., 1985) and derived approaches to relationships
14 between the political and economic spheres (Pizarro, 1999).

15 5. As in so many situations where they are supposed to be the prototypical third parties,
16 State organizations have combined incentives as well. They have vested interests related to
17 their own involvement in market activities. Therefore, for institutions of conflict resolution,
18 such as courts dealing with market litigation, it may make a strong difference whether the
19 State is represented by professional judges who are civil servants, or whether it delegates its
20 judicial powers to elected judges representing civil society and/or the business community.

21 6. "Pure" self-regulation, such as arbitration and its more secretive operations also exists
22 as a formal avenue of conflict resolution for businesses. But it is usually limited to large
23 multinational companies prepared to pay large sums, particularly when they want to keep
24 a litigation case secret.

25 7. For the characteristics of the French system of commercial courts as an insti-
26 tution of combined external and self-governance, see, for example, Hirsch (1985),
27 Ithurbe (1970), Szramkiewicz (1989). Today, there are 191 commercial courts in France,
28 around 3,000 consular judges making approximately 300,000 judicial decisions each
29 year, of which 50,000 concern insolvency issues (Ministry of Justice figures for 1998;
30 www.justice.gouv.fr/publicat/tc1807.htm).

31 8. Two months after our fieldwork was carried out, French commercial courts went on
32 strike, for the first time in their history, against the proposed 2001 reform of their system.
33 At the TCP, we were surprised to see so many judges haunting the corridors of the building
34 during weeks of strike: many were retired, "all dressed up with no place to go" as their
35 younger colleagues say.

36 9. The same is true for in English and American history: "In bankruptcy cases, delay
37 permits the remaining assets of the bankrupt corporation to run down, or to forestall rapid
38 reorganization, thus impairing chances for corporate turnarounds" (Carruthers & Halliday,
39 1998, p. 474). There is thus a need for rapid judgments by an empowered court. In the past,
40 patronage, political partisanship, and conflicts of interests bedeviled bankruptcy courts. A
system of mutual accommodations and exchanges of favors brought all the players in the
system into a tight coalition of mutually protective practitioners. Judges were necessarily
part of this "bankruptcy ring" (Carruthers & Halliday, 1998, p. 480).

10. This led to attempts at reforms of commercial jurisdictions. The French commercial
justice system is also changing, with the State trying to increase its control over the *Tribunal
de Commerce*. Since 1981, the attorney general has an office at the Court and may participate
in the judges' deliberations, especially in bankruptcy proceedings (which are not public).
In 2001 and 2002, a new law was unsuccessfully debated at the National Assembly and the

1 Senate which aimed at introducing professional and tenured judges in the midst of consular
2 judges. This “mixity” is presented by reformers as a means to reassure businesses involved
3 in court proceedings by improving control over the controllers (Colcombet & Montebourg,
4 1998; Gaudino, 1998). In fact, it is worth noticing that this reform reproduced a paradoxical
5 situation. When the French State used to be an even more active member of the business
6 community (than it is today), it left commercial justice in the hands of this community.
7 After it began to withdraw from direct control of the economy, since the 1980’s, it also
8 began to try to increase its control over the judicial process in commercial courts. The
9 justification for this change in policy is to reassure European and global investors who want
10 to be certain that they will receive a fair treatment in French consular commercial courts.
11 This explanation, however, must be taken with caution. In spite of a decade of selling some
12 of its holdings, the French State’s direct ownership in the economy remains enormous, a
13 long time *caractéristique* of French capitalism.

14 11. Sometimes, they speak out about even broader and politically-charged policy issues,
15 such as “Should commercial courts handle bankruptcy cases?” Many in French commercial
16 courts are in favor of getting rid of such cases, which are precisely the cases that attract
17 suspicions upon the activity of consular judges.

18 12. The classification of the top 500 French and European non-financial groups in France
19 (Enjeux, *Les Echos*, November 2000) shows that 42 groups out of these 500 are mentioned
20 as employers in the biographies of these consular judges. 38% of the judges have had one,
21 two, or three such large groups as employers during their personal career.

22 13. NAF 60, code 65. NAFs are the French equivalent of Standard Industrial Classification
23 codes.

24 14. For example, 21 were elected as candidates of the *Association française de banque*
25 and 5 as candidates of the *Association française de sociétés financières*. Among the financial
26 institutions that were the employers of sitting judges (at the TCP alone), BNP-Paribas had
27 sent seven judges, Suez had sent four, Société Générale four, Crédit Lyonnais four, and
28 Crédit Commercial de France four.

29 15. *Source*: Enquête Emploi 2000, Institut national de la statistique et des études
30 économiques, CD-ROM Version.

31 16. *Source*: Institut national de la statistique et des études économiques, Mensuel
32 No. 202, Octobre 20001, Ile-de-France à la page: “Gros plan sur l’emploi francilien en
33 1999.”

34 17. *Source*: Institut national de la statistique et des études économiques, Comptabilité
35 nationale, 2001 (www.insee.fr/indicateur/cnat_annu/tableaux/t_1201_25_4.htm). In 1998,
36 there were 1237 credit establishments in France, with 25428 bank tellers, and 714730
37 employees.

38 18. Additional data were also collected during interviews with the judges. But we were
39 not authorized to elicit other network information, for example about friendship ties among
40 judges (a question considered to be highly intrusive in French society in general, and in
this organization in particular). We were allowed to ask questions about the following vari-
ables, which will be used in the regression model presented in Table 1: Did the judge
seek advice, during the past two years, from former judges of the Tribunal of Commerce,
from personalities in the business community, from professional judges, from the office
of the attorney general? We were also allowed to ask questions about participation in the
social life organized within the courthouse (dinners, trips, or conferences organized by
the President, by their Chamber, by their promotion, or by their *syndicat*), and
about opinions concerning current reform discussed at the National Assembly.

1 19. Some of the characteristics of these judges were strongly correlated with others, as
 2 shown in Table 1. Therefore, we did not include all of them in the regression equation.
 3 For example, number of years as a judge is strongly correlated with being a *Président de*
 4 *Chambre*, or with age. Also, we do not know much about the judges. For example, several
 5 judges told us that membership in local chapters of the Free Masonry was an important
 6 variable in order to explain advice seeking behavior. That variable is not available to us for
 inclusion in this model.

7 20. Sometimes to escape the pressure of competitive markets: As well described by
 8 Schumpeter, entrepreneurs often try to dump market competition on others, and to look for
 9 niches in which rents and discounts are available. Researchers have shown that businesses
 10 often do this illegally, through various forms of collusion (see, for example, Reiss, 1984;
 11 Stone, 1975; Vaughan, 1983, 1999). But in many countries they do so perfectly legally (with
 respect to the laws of these countries) and openly.

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 15
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13
 14 **APPENDIX**

15
 16 **Table 3** is the density table for the advice network among the judges of the Com-
 17 mercial Court of Paris, produced by Structure 4.1 (Burt, 1991). In this density
 18 table, cell i, j is the average relation from someone occupying position i to some-
 19 one in position j . The average relation between any two people in the network
 20 is 0.101.

21 The two image matrices in **Table 4** are derived from the density table in **Table 3**.
 22 The cutoff for the first matrix is the overall density of the network (cell $i, j = 1$
 23 if cell i, j density is greater than the average relation in the network between any
 24 two people) and a high density of 2.5 for the second matrix. This second matrix is
 25 used to represent the structure in **Fig. 1**.

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 30 **Table 3.** Density Table for the Advice Network Among the Judges of the
 31 Commercial Court of Paris.

Position	1	2	3	4	5	6	Residual
1	0.000	0.001	0.000	0.000	0.004	0.000	0.000
2	0.000	0.000	0.000	0.000	0.005	0.000	0.000
3	0.002	0.115	0.027	0.495	0.437	0.269	0.367
4	0.000	0.103	0.013	0.539	0.450	0.316	0.393
5	0.000	0.001	0.000	0.000	0.006	0.000	0.000
6	0.000	0.106	0.011	0.558	0.449	0.256	0.313
Residual	0.000	0.176	0.069	0.396	0.371	0.291	0.000

Table 4. Two Images Matrices for the Advice Network Among the Judges of the Commercial Court of Paris.

Position	1 2 3 4 5 6	1 2 3 4 5 6
1	000000	000000
2	000000	000000
3	010111	000111
4	010111	000111
5	000000	000000
6	010111	000111
	Cutoff at overall density	Cutoff at 2.5, used for Fig. 1

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