The Effect of Judicial Independence on Courts:

Evidence from the American States [1]

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Abstract

This paper demonstrates that two initial conditions – having been settled by a country with a civil law legal system (France, Spain, or Mexico) and membership in the Confederacy during the Civil War – have had lasting effects on state courts in the United States. We find that states initially settled by civil law countries and states in the Confederacy granted less independence to their judiciary in 1970-90 and had lower quality courts in 2001-03. And, judicial independence is strongly associated with court quality. To explain these findings, we hypothesize that civil law acted through legislator preferences regarding the balance of power between the legislature and the judiciary, with legislators in civil law states preferring a more subordinate judiciary. The ability of civil law legislators to act on these preferences was, however, affected by within-state political competition, which was much higher in northern states than in southern states after the Civil War.

[1] Co-authors: Daniel Berkowitz, Department of Economics, University of Pittsburgh, Pittsburgh, PA 15260, dmberk@pitt.edu; Karen Clay, the Heinz School of Public Policy and Management, Carnegie Mellon University, Pittsburgh, PA 15213, email: kclay@andrew.cmu.edu.

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1. INTRODUCTION

In this paper we provide new evidence from the American States on the determinants of the quality of courts. Courts are widely viewed as central economic institutions (North 1990). There is now considerable cross-country evidence showing that the quality of courts or the legal family under which the court system operates are related to a variety of political and economic outcomes. These findings raise the question of what determines the quality of courts. The American States are a useful laboratory for studying the determinants of good institutions because they share a single language, a common legal family (with the exception of Louisiana), and there has been, and continues to be, mobility of human and physical capital across states, so one might expect any initial differences in quality of courts or other institutions to diminish over time.

We argue that two initial conditions – membership in the Confederacy during the Civil War and having been settled by a country with a civil law legal system – have had long lasting effects on state courts. Slavery was present to a greater or lesser degree in many states during the first half of the nineteenth century. The states with the highest proportions of slaves, however, and the ones hardest hit by the Civil War were the eleven southern states that were members of the Confederacy. Thus we will focus on the influence of slavery in these eleven states. France, Spain and Mexico, all countries with civil law legal systems, settled territory that eventually emerged as thirteen states; and all of these states had operational civil law courts prior to British or American acquisition. With the exception of Louisiana, the civil law states adopted common legal systems prior

to joining the Union. Of the thirteen civil law states, six states were also members of the Confederacy.

We demonstrate that these two initial conditions can explain a large fraction of the cross-sectional variation in the quality of state courts, as measured in 2001-03. Further, we show that initial legal family and membership in the Confederacy appears to have acted on state courts primarily through judicial independence as measured by four variables: i) how state judges are selected and retained; ii) the level of within-state political competition; iii) levels of judicial activism by the state supreme courts and iv) state budget allocations to the judiciary.

Finally, this paper analyzes why these two initial conditions might have affected state courts. First consider how civil law legal traditions, *if persistent*, would affect the state judiciary and state courts. By the end of the eighteenth century, civil and common law legal systems had diverged substantially in their views of the role of the judiciary (Glaeser and Shleifer 2002). In civil law systems, the judiciary was viewed as being the enforcement arm of the state, whereas in common law systems the judiciary also protected citizens from the state. In civil law systems judges primarily interpreted existing statutes while in common law judges could use the system of precedents to create laws. We hypothesize that civil law norms in which judges are treated as civil servants that are subordinated to elected branches have persisted in civil law states.

The ability of legislators in civil law states to act on these preferences was, however, affected by within state political competition, which has been much greater in the North than the South, since the Civil War, particularly after the end of Reconstruction (1877). The Civil War dramatically diminished political competition in the eleven states

that formed the Confederacy, as states adopted single party (Democratic) political systems. This had repercussions for the independence of the judiciary. Competition directly affects judicial independence, since state legislatures with higher levels of political competition have a more difficult time reaching the number of votes to recall or otherwise punish judges who make unpopular decisions. Political competition also indirectly affects judicial independence because it is a determinant of methods of judicial selection and retention (Hanssen 2004a, 2004b; Landes and Posner 1975).

We present a large body of evidence that is consistent with this hypothesis. During 1970 and 1990, controlling for membership in the Confederacy, civil law states were more likely to select and retain their higher court state judges through partisan elections. Of the methods of judicial selection and retention, partisan elections are widely considered to give state officials in the legislative and executive branches the most control over judges. Again controlling for membership in the Confederacy, civil law states also had lower judicial budgets; they remove their judges more frequently; they have higher rates of federal convictions of public officials for corruption; and they amend and replace their constitutions more frequently. The first two variables suggest a more subordinate judiciary that is less able to extract funds from the legislature and is at greater risk for removal for unpopular decisions. The latter three variables are indicative of lower quality state bureaucracy overall, possibly including the state judiciary. They also indicate the ease with which the legislature can overrule the judiciary through modifications to the state constitution.

This paper is related to two broad literatures. The first is the literature on initial conditions and institutions, most of which are cross-country studies. The initial

conditions found to be significant include disease, slavery, and whether countries have a civil law legal system or a common law legal system (Acemoglu et al. 2001; Engermann and Sokoloff 2002; La Porta et al. 1998). We provide new evidence that both slavery and legal family are important determinants of the quality of state courts in the United States. The reasons why they are important may, however, be specific to the United States.

The second is the literature on judicial independence. Several influential papers document how in the United States the different methods of judicial selection and retention influence whether or not courts will tend to effectively enforce constitutional restrictions on deficit finance, whether or not state courts are willing to consider public utility dispute cases, and whether or not state judges will side with plaintiffs in cases involving employment discrimination charges (Bohn and Inman 1996, Hanssen 1999, Besley and Payne 2003). La Porta et al (2004) find that judges in civil law countries have less independence than judges in common law countries. Consistent with these results, we provide evidence that judicial retention methods are an important determinant of the quality of the state judiciary and the quality of state courts as a whole. Further, we document that three other factors – political competition, the judicial budget, and judicial activism – are also determinants of judicial independence and the quality of state courts. Finally, while our measure of judicial independence is somewhat different than the measure employed by La Porta et al (2004), we also find that judges in states with civil law traditions tend to be less independent than in states with common law origins.

In section 2, we discuss our initial conditions in greater detail. In section 3, we present our measure of the quality of state courts and demonstrate that state initial conditions can explain a substantial amount of the cross sectional variation in the quality

of state courts. In section 4, we discuss judicial independence, present several proxies for judicial independence, and demonstrate the relationship between these proxies and the quality of state courts. In section 5, we provide evidence on the link between initial conditions and judicial independence and discuss in greater detail the mechanisms through which the initial conditions affected independence. In section 6, we discuss the implications of our findings.

2. INITIAL CONDITIONS

2.1 Civil Law Origins

After the discovery, or perhaps rediscovery of North America, by Christopher Columbus in 1492, European powers vied for footholds. For example, prior to the first British settlements in Jamestown, Virginia and Plymouth, Massachusetts, Spain and France engaged in armed conflict in South Carolina and Florida in 1565, as part of the Spanish plan to regain control of the North Atlantic coast (Vigneras, 1969). In what would become the United States, the major players were France, Spain, Mexico (after its independence from Spain), and England. Lesser rivals included the Netherlands and Sweden in the mid-Atlantic and Russia in the Northwest. By the end of the seventeenth century, England had acquired control of the Dutch and Swedish settlements in the mid-Atlantic, consolidating their control of a large stretch of the Atlantic seaboard. The eighteenth century was marked by British conflict with the Spanish to the South and the French to the North and West of the British colonies. With the Peace of Paris in 1763 at end of the French and Indian War, the French were pushed back to the Mississippi. And the Spanish were contained to Florida and parts of the Gulf coast.

With the War of American Independence and the Treaty of Paris in 1783, the newly founded United States came to control a large share of the British possessions in North America. In 1803 vast amounts of land that had been recently controlled in most cases by both the French and the Spanish, came into United States possession through the Louisiana Purchase. Additional land was added by the purchase of Florida in 1821. In the far West, Russia established short-lived settlements in California at Fort Ross and later in Washington and Oregon. Ongoing American settlement in the British controlled Oregon and Washington and the election of James Polk, an expansionist whose slogan was "Fifty-four Forty or Fight!", led to the Treaty of Washington in 1846. Conflict with Mexico in Texas and elsewhere led to war and the acquisition of additional territory through the Treaty of Guadalupe Hidalgo in 1848. The final territory in the continental United States was acquired through the Gadsden Purchase in 1853.

Thus, many states, including, as we will see, a number of the original thirteen colonies, had settlements by civil law countries at some point during their history. We will, however, restrict attention to the subset of these states that have evidence of permanent settlement and operation of a civil law system during the eighteenth century. If civil law is to have had an impact on the legal evolution of individual states during the nineteenth and twentieth centuries, settlement has to have been permanent. Thus, for example, a French or Spanish settlement in South Carolina that was established in the sixteenth century and lasted for twenty years was unlikely to have had an enduring effect on South Carolina's legal evolution.

Although the exclusion of temporary settlements by civil law countries is relatively uncontroversial, the requirement that civil law control occur in the eighteenth

century is more controversial, because it excludes Dutch and Swedish settlements in the Mid-Atlantic. We exclude the states controlled by the Dutch and Swedes because of the early and relatively short duration of civil law (for more details, see the Appendix). Table 1 compares the approximate dates of the first permanent settlement and the change to common law for the states that we examine. All of the other states settled by civil law countries had civil law in the eighteenth century and most had it for a longer period of time. Thus, we would expect civil law to have had a greater impact in these areas.

To determine the extent of actual settlement, we use data on population and land claims. Table 2 presents available estimates of the population of civil law states before and after acquisition. Ideally, we would like to know the size of the original population, its ethnic composition, and whether the residents stayed or moved elsewhere. If the original population was large, primarily composed of individuals who had always been subject to civil law, and these individuals stayed after American acquisition, we would expect the civil law effect to be the strongest. Unfortunately relatively little is known about the population of any of the states in the United States prior to the first census in 1790, about the ethnic composition of the states prior to 1850, when the census began recording where individuals were born, and about mobility of the population prior to 1850.[2] The evidence is particularly weak for areas outside of the British colonies.

Pre-acquisition estimates are not available for all states and comparisons of pre-acquisition estimates with the first census suggest that some states had much larger population influxes than others. To address this deficit, we use the 1850 Census of

[2] Gemery (2000) provides population numbers by region (New England, Middle colonies, and South) for 1610-1790, Table 5.1. Villaflor and Sokoloff (1982) use data on birthplace and residence of recruits at the time of enrollment to compute migration patterns for 11 colonies. Gemery (1984) assembles estimates of European emigration to (British) North America.

Population to estimate the share of the adult male population over 40 with at least $100 in real property that were born in civil law areas. These men were likely to be in their prime years of political leadership. Because these men were born in 1810 or earlier, if they were born in a civil law area, they were very likely exposed to civil law and so may have internalized civil law norms.[3] Attention is restricted to individuals with at least $100 in real property, because these individuals were more likely to be able to vote and thus be active in politics.

In the share civil 1850 column, birth in civil law areas includes individuals born in any of the civil law states and individuals born in France, Spain, Mexico or French Canada. The underlying assumption is that many of these individuals came during the period in which civil law was in force or arrived shortly thereafter. Thus, they would have played a critical role in the transmission of civil law attitudes and norms. The share civil varied from a low of 0.5 percent in Alabama to a high of 56.5 percent in Louisiana. The shares in five states – Arizona, California, Florida, Louisiana, and New Mexico – were above 10 percent. Texas and Arkansas were around 5 percent and the remaining states were below 3.5 percent. Even in states with low shares of civil, if civil law attitudes towards politics and the judiciary were persistent and were internalized by the earliest settlers from common law areas, they may have been transmitted.

The next column includes individuals born in any of the civil law states, individuals born in France, Spain, Mexico or French Canada, and individuals born in other civil law areas, notably Germany, Switzerland, Austria, and the Netherlands.

[3] Arizona was not included in the 1850 census and the numbers in the 1860 census are small. Thus, the share for Arizona was computed based on the 1870 census. In that year, no men with at least $100 in real property were over 40, so the percentage is computed based on men over 20. These men were born on or before 1850 and so would have been exposed to civil law.

Individuals born in Germany, Switzerland, Austria, and the Netherlands were probably not in the civil law states while they were still governed by Spain, France, or Mexico. Their Germanic civil law background may, however, have reinforced any existing civil law attitudes and norms that were established under France, Spain, or Mexico. Under this expanded definition of civil, the share civil in the Midwest, California, and Texas jumps substantially. The number of states with at least 10 percent civil increases to twelve – Arizona, California, Florida, Illinois, Indiana, Louisiana, Michigan, Missouri, New Mexico, Ohio, Texas, and Wisconsin. Other states, with over 10 percent civil include New York (11.5 percent), New Jersey (12.1), Pennsylvania (14.1), and Iowa (19.1). Under the previous definition, New York, New Jersey, Pennsylvania, and Iowa had negligible civil law populations. To be clear, we do not think that emigrants from civil law areas such as Germany in, say, Pennsylvania or Iowa would have been successful in establishing civil law where common law had previously flourished. Emigrants may, however, have played a role in perpetuating any existing civil law attitudes or norms in states that had previously had civil law legal systems.

When the United States acquired territory from France, Spain, Mexico and Great Britain, it agreed in principle to respect the land grants of prior governments. Congress established land commissions to examine these foreign land grants, and if the grants were deemed valid, to bring them into the United States system of property rights. After a survey of the property, the process culminated with the issuance of a patent for the land.[4]

The land claims process was very imperfect, with claims being held to various standards over time and the whole process being characterized by various degrees of corruption. Land claims, however, are one of the few proxies we have for the degree of

[4] For more detail on the land claims process, see Clay (1999).

settlement in various states prior to American acquisition. Table 3 lists by state the number of private land claims as of 1904 that had been approved by the various land commissions or by Congress. States that were part of the territory acquired by Great Britain from France prior to the American Revolution: Michigan, Illinois, Indiana, Wisconsin, and Ohio, are included, because the United States established land commissions after the American Revolution to incorporate the French land grants into the American system of property rights (for a discussion of why land claims for Texas and Native American are excluded from Table 3, see the Appendix).

For all of the states with at least 200 confirmed claims, we were able to find additional evidence that established the settlement and operation of a civil law legal system that saw a full range of cases.[5] Legal historians have tapped surviving colonial records to write book length legal histories on Arkansas, California, Florida, Missouri, Louisiana, New Mexico, and Texas, and articles for Mississippi and Alabama.[6] The large number of land grants in Illinois (936 grants), Indiana (862), and Michigan (942), suggests that the population was significant. Further, records from the village assemblies, which governed many aspects of village life, and records of disputes that made it to New Orleans suggest there was something similar to a formal judicial system in these three states.[7]

[5] For more on French Illinois, see Ekberg (1998) and Briggs (1990). Unfortunately, there was only rarely a notary in the Illinois country, and what notarial records there may have been have not survived. There has been an assumption by some historians that there was no legal system in some colonies prior to the American legal system.

[6] See Arnold (1985) on Arkansas, Banner (2000) on Missouri, Cutter (1995) on Texas and New Mexico, Fernandez (2001) on Louisiana, Langum (1987) on California, and Matthews (1987) on Florida. On Natchez, Mississippi, see Holmes (1963) and on Mobile, Alabama, see Hamilton (1910). For West Florida, see also *Archives of Spanish Government of West Florida, 1782-1816.* National Archives T1116.

[7] For more on French Illinois, see Ekberg (1998) and Briggs (1990).

We checked the five states with fewer than 200 land grants - Wisconsin, Ohio, Arizona, Colorado, and Iowa and found that only Arizona should be classified as civil law. This is because Arizona had strong links to New Mexico, which had a well-developed civil law system (see the Appendix for the details). Thus, we define the twelve states with more than 200 land grants plus Arizona as civil law states.

2.2 Slavery

One can similarly classify states based on whether they had slaves or not. This classification can be done in one of a number of possible ways, including: i) whether the state was a member of the Confederacy, ii) slaves as a percentage of the 1860 population, which captures variation in slavery across the Confederacy and reflects the fact that some states with slaves chose not to join the Confederacy, and iii) climate, which captures the suitability of a state for slavery , since both membership in the Confederacy and slaves as a percentage of the 1860 population were to some degree endogenous. The measure of climate we use is the interaction of average annual temperature, humidity, and rainfall. States with more tropical (warmer, wetter, and more humid) climates were better suited to large scale agriculture using slaves. Climate was by no means the only determinant of whether a state would have an agricultural system based on slavery. Soil type played an important role as well (Wright 2003).

Table 4a shows the correlation between slaves as a percentage of 1860 population, membership in the Confederacy, and climate. The three measures are highly correlated. They area also highly correlated with measures of disease. Table 4b shows the correlation between slaves as a percentage of 1860 population and yellow fever, malaria, and soldier mortality.

We use membership in the Confederacy to capture the effect of slavery for two reasons. First, these states had the most slaves. Second, and more importantly, these states were more severely affected by the Civil War than other slave states that stayed in the Union.

Based on our classification of civil law and slave states, there were a total of eleven slave states and thirteen civil law states. Five states in what we refer to as the Common South – Georgia, North Carolina, South Carolina, Tennessee, and Virginia – were members of the Confederacy and had always had common law legal systems. Six states in what we refer to as the Civil South – Alabama, Arkansas, Florida, Louisiana, Mississippi, and Texas – were members of the Confederacy and had been settled by countries with civil law legal systems. Seven states in what we refer to as the Civil North – Arizona, California, Illinois, Indiana, Michigan, Missouri, and New Mexico – were settled by countries with civil law legal systems and were not members of the Confederacy. The remaining thirty states in the Continental United States in what we refer to as the Common North always had common law and were not members of the Confederacy. The map in Figure 1 highlights the states in the four regions.

3. INITIAL CONDITIONS AND QUALITY OF STATE COURTS

In this section, we examine the ability of our initial conditions to explain the current quality of state courts. To measure the quality of courts, we average the results of two rounds of the Institute for Legal Reform of the U.S. Chamber of Commerce-States Liability Ranking Survey. The first round was collected November-December, 2001; the second round was conducted in January-February, 2003 (final reports are January, 2001

and April, 2003) The survey results are based on telephone interviews of nationally representative samples of 824 and 928 senior attorneys in 2001 and 2003 at companies with annual revenues of at least $100 million. Attorneys evaluated the overall treatment of tort and contract litigation, timeliness of summary judgment/dismissal, discovery, scientific and technical evidence, judges' impartiality, judges' competence, juries' predictability and juries' fairness on a discrete scale of 0 (worst) to 4 (best) for states for which they were familiar.[8] Because lawyers representing major corporations are the respondents, the survey can be interpreted as measuring pro-business orientation of state courts.

We use the average score over the 8 categories for each state and average over 2001 and 2003. The average score is 2.3, and ranges from 1.2 (Mississippi) to 3.1 (Delaware). Although survey measures can be problematic, three properties of the surveys give us confidence in their ability to measure the quality of courts. First, the survey was conducted twice – in 2001 and again in 2003 – and the results were very highly correlated.[9] Second, the average attorney who participated in the survey evaluated 4.8 states in the 2001 survey, and 4.6 states in the 2003 survey. Lawyers who ranked four or more states represent 83-percent and 81-percent of the responses in 2001 and 2003. Third, our measure of state courts quality is associated in the predicted manner with measures of professionalism, tort law innovation in state courts, and public sector corruption (see Appendix, Table 1 for the details).

In Table 5 we present OLS regressions that examine the determinants of the current quality of state courts. We begin in column 1 by regressing state court quality on

[8] We exclude treatment of class action suits and punitive damages in our calculated average because these two categories cannot be determined in several states.
[9] The correlation of the average measure in 2001 with the average measure 2003 is 0.95.

dummy variables for the Civil North, the Common South and the Common North, with the Civil South being the omitted category. The coefficients on the dummy variables measure the impact on state court quality of a being a state within each of the three regions relative to being a state in the Civil South; the estimated constant is the average level of state court quality in the Civil South. The results show that all Civil North, Common South and Common North all have statistically significantly better courts than the Civil South, and that these magnitudes are very large. For example, the effect of having been a Common South versus Civil South state accounts for a 1.9 standard deviation in court quality, which is roughly the difference between Alabama and Georgia. The effect of having been a Civil North versus Civil South state accounts for 1.7 standard deviation in courts, which is roughly the difference between Alabama and New Mexico, and the effect of having been a Common North versus Civil South states accounts for a 2.1 standard deviation in courts, which is roughly the difference between Alabama and Rhode Island.

In column 2 we add two other initial conditions that could plausibly have been important, the date a state entered the union and the natural log of the population at first census, to the regression reported in column 1. Later entrants may have had either better or worse courts; and more populous states may have invested either more or less than less populous states in their courts. The results in the column 1 are robust. The coefficients on these two addition variables are small and are not statistically significant. The point estimates and standard errors for the Civil North, Common South and Common North change only marginally.

In column 3, we use ln(number of years of civil law + 1), ln(slaves as a percentage of the population in 1860 + 1), and the interaction of the two as explanatory variables. These variables allow us to examine differences among civil law and slave states. The coefficients on the natural log of the number of years of civil law and the natural log of years civil interacted with the natural log of the share of slaves are statistically significant, negative, and large. The effect of the natural log of slaves is negative but, interestingly, is not significant. This captures something that was evident in column 1 as well. The Common South has courts that are nearly as well respected as the Common North on average, suggesting that any negative effect of slavery by itself was small. The negative effects stem from civil law and the interaction of civil law with slavery. In column 4, we add the natural log of initial population and union entry date to the regression reported in column 3. The coefficients on these variables are not statistically significant, and the natural log of years civil and the interaction term continue to be statistically significant.

In unreported regressions we evaluate additional initial conditions that have been identified as important for the emergence of institutions including natural resource endowment (Sachs and Warner 1999) and geography including proximity to coast and shorelines (Rappaport and Sachs 2002). Our results are robust to inclusion of these other initial conditions in the regressions.

The foregoing results suggest that the initial conditions we have identified are important determinants of the quality of state courts, but do not identify specific channels through which these initial conditions might have operated. In the next section, we examine a number of measures of judicial independence and their relationship to the

quality of state courts. In the section that follows, we investigate the relationship between our two initial conditions and a number of measures of judicial independence, and then address the issue of the channels through which the initial conditions operated.

4. JUDICIAL INDEPENDENCE AND QUALITY OF STATE COURTS

In Figure 2, we graphically depict several important features of the relationship between the legislature and the judiciary. The legislature has an effect on the judiciary through a number of channels including: i) the way in which judges are selected and retained, ii) passing laws that directly impact the judiciary such as laws determining the organization of courts, iii) passing new laws or amending the state constitution in response to constitutional challenge, and iv) setting the judicial budget. The judiciary has an effect on the legislature as well, although the primary mechanisms are: i) enforcement of laws that affect units of state government, such as educational mandates or balanced budget rules, and ii) ruling on the constitutionality of laws passed by the legislature.[10] We discuss each of these mechanisms in what follows.

4.1 Judicial Selection and Retention

The spectrum of judicial independence could, in principle, run the gamut from judges having at will contracts with the legislatures to judges having lifetime appointments like the United States Supreme Court. The five state-level judicial retention procedures currently in use fall in between these two extremes. Of the five, merit based appointment is widely regarded as leading to the most independent judiciary,

[10] In some states judge may also issue non-binding advisory opinions to the state legislature about the constitutionality of prospective laws.

and partisan elections as leading to the least independent judiciary. The three others – nonpartisan elections and (nonmerit) appointment by the legislature or the governor – fall in between.

Numerous scholars and public officials have publicly opposed the partisan election of judges. In a 1906 address to the American Bar Association, the renowned legal scholar Roscoe Pound argued that "putting courts into politics, and compelling judges to become politicians in many jurisdictions. . . [has] almost destroyed the traditional respect for the bench."[11] The American Bar Association (ABA) was instrumental in the development of merit plans in the 1930s and in their adoption in some states beginning in the 1940s. The ABA is also on record as opposing both partisan and nonpartisan judicial elections.[12]

Judicial retention procedures vary across states and have varied at the state level over time. Hanssen (2004a) divides historical trends in how judges were selected and retained into four periods. Figure 3 from Hanssen shows the distribution of selection and retention systems in use over time. During the earliest period (1790-1847), all judges were appointed, either by the legislature or by the governor, or jointly with one nominating and the other confirming. This retention process reflected a number of issues including the primacy of the early legislatures, a lack of distinction between lawmaking and judging, and a distrust of Colonial judges, many of whom had been loyal to the crown. During the second period (1847-1910), twenty of the twenty-nine existing states and all seventeen of the new states adopted partisan elections. This change was in

[11] 29 A.B.A. Rep. 395, 410-411 (1906), *reprinted in* 8 Baylor L. Rev. 1, 19-20 (1956)
[12] "BE IT RESOLVED, that the American Bar Association urges state, territorial, and local bar associations in jurisdictions where judges are elected in partisan or non-partisan elections to work for the adoption of merit selection and retention, and to consider means of improving the judicial elective process." www.abanet.org/govaffairs/judiciary/rappd.html

response to popular concerns about legislatures and a perceived need for state courts to be independent of state legislatures. The result was the direct election of judges. Partisan elections forced judges to participate in the same processes as other political actors, leading to many of the same problems. In response, seventeen of the forty-six existing states and one of the two new states adopted nonpartisan elections in the third period (1910-1958). Although perceived to be an improvement, many felt that judges were still inadequately insulated from the political process. In 1934 California began having the governor appoint judges, and at the end of their term subjecting judges to noncompetitive retention elections that basically ask voters to vote yes or no on the question: should Judge X be reappointed? In 1940, Missouri implemented what is commonly called the merit system. Judges are appointed based on merit criteria and are subject to retention elections. By 1990, eighteen states had full (merit selection, retention elections) or partial (other selection, retention elections) merit plans.

The existence of variation in judicial selection over time and across states has led to a substantial empirical literature on the effect of judicial selection and retention on outcomes. Partisan elections are associated with higher tort awards, decisions against out of state businesses, a higher likelihood of siding with state agencies in challenges to regulations, and a lower likelihood of enforcing constitutional restrictions on deficit financing (Tabarrok and Helland 1999, Hanssen 2000, Bohn and Inman 1996).

One question that arises is whether the differential behavior of judges selected and retained by partisan elections and by other mechanisms reflects selection or incentives. The available evidence suggests that incentives are the dominant factor. That is, the

judges selected are similar, but they behave differently once on the bench.[13] Thus, we use judicial retentions procedures as a measure of judicial independence.

4.2 Level of Political Competition

Political competition within a state is related to the independence of state judges for at least two reasons. First, there is a majority party power effect. Weak competition means that the majority party can easily get its state legislators to cooperate in punishing the judiciary for unpopular decisions. Strong competition means that state legislatures are divided, and it is more difficult for the majority party to amass the votes necessary to punish the judiciary by, for example, trying to recall the judge or passing a constitutional amendment to override judicial decisions.

Second, political competition may affect the legislature's preferences for an independent judiciary. Specifically, as state political competition increases, legislatures will tend to push for reforms that create a more independent judiciary. Drawing on Landes and Posner's (1975) fundamental insight, Hanssen (2004b) argues that independent judges have the power to make policy and override policy initiated in the legislature or executive office. Thus, the cost to incumbents of an increase in judicial independence is diminished control over current policy. Incumbent policy makers, however, trade off current control of policy against future policy durability, since a more independent judiciary makes it more difficult for future legislatures to override existing policy. As political competition increases, the probability that an incumbent will lose office in the upcoming election also increases, and therefore, incumbents are more likely to push for reforms that increase judicial independence.

[13] Besley and Payne (2003) directly address this issue.

We expect the majority party power effect to be stronger than the preference for judicial reform effect for two reasons. First, while Hanssen (2004b) shows that there is a strong link between political competition and the rules used for retaining appellate judges during 1950-90, this link becomes weaker once he controls for state fixed effects. Since we control for initial conditions (which are similar to state fixed effects), we expect the indirect effect of political competition on court quality would also be relatively weak. Second, once a state has opted out of partisan elections, it never reverts back to using this procedure during the time period that we analyze. Thus, while the past level of political competition is strongly associated with past reforms of judicial selection and retention procedures, the more recent level of political competition impacts the ability of the legislatures to challenge the judiciary through other measures such as passing legislation and amending the state constitution.

We use the Ranney index to measure state-level inter-party competition. This index is widely used in political science. On a 0.5-1.0 scale, where 0.5 represents control by a single party of all seats in both houses of the state legislature and a 100 percent share of the vote for the state governor, and 1 represents equal control by the two parties, the average state measured 0.82.

There has been a gradual increase in political competition during 1950-90. During the 1950s, the average of the Ranney index across all states ranged from 0.72 to 0.78; during the 1960s it ranged from 0.77 to 0.82; during the 1980s it ranged from 0.79 and 0.82; and by 1990 it was 0.87. During the same period, the variance in political competition across states also gradually fell; in the early 50s, the cross-state standard deviation in political competition was 0.14; and by 1990 this statistic had fallen to 0.096.

4.3 Judicial Activism

By judicial activism, we mean the willingness of the state supreme court to rule legislation to be contrary to the state constitution. The effect of judicial activism on the quality of state courts is not clear a priori. Activism by the state supreme courts could indicate that the judiciary is relatively strong and thus willing to make decisions that may be counter to the wishes of the legislature. Or activism can be a destabilizing influence, since striking down statutes can make it difficult for lower court judges to know what the applicable law is and whether laws will survive constitutional challenges.

Further, if activism is unpopular, it can invite repercussions from the legislature, which may further destabilize the legal system. In 1999, the Superior Court Chief Justice of New Hampshire discussed the effect of legislative retaliation, "… [w]hen removal is threatened for the kind of conduct that is expected of a judge, judicial independence is compromised. When there is legislative retaliation for decisions, independence is compromised." (Larger, 2002, p. 11). Using data from 1970-1993 covering four areas of law, Langer (2002) shows that the behavior of supreme court justices is dependent on how difficult it is for the state legislature to pass constitutional amendments (often in retaliation for state supreme court constitutional rulings), as well the term length of judges and whether judges are retained by the legislature. Thus, the possibility of retaliation by the legislature (by denying judges re-appointment and by amending constitutions) appears to affect judicial behavior.

We use data from Beavers and Emmert (2000) on judicial activism in state courts. The data include all 3,024 constitutional challenges heard by state supreme courts

between 1981 and 1985.[14] In 550 of the cases, state supreme courts ruled that state legislation was, at least in part, unconstitutional. In the regressions, we include both the natural log of the number of cases heard by each state supreme court and the natural log of the number of cases overturned. The number of cases heard is a proxy for the courts' willingness to possibly rule a statute unconstitutional, since a court could avoid the issue entirely by refusing to hear these cases. The natural log of the number of cases ruled unconstitutional is a measure of actual activism.

4.4 Judicial Budget

The budget can be interpreted in a number of ways. It can be thought of as a control, where states with higher expenditures are likely to have higher quality courts. Or it can be considered a proxy for the power of the judiciary, where more powerful judiciaries can extract more resources from legislatures. Or it can be a measure of independence, where a bigger budget means that budget cuts of a given dollar amount will be less harmful to the judiciary. And thus, the legislature will be less able to punish a judiciary with a larger budget. We are agnostic about the relative importance of these explanations.

We use the deflated per capita budget allocated to the judiciary during 1970-90 to measure state allocations to the judiciary. Between 1970 and 1990 this state budget item increased on average from $6.57 per capita to $32.15 per capita in real (year 2000) dollars, which is roughly an annual average growth rate of 9%. Dispersion in state spending became tighter over time: in 1970 spending on courts in the top ranked state (Delaware at $27.11) was 16.4 times greater than in the lowest ranked state (South

[14] The data include challenges arising from both civil and criminal cases.

Carolina at $1.65); and, in 1990 spending in the top ranked state (Delaware at $84.94) was roughly 8.7 more than in the lowest ranked state (Indiana at $9.74). Moreover, the correlation coefficient for a state's rank of spending on the judiciary in 1970 versus 1990 is 0.69. The relatively high correlation suggests that the rank of state spending on the judiciary remained relatively stable over this time period.

4.5 Judicial Independence and the Quality of State Courts

In this subsection, we regress the quality of state courts on the measures of judicial independence. We lag the measures of dependent variables, taking the average over the period 1970-90. There is no reason to prefer a specific year, and averaging over this period reduces any noise in the data due to measurement error. As we noted earlier, judicial expenditures and the Ranney index are persistent, although the both are trending up over time. Averaging the partisan variable is more controversial, because there are discrete changes as some states change away from partisan elections. If the judiciary does not immediately change its behavior in response to the change in selection and retention, then averaging may be useful, because it preserves information on how long it has been since the state last used partisan elections.

In Table 6, we examine the effect of our measures of judicial independence on the average quality of state courts. In column 1, we include only judicial spending and find that judicial spending is positively and statistically significantly related to the quality of courts. In columns 2-4 we examine the effect of each of the three variables we discussed earlier – partisan elections, political competition, and judicial activism – controlling for judicial spending. In column 2, partisan elections are negatively and statistically

significantly associated with higher quality courts. In column 3, greater political competition is positively and statistically significantly associated with higher quality courts. In column 4, judicial activism is negatively and statistically significantly associated with higher quality courts controlling for the number of cases.

In column 5, we include all four variables. Partisan elections, political competition, and judicial activism all are statistically significant and have the appropriate signs. In column 6, we assess the quantitative significance of the variables in column 5 by measuring the effect of a one standard deviation increase in an explanatory variable in terms of standard deviations in court quality.[15] Partisan elections have the largest absolute quantitative significance. A one standard deviation increase in partisan elections is associated with a 0.46 standard deviation decrease in the quality of state courts. A one standard deviation increase in the Ranney index is associated with a 0.29 standard deviation increase in the quality of state courts. And a one standard deviation increase in judicial activism is associated with a 0.28 decrease in the quality of state courts.

5. INITIAL CONDITIONS AND JUDICIAL INDEPENDENCE

Table 7 shows that our initial conditions, as measured by dummy variables for the four regions, are able to explain a substantial amount of the cross-sectional variation in the four measures of judicial independence. Overall the picture is one in which the Civil South and the Common North are at opposite ends of the spectrum, with the other two

[15] One wants to be cautious in interpreting the effect of the measures of judicial independence, since the measures of independence may not be completely exogenous. It is common to lag the values of policy variables to reduce possible endogeneity. This may not be sufficient to address the problem of endogeneity if the variables involved are all very persistent. For example, legislatures may give low quality courts small budgets precisely because they are low quality. If both the quality of courts and budgets are persistent, we could get the observed effect. Similarly, low quality courts may lead or permit judges to engage in judicial activism. It is less likely that courts would effect political competition. And the dominant reason for movement away from partisan elections has been shown to be political competition.

regions falling somewhere in between. The question is why. Why would civil law states differ from common law states on judicial independence? And similarly, why would former members of the Confederacy differ from states that were not part of the Confederacy on judicial independence?

The brief answers are different legislative attitudes regarding the appropriate balance of power between the legislature and the judiciary in civil and common law states and different levels of political competition in the North and the South. More specifically our argument is that legislators in civil law states initially preferred, and are likely to continue to prefer, a less independent judiciary than their counterparts in common law states. In civil law legal systems judges have had relatively less power to check the executive and legislative branches than in common law systems (Merryman 1985). One of the legacies of a civil law legal system is likely to have been a belief that the judiciary should be subordinate to the legislature. The ability of legislators in civil law states to act on their preferences has, however, been affected by political competition, which has been much greater in the North than the South since the end of Reconstruction (1877) (Key 1984, Bullock and Rozell 2003).

Legislators in the Civil North and Civil South faced very different political environments during the twentieth century, which in turn affected their ability to act on beliefs that the judiciary should be subordinate. As we discussed earlier, when there is significant risk that the current majority party will not be in power in the future, legislators prefer a more independent judiciary. Thus, changes in procedures for retaining judges are much more likely to occur in competitive political environments (Hanssen 2004a). As Figure 4 shows, state legislators in the lower house in the Civil

North faced a dramatically more competitive political environment than state legislators in the Civil South, where Democrats controlled virtually all of the seats.

To understand how differences in beliefs and political systems affected the judicial system, it is useful to discuss historical methods of judicial appointment in greater detail. In the early twentieth century in both common law states and civil law states, the judiciary was still relatively subordinate. As of 1909, most states used partisan elections to appoint state court of last resort judges and lower court judges (Hall 1983, Hanssen 2004a, American Judicature Society 2005). The only states that did not have or had not had partisan elections for state court of last resort judges were nine states derived from the original thirteen colonies. These states – Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont – all retained appointment systems. Why were partisan elections so widespread? They were part of a common package of reforms designed to address a nineteenth century crisis in the judiciary (Hall 1983). State judges were of highly variable quality; courts were clogged; and lay people could not understand rulings. Some felt judges were insufficiently responsive to the legislatures; others felt they were insufficiently responsive to the electorate. It is worth noting, however, that partisan elections were not all that different from appointment systems during this period, since both had close ties to party politics and strong legislative oversight. In all states, the legislature had the ability to remove or impeach judges, and legislatures did not hesitate to exercise this ability (Ziskind 1969 and Hanssen 2004a).

The most significant change in the independence of state judiciary occurred in twentieth century; with the movement towards different methods of selection and

retention elections for sitting judges. As we noted earlier, by 1990, eighteen states had full or partial merit plans. In addition, eleven states appointed judges; twelve states had nonpartisan elections; and seven states had partisan elections. Six states that had previously used partisan elections switched to other methods of appointment during the 1970 to 1990 period.

To examine the effects of civil law on the four measures of judicial independence holding constant differences associated with membership in the Confederacy, we conduct pair wise comparisons between the Civil North and the Common North and between the Civil South and the Common South. The results are presented in Table 8. It is worth noting that sample sizes are small and the t-tests are two-tailed, as opposed to weaker one-tailed tests, so it is unlikely that any differences will be statistically significant.

Our hypothesis implies that we should observe a greater use of partisan elections and lower judicial budgets, along with lower quality courts in civil law states. This is indeed what we see in Table 8. It is striking that these differences occurred despite the Civil North states having higher levels of political competition as measured by the Ranney Index than the Common North. For the natural log of cases subject to judicial review, differences between the Civil and Common North and Civil and Common South follow the pattern we observed with partisan elections and the budget. Civil law states took more cases for judicial review, but the share overturned varied, with the Civil North overturning less than the Common North and the Civil South overturning more than the Common South.

At the bottom of Table 8, we present additional evidence that is consistent with there being different balances of power between the state legislature and the judiciary in

the Civil and Common North and the Civil and Common South. Note that both federal prosecution of state officials for corruption and the number of judges removed were higher in the Civil North than in the Common North and higher in the Civil South than in the Common South. Judicial removal can be interpreted as evidence of corruption, as evidence of judicial subordination to the legislature, or both.

The analysis in Glaeser and Shleifer (2002) suggests a theoretical link between civil law and corruption.[16] Based on an analysis of the development of civil law in France following the Gregorian revolution, they argue that, when the sovereign of the nation cannot enforce regional borders and property rights and local elites are battling with each other to secure land claims, the position of judges in civil law systems is efficient. Because judges are easily bullied by local elites under these circumstances, the social benefits of having the national sovereign and his regional representative protect judges against bullying exceed the social costs of politicizing judges by making them subordinate to the sovereign. The position of an independent common law judge is an efficient institution when, because regional borders and property rights are relatively secure, there is relatively little bullying of judges. Thus, the transplantation of the system of common law that occurred when the civil states entered the union may have led to a deterioration of rule of law.[17] In other words, if bullying judges was a potential problem in the civil states prior to statehood and judges were no longer protected from bullying by

[16] We thank Paul Mahoney for raising this point.
[17] This is an example of a "transplant effect" as documented at the national level in Berkowitz, Pistor and Richard (2003).

the sovereign or his regional representatives, then the quality of the judicial system may have fallen as judges become captured by local elites.[18]

Judicial capture by local elites could have happened through a second complementary channel to the one described in the previous paragraph. Namely, it could have originated with the involvement of many officials, including judges, in the rampant land speculation related to foreign land claims during the nineteenth century. While state judges did not have control over the outcome of land claims (that was under the jurisdiction of land commissioners, federal judges, and Congress), their participation may have strengthened their ties to the local elite, with whom they often owned claims (Gates 1991, Briceland 1980, Whatley and Cook 1971, Richardson 1956).

The last two variables in Table 8 are annual rate at which state constitutions were amended between 1970 and 1990 and the number of constitutions that a state has had per century as of 1991 (duration). These rates are indicative of the ease with which the legislature can overrule the state court of last resort should it provide an unpopular ruling, and so provides indirect evidence on the balance of power. The Civil North had higher amendment rates and more constitutions (shorter duration) than the Common North; and the Civil South had higher amendment rates and more constitutions than the Common South.

6. CONCLUSION

The paper breaks new ground by documenting for the United States: i) that state-level initial conditions affect the quality of state courts and ii) some of the channels

[18] To test this formally, one would want evidence on the power of the colonial elite relative to the power of the home country elite and evidence on bullying of judges. Unfortunately, such evidence does not exist.

through which these initial conditions may act. States that were initially settled by civil law countries – France, Spain, and Mexico – and states that were members of the Confederacy during the Civil War have lower quality state courts in 2001-03. These states also were more likely to have a less independent judiciary between 1970 and 1990 as measured by: partisan election of judges, lower levels of political competition, and lower judicial budgets. These measures of judicial independence together with measures of judicial activism, in turn, explain much of the cross-sectional variation in the quality of state courts.

We provide evidence to suggest that, holding constant membership in the Confederacy, civil law states have a different balance of power between the legislature and the judiciary than common law states. This is reflected in ratings of the quality of state courts. We hypothesis that this difference in the balance of power reflects differences in state legislators preferences for the balance of power, with legislators in former civil law states preferring a relatively more subordinate judiciary. This preference is consistent with what we observe both historically and today, namely, that in civil law legal systems the judiciary is viewed as the enforcement arm of and in fact is subordinate to lawmakers.

Our findings suggest that it may be possible for states to overcome the negative effects of civil law and membership in the Confederacy. The role for policy intervention is most obvious for states that use partisan elections to retain state judges. If sufficient political differences between parties emerge, or if high level political figures could push through a policy reform, our estimates suggest that there would be real effects on courts. Specifically, after controlling for initial conditions and contemporary measures of judicial

independence, a change away from partisan elections to nonpartisan elections or an appointment-based system would increase the quality of state courts by roughly almost a half a standard deviation (which is roughly the difference between Massachusetts and Kentucky). States may also want to increase spending on the judiciary. It is less obvious how to increase political competition, although the single party legacy of the Civil War in Confederate states continues to erode over time.

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Figure 1: Map of Common North, Common South, Civil North, and Civil South States

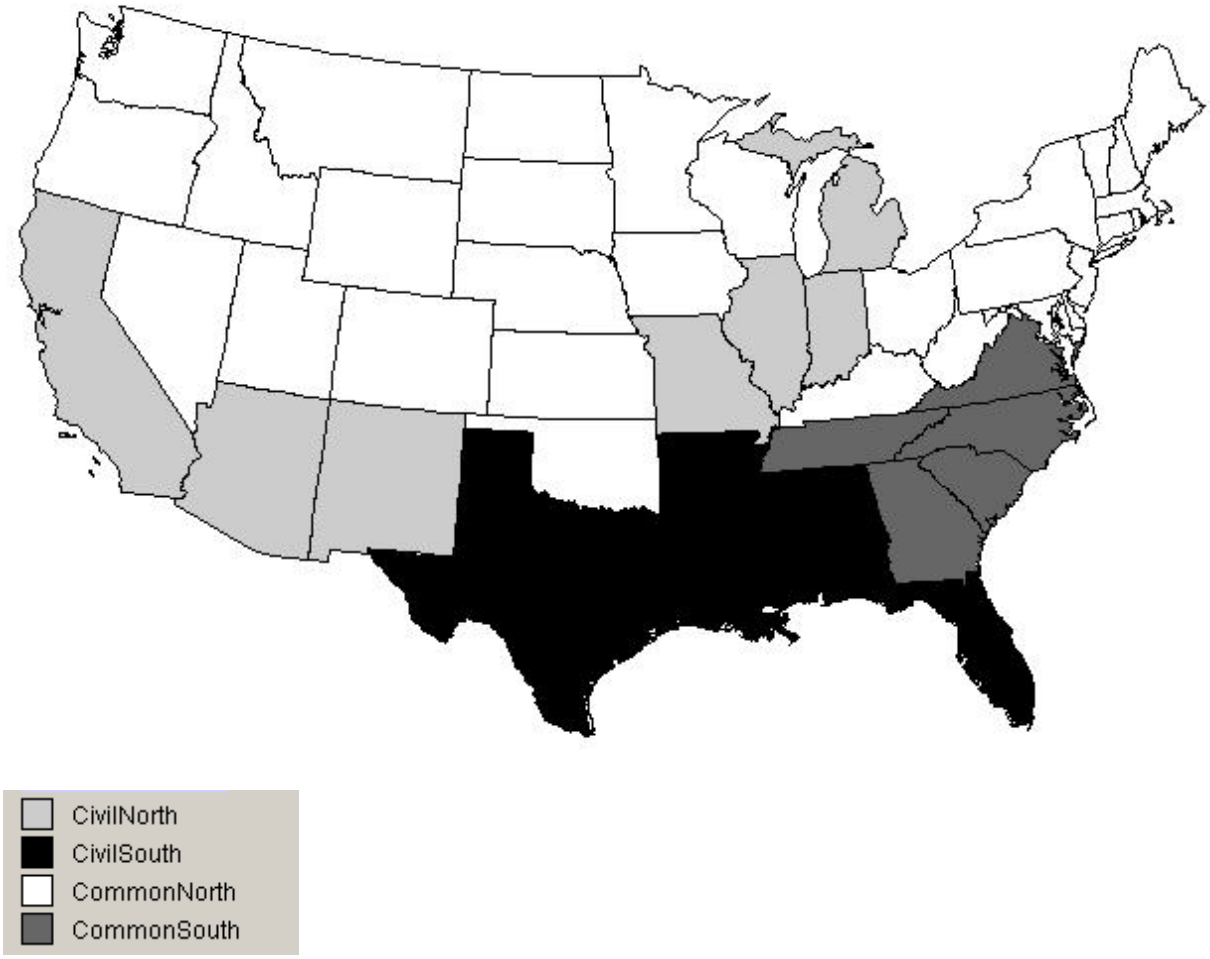


Figure 2: Interaction between the State Legislature and the Judiciary

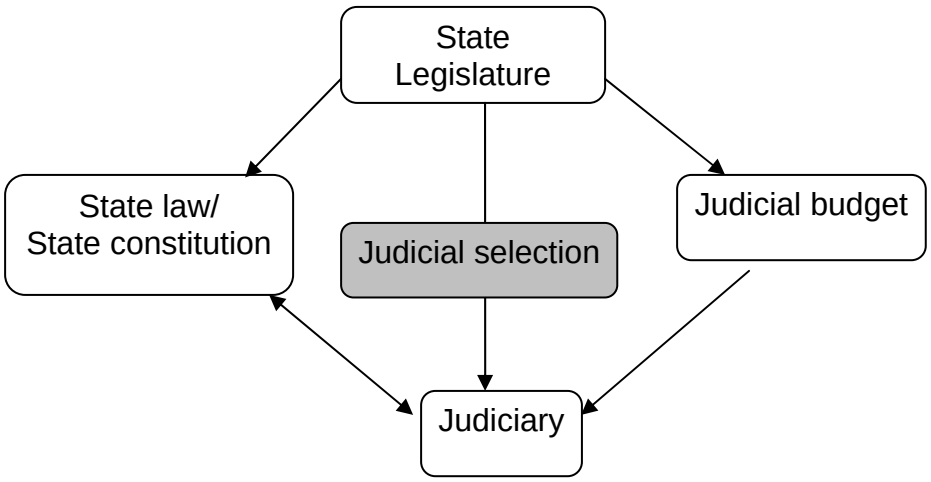
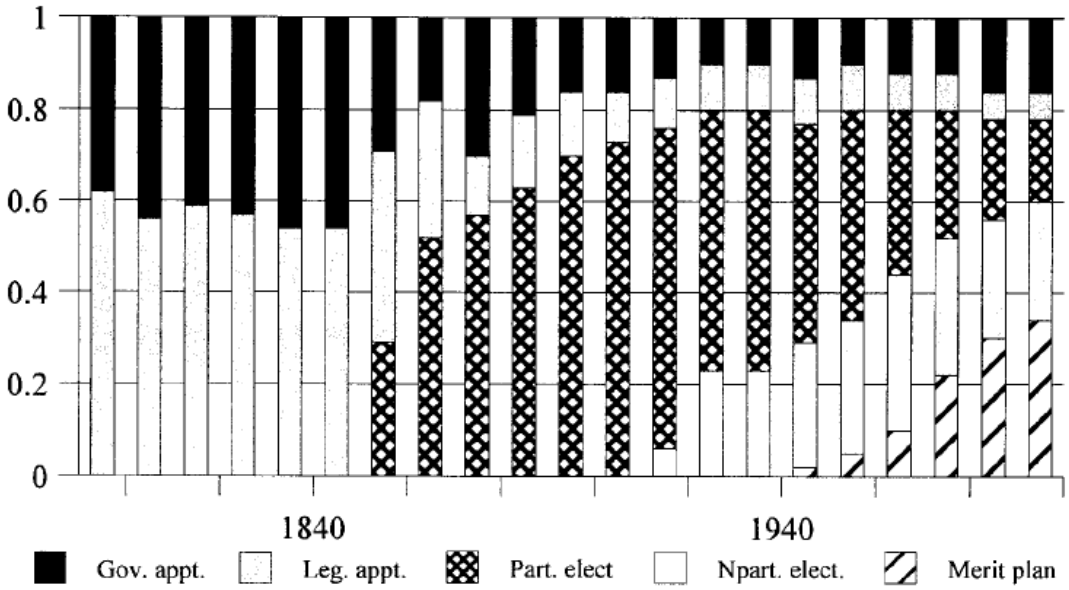
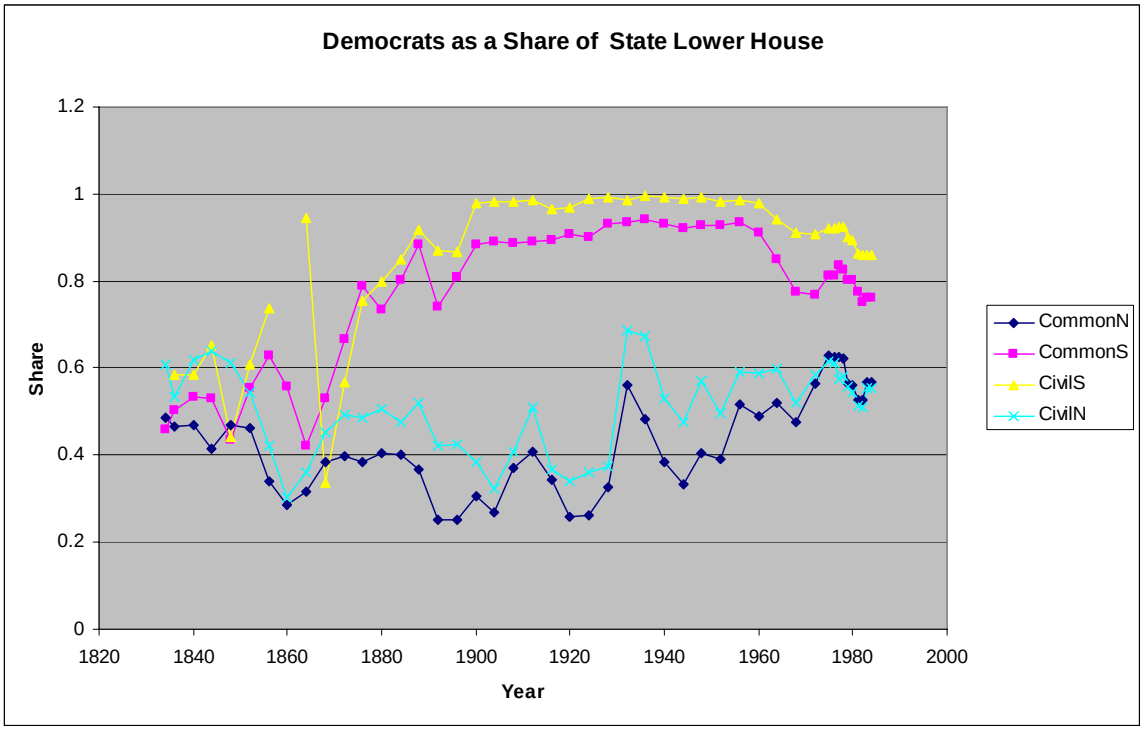


Figure 3: Judicial Selection over Time



Notes: Figure 1 from Hanssen 2004a, p. 435.

Figure 4: State-level Political Competition



Notes: Authors' computations based on data from ICPSR Study No. 16. Partisan Division of American State Governments, 1834-1985. The data are available at http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/00016.xml

Table 1: Duration of Civil Law

	Approximate Date of First Permanent Settlement	Approximate End of Civil Law	Duration of Civil Law
Dutch New Netherland (DE, NY, NJ, PA)	1624	1665	41
British acquisitions from French (Old Northwest Territory)			
Illinois	1700	1790	90
Indiana	1732	1790	58
Ohio		1790	
Michigan	1668	1790	122
Wisconsin	1764	1790	26
American Acquisitions from France, Spain, and Mexico			
Alabama	1702	1813	111
Arizona	1700	1848	148
Arkansas	1686	1803	117
California	1769	1848	79
Florida	1565	1821	256
Louisiana	1715	1803	88
Mississippi	1699	1813	112
Missouri	1735	1803	68
New Mexico	1700	1848	148
Texas	1718	1836	118

Notes: All dates are approximate. The dates of settlement for the Old Northwest Territory are taken from Ekberg (1998). Ohio is included because there were some foreign land grants there, although the location of these grants and the associated settlement date could not be determined. Dating the end of civil law in the Old Northwest Territory is difficult, because at the time of the 1790 census, the Northwest Territory was de facto under British control and the British had permitted the continued use of civil law under the Quebec Act. The date of first settlement for Alabama was taken from http://www.alabamamoments.state.al.us/sec02det.html. The data of first settlement for Louisiana was taken from http://www.state.la.us/about_history2.htm Dates for all other states are taken from the settlement section of the state histories in Encyclopedia Britannica online version.

Table 2: Estimates of Pre and Post Acquisition Population

	Year Acquired	Date Estimate	Population	First US Census	Pop. at first census	1850 share civil	1850 add Germanic civil
British acquisitions from French (Old Northwest Territory)							
Illinois	1763	1763	<2,000	1800	2,458	0.034	0.227
Indiana	1763			1800	2,632	0.026	0.135
Michigan	1763			1800	3,757	0.020	0.161
Ohio	1763			1800	42,159	0.013	0.181
Wisconsin	1763			1820	1,444	0.014	0.415
American Acquisitions from France, Spain, and Mexico							
Alabama[19]	1813	1812	<1,000	1800	1,250	0.005	0.043
Arizona[20]	1848/1853	1846	<1,000	1860	6,482	0.500	0.500
Arkansas[21]	1803	1798	400	1810	1,062	0.048	0.071
California[22]	1848	1846	10,000	1850	92,597	0.143	0.250
Florida	1821			1830	34,730	0.158	0.158
Louisiana[23]	1803/1810	1803	43,000	1810	76,556	0.565	0.647
Mississippi	1813			1800	7,600	0.028	0.043
Missouri[24]	1803	1804	9,373	1810	19,783	0.032	0.120
New Mexico[25]	1848/1853	1846	65,000	1850	61,547	0.150	0.150
Texas[26]	1846/1848	1836	40,000	1850	212,592	0.055	0.151

Notes: Arkansas, Louisiana, and Missouri were acquired as part of the Louisiana Purchase. The northern portions of Alabama and Mississippi were part of the original territory acquired from Great Britain. The U.S. established control of western Louisiana, and southern Alabama and Mississippi in 1810, 1813, and 1813. This territory was formally acquired along with Florida from Spain in 1821. Parts of Arizona and New Mexico, all of California, and the questionable title to Texas, which had been independent and then opted to join the U.S. in 1846, were acquired from Mexico in 1848. Additional territory in southern Arizona and New Mexico were acquired as part of the Gadsden Purchase in 1853.

[19] Population estimate is for the part of Alabama controlled by the Spanish. The largest city in this area was Mobile. Hamilton (1910), pp. 405.
[20] Weber (1982), pp. 183-184.
[21] Arnold (1985), Appendix IV, p. 222.
[22] Langum (1987), p. 23, Table 1.
[23] Dargo (1974), p. 6.
[24] Cited in Banner (2000), p. 14, footnote 9.
[25] Weber (1982), p. 195.
[26] Weber (1982), p. 177.

Table 3: Confirmed Private Land Claims [to June 30, 1904]

State	*Number of Claims*	*Area of Claims in acres*	*Average Claim Size in acres*
British acquisitions from French (Old Northwest Territory)			
Illinois	936	185,774.37	198
Indiana	862	188,303.62	218
Michigan	942	280,672.83	298
Ohio	111	51,161.14	461
Wisconsin	175	32,778.82	187
American Acquisitions from France, Spain, and Mexico			
Alabama	448	251,602.04	562
Arizona	95	295,212.19	3107
Arkansas	248	110,090.39	444
California	588	8,850,143.56	15,051
Colorado	6	1,397,885.78	232,981
Florida	869	2,711,290.57	3,120
Iowa	1	5,760.00	5,760
Louisiana	9,302	4,347,891.31	467
Mississippi	1,154	773,087.14	670
Missouri	3,748	1,130,051.62	302
New Mexico	504	9,899,021.67	19,641

Notes: From the Report of the Public Lands Commission (1905) http://memory.loc.gov/gc/amrvg/vg57old/vg57.html Image 84. Oregon and Washington are excluded because they were settled by Great Britain. Utah (60 grants totaling 8,876.80 acres) was excluded, because we could not find *any* documentary evidence indicating the source of these land claims. In particular, we could not find any evidence to suggest that they were confirmed as part of the work of the Surveyor General of the New Mexico Territory or the Court of Private Land Claims, which were responsible for addressing claims in all territory acquired from Mexico other than California. Land grants for Texas are not reported, because Texas was briefly independent and retained control of unsettled lands in the state as a condition of joining the Union.

Table 4a: Correlation Patterns for Slavery, the Confederacy and Climate

Slavery-1860	1.00		
Confederacy	0.94	1.00	
Climate	0.76	0.71	1.00

Notes: Slavery-1860 is slaves as a share of population as given in Mitchener and McClean (2003). Confederacy is a 1 for the eleven states that were part of the Confederate States of America during the Civil War. Climate is (avg. temperature*avg. humidity*avg. precipitation)*(0.0001).

Table 4b: Correlation Patterns for Slavery and Early Disease Environment

	Slavery-1860	Soldier Mortality	Yellow Fever	Malaria
Slavery-1860	1.00			
Soldier mortality, pre-Civil War	0.69	1.00		
Yellow Fever, 1700s&1800s	0.59	0.34	1.00	
Malaria, 1912	0.68	0.69	0.25	1.00

Notes: Malaria dummy = 1 if state had outbreaks during 1912, 0 otherwise. Earliest data from 1881 is not used because almost all of the states were afflicted (Pan American Health Organization 1969). Yellow fever dummy = 1 if there were 5 or more major outbreaks during the 1700s and 1800s, 0 otherwise (robust if we use 3 or more major outbreaks; Vainio and Cutts 1998, Appendix I). Solider mortality is the average annual soldier mortality as a share of soldier strength during 1929-1838 and 1839-1854 as computed in Mitchener and McLean 2003.

Table 5: Initial Conditions and the Quality of State Courts

	1	2	3	4
Civil North	0.607* (0.152)	0.602* (0.155)		
Common South	0.675* (0.161)	0.679* (0.152)		
Common North	0.760* (0.143)	0.756* (0.145)		
Ln(years of civil law)			-0.064** (0.036)	-0.077* (0.034)
Ln(slaves as % of 1860 pop)			-0.024 (0.029)	-0.022 (0.032)
Ln(years civ)* Ln(slaves)			-0.075* (0.018)	-0.078* (0.021)
Initial Population		0.000 (0.000)		-0.018 (0.026)
Union entry date		0.000 (0.001)		-0.000 (0.002)
Constant	1.663* (0.133)	1.99 (2.20)	2.420* (0.051)	3.144 (2.818)
R^2	0.473	0.473	0.450	0.457

Notes: Point estimates for regression coefficients and heteroskedasticity-corrected standard errors (in parentheses) are reported. * denotes significance at the 5-percent level; ** is at the 10-percent level. This convention holds for subsequent regression tables. Initial population is computed using the census closest to year when a territory entered the Union; Union entry date is simply the year of entry (*Historical Statistics of the United States: From Colonial Times to 1970*, 1976).

Table 6: Judicial Independence and Quality of State Courts, 2001-03

Judicial Independence	1	2	3	4	5	6 Quantitative significance
Retention by partisan elections, 1970-90		-0.570* (0.148)			-0.446* (0.112)	-0.46
Ranney index, 1970-90			2.41* (0.563)		1.18** (0.617)	0.29
Judicial Activism, 1981-85				-1.26** (0.744)	-1.23* (0.502)	-0.28
Log Cases, 1981-85				-0.159 (0.110)	-0.072 (0.090)	-0.097
Judicial budget per capita, 70-90	0.194* (0.091)	0.124 (0.075)	0.147* (0.067)	0.134 (0.111)	0.084 (0.065)	0.13
Constant	1.82*	2.11* (0.190)	-0.052 (0.525)	2.85* (0.748)	1.72** (0.862)	
R^2	0.091	0.435	0.453	0.199	0.627	

Notes: Quantitative significance reported in column 6 is the sample standard deviation of a statistically significant dependent variable from column 5 times its regression coefficient as a percentage of a sample standard deviation in state court quality. Because there is no Ranney index for Nebraska (it has a unicameral state legislature), Nebraska is deleted from the regressions in columns 3 and 5.

Table 7: Judicial Independence, Civil Law Origins and Slavery

Dependent Variable	Partisan elections 1970-90	Ranney index, 1970-90	Judicial Activism, 1981-85	Ln Cases, 1981-85	Judicial budget, 1970-90
Civil North	-0.584* (0.207)	0.201* (0.029)	-0.041 (0.030)	-0.338 (0.243)	0.177 (0.282)
Common South	-0.200 (0.268)	0077** (0.042)	-0.040 (0.067)	-0.296 (0.308)	0.122 (0.322)
Common North	-0.682* (0.170)	0.161* (0.030)	0.021 (0.027)	-0.581* (0.174)	0.586* (0.211)
Civil South (constant)	0.727* (0.166)	0.685* (0.027)	0.186 (0.023)	4.45* (0.155)	2.03* (0.186)
R^2	0.444	0.478	0.099	0.176	0.173

Table 8: Pair-Wise Comparisons for Civil and Common North and Civil and Common South

	Civil North[a]	Common North[a]	Civil North – Common North[b]	Civil South[a]	Common South[a]	Civil South – Common South[a]
Partisan elections, 1970-90	0.143 (0.340)	0.0450 (0.192)	0.097 (0.488)	0.727 (0.426)	0.527 (0.504)	0.200 (0.502)
Judicial budget, 1970-90	2.21 (0.579)	2.62 (0.534)	-0.409 (0.124)	2.03 (0.477)	2.16 (0.630)	-0.122 (0.731)
Quality Courts, 2001-03	2.27 (0.200)	2.42 (0.277)	-0.153 (0.119)	1.66 (0.342)	2.34 (0.217)	-0.675* (0.004)
Ranney index, 1970-90	0.886 (0.029)	0.847 (0.070)	0.039* (0.031)	0.685 (0.069)	0.762 (0.079)	-0.077 (0.126)
Judicial activism, 1985	0.145 (0.054)	0.207 (0.076)	-0.062* (0.027)	0.186 (0.059)	0.147 (0.151)	0.040 (0.604)
Ln cases, 1985	4.12 (0.511)	3.87 (0.419)	0.243 (0.275)	4.45 (0.398)	4.16 (0.636)	0.296 (0.399)
Corruption, 1992-2001	2.72 (1.40)	2.44 (1.38)	0.283 (0.641)	4.13 (2.20)	2.79 (0.806)	1.34 (0.212)
Judicial Removal, 1990-2001	3.57 (2.07)	2.40 (7.61)	1.17 (0.468)	6.67 (3.44)	1.80 (2.49)	4.45* (0.024)
Constitutional Amendment rate, 1970-90	1.80 (1.54)	1.59 (0.869)	0.204 (0.745)	4.11 (3.25)	1.97 (1.28)	2.14 (0.183)
Constitutional duration, as of 1991	63.4 (20.9)	96.2 (38.9)	-32.8* (0.007)	29.0 (9.10)	45.0 (22.3)	-16.0 (0.191)

Notes: [a] These columns report averages and standard deviations in parentheses.
[b] These columns report differences in averages and p-values for the hypothesis test that the difference in means is zero in parentheses. The notation *, ** denotes significance at the 5% and 10% levels. Corruption, 1992-2001, is average federal public corruption convictions per 100,000 for 1992-2001 (Public Integrity Section 2001). Judicial removal is the total number of judges removed, including those who step down by agreement or an order, between January 1990 and December 2001 (Gray 2002). Amendment rate, 1970-90, is the number of times that the state constitution has been amended per year during 1970-90 (Book of the States various years). Constitutional duration is, as of 1991, the number of constitutions that a state has used divided by years/100 of statehood (Lutz 1994).

Appendix

Civil Law Classification

1. Additional documentation justifying the classification requirement that civil control occur in the eighteenth century.

The potential problem with this requirement is that it excludes Dutch and Swedish settlements in the Mid-Atlantic. The first permanent Dutch settlements were established in 1624 in Albany and on High Island (Burlington Island) in the Delaware River. Permanent Swedish settlements followed in 1638, when settlers under the command of Peter Minuit established Fort Christina. Within the next two decades, the Dutch established permanent settlements in Delaware, New York, New Jersey, and Pennsylvania; and the Swedish established permanent settlements in Delaware and Pennsylvania.[27] Both the Swedish and Dutch settlements had operational civil law legal systems.[28] In 1655, the Swedish settlements were captured by the Dutch and became part of Dutch New Netherland. In 1664, the population of Dutch New Netherland was estimated to be 9,000.[29] That year the British captured New York. Although it was briefly recaptured by the Dutch, New Netherland was under British control and the

[27] The Dutch also had a settlement in Connecticut, but it appears to have been temporary. Estimates of the fraction of the population with Dutch surnames in the 1790 census indicate that by far the largest or at least the most enduring populations were in New York and New Jersey (Purvis 1984).

[28] For court records pertaining to New York and New Jersey, see Van Laer (1974) for court records of the Director General and Council of New Netherland (the highest court, covering all of New Netherland) 1638-1664; and O'Callaghan and Fernow (1897, reprinted 1976) for court records of the Courts of Schouts and Schepens for New Amsterdam. For court records pertaining to Pennsylvania and Delaware, see Brodhead and O'Callaghan (1853), volume 12 for Dutch minutes of court actions, 1655-1657; Armstrong (1969) for records of the Upland Court (Chester County, Pennsylvania), 1676-1681 which was a Dutch court that continued to operate after English acquisition; Gehring (1981) has records for the Dutch 1648-1664; and Johnson (1930) for some court minutes for New Sweden, 1643-1644.

[29] See Rink (1986). In 1673, the Dutch temporarily regained control of New Netherland. The land was officially ceded to England in 1674.

British legal system from then on.[30] The British acquired permanent control of Dutch New Netherland in 1674 under the Treaty of Westminster.

Thus, we exclude state controlled by the Dutch and Swedes because of the early and relatively short duration of civil law.

2. Additional Notes on Table 3

Table 3 does not include land claims for Texas or Native American land claims. One of Texas's conditions of entry into the United States after its brief history as an independent republic was that land claims would be handled by the state and not the federal government.[31] In principle, Native Americans inhabited all of the states and their legal traditions could have had an impact on the legal systems in the states. In practice, decimated by disease, given lower status than white colonists, and having had their land taken with little or no compensation, the Native Americans were not in any position to influence the evolution of the state legal system.

3. Civil Law Origins in States with Fewer than 200 Land Grants

The five states with fewer than 200 land grants include Wisconsin, Ohio, Arizona, Colorado and Ohio. The historical evidence suggests that the Colorado and Iowa grants were large speculative grants that were intended to induce, but never actually led to, substantial settlement.[32] Thus we classify Colorado and Iowa as common law states. Wisconsin was settled later and was much more lightly settled than Indiana, Michigan, and Ohio. Indeed the settlement was sufficiently light that it probably did not have fully-

[30] The terms of acquisition were initially favorable to the Dutch settlers, largely preserving the existing Dutch legal system. The next year, however, the Dukes Laws, modeled on New England legal codes were imposed on the New York colony.
[31] See http://www.glo.state.tx.us/archives/landgrant.html
[32] Gates (1968).

functioning courts.[33] For Ohio, it is not clear when it was settled, where the settlement was located, and whether it was French or British. If it was French, like Wisconsin, it probably did not have fully-functioning courts. Thus we classify Ohio and Wisconsin as common law states. Although Arizona had fewer grants than Wisconsin and Ohio, a number of these were pueblo (town) grants and so would have encompassed multiple settlers. Arizona also had strong links to New Mexico, which had a well-developed civil law legal system.

[33] Ekberg (1998) and Briggs (1990) do not mention courts, but the legal system is not the main topic of their work.

Appendix Table 1: Alternative Determinants of the Quality of Courts in 2001-03

	(1) OLS	(2) OLS
State Court Innovations in Tort Law, 1946-75 Rank	0.0023 (0.0039)	0.0027 (0.0038)
Reputation of Supreme Courts, 1975 Rank	0.0035 (0.0045)	0.0039 (0.0045)
Index of Legal Professionalism, prior to 1973 Rank	0.0096** (0.0040)	0.0113** (0.0042)
Government Corruption, 1992-2001	-0.102** (0.032)	-0.0971** (0.0308)
Political Attitude of Supreme Courts Judges, 1960-93 (increasing in liberalism)		-0.0067** (0.0032)
Strength of Republican party, 1972-2000		-0.0077 (0.0403)
Adjusted R^2	0.244	0.288

Notes: Standard errors accompanying point estimates are given in parentheses; * denotes significance at the 10% level; ** denotes significance at the 5% level. OLS denotes ordinary least squares. In each estimate the constant term has been computed but is not reported. Rank of state innovation scores 1946-75 is based upon the timing of adoption of 23 plaintiff-oriented doctrinal innovations in tort law in state courts systems (Canon and Baum 1981). 1975 Rank is based upon the number of citation of other supreme courts in 1975 (Caldeira 1983). The index of legal professionalism is a composite score including five major factors of state courts systems. The factors include (1) method of selection for judges in all courts -- states were scored for approximation to ABA model plan of selection; (2) state court organization and the approximation to the ABA model court structure; (3) judicial administration in the states -- states were scored for presence of professional administrator and size and nature of his staff; (4) tenure of office for judges of major trial and appellate courts and approximation to ABA recommendations; (4) level of basic salary for judges of major trial and appellate courts exclusive of fees and local payments. Each factor involved scoring the state on a five-point scale according to how closely judicial features in the state approached the ABA model and each was measured prior to 1973 (Glick and Vines 1973). Government corruption, 1992-2001, is average federal public corruption convictions per 100,000 for 1992-2001. The average (standard

deviation) of corruption is 2.73 (1.52) (Public Integrity Section, 2001). Political Attitude of Supreme Courts Judges, 1960-93, is a measure of the ideology of these judges serving during this period based on elite ideology for appointed judges and citizen ideology for elected judges and that also includes the influence of partisan affiliation of these judges. The measure ranges from a minimum of most conservative to a maximum of most liberal and is computed for 900 judges at the time of appointment or election. We report the ideology of the median judge in each state. The average (standard deviation) for this variable is 33.1 (15.2) (Brace, Langer, and Hall 2000). The numbers used have been updated and are available at http://www.u.arizona.edu/~llanger/replication_datasets.htm. Strength of Republican party, 1972-2000 is an index based on the methodology developed in David and Goldman (1960) for determining which states were strongly or moderately Democratic, Republican or neither in presidential elections over periods made up of to eight presidential elections each. This index applies this method for the period during the 1972-2000 and makes adjustments for each state's record during the last two or election elections. The scale is 0 = strongly Democratic, 1 = moderately Democratic, 2 = competitive, 3 = moderately Republican and 4 = strongly Republican. We have converted the original scale of 0 to 6 to our scale of 0 to 4 because there are two categories that contain no states. The source is The Green Papers Relative Political Party Strength in Presidential Elections, last updated November 2003, and the web site is http://www.thegreenpapers.com/G04/President-Strength.phtml