American Civil Law Origins: Implications for State Constitutions

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Headnote

We examine the effect of initial legal traditions on constitutional stability in the American states. Ten states were initially settled by France, Spain, or Mexico and had developed civil law legal systems at the time of American acquisition. Although Louisiana retained civil law, the remaining nine adopted common law. Controlling for contemporaneous and initial conditions, civil law states have substantially higher levels of constitutional instability at the end of the twentieth century. We speculate that this effect is attributable to instability in property rights caused by the change in national governments and to the legacy of the civil law system.

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1. Introduction

In this paper, we examine the role that initial conditions have played in the stability of American state constitutions. Constitutions and constitutional stability are widely believed to be important because of their effects on the legal framework, the political system, and possibly economic growth. In a study of 77 countries, La Porta et al (2004) show that constitutional rigidity (low instability) is associated with more political freedom. Persson (2003), using cross-country data and drawing on work with various coauthors, presents evidence that constitutional structure is related to economic performance.

The American states have had varied experiences with the stability of their constitutions. By 1991, new state constitutions had been adopted 144 times. Eighteen states still were using their original constitution, while the state of Louisiana had replaced its constitution eleven times. In addition to replacing their constitutions, states had also amended their operating constitutions thousands of times. Between 1970 and 1990, the average state amended its constitution 2.0 times per year. Vermont registered the slowest rate, 0.3 per year, and Alabama had the fastest rate, 9.65 per year. This general pattern appears to be persistent. For example, between the adoption of the most recent constitution (prior to 1991) and 1991, the average state amended its constitution 1.4 times per year. Vermont and Alabama still had the fastest and slowest rates (0.25 and 8.07 per year), respectively.

What factors are important for constitutional stability across the American States? Lutz (1994) presented evidence that two factors – the length of the operating constitution

and the rules governing amendment of the constitution were empirically related to the rate at which states amended their constitutions. The length is important because longer constitutions tend to be more specific (Hammons,1999), and the specificity generates demand for change as society changes (Friedman, 1988). More stringent rules for change arguably make change more difficult and thus lead to fewer changes. Although not addressed by Lutz (1994), political competition is also likely to play a role. More competitive political systems may be less likely to be able to amass the number of votes in state legislatures needed for amending and replacing the state constitutions.

While contemporary variables have received some attention, there has been no discussion of the determinants of these factors. In this paper, we examine the effect of initial conditions on the stability of American states' constitutions. We are particularly interested in the effect of having been settled by a country with a civil law legal system. Ten American states – Alabama, Arizona, Arkansas, California, Florida, Louisiana, Mississippi, Missouri, New Mexico, and Texas – were settled by France, Mexico or Spain and had developed civil law legal systems in place at the time of the American Revolution. All, except for the case of Louisiana, received common law when they became states.

In addition to civil law origins, we control for the climate of the state, the population of the state at the time of first census, and when the state entered the union. Climate captures the degree to which a state was suitable for large scale use of slave labor. We expect that states with a greater proportion of slaves and states with larger populations at the first census, because of the concentrated structure of landholdings in

the former and the larger size of the elite in the latter, will tend to have more special interest legislation and therefore longer constitutions. We expect that later entrants into the union, because of extensive borrowing from other states, will also tend to have longer constitutions.

We find that that initial conditions play a significant role in constitutional instability, whether measured by amendment rates or the duration of the constitution. The dominant effect statistically and quantitatively is that of having been settled by a civil law country. For example, after controlling for contemporaneous political competition and contemporaneous rules governing the amendment process, the log annual average constitutional amendment rate is roughly four fifths of a sample standard deviation higher in civil law states. This accounts for the difference between the relatively rapid rate in Florida, and the relatively slower amendment rate in Delaware.

It is important to note that the effect of having been settled by a civil law country is distinct from whether or not a particular state was a member of the Confederacy or had substantial slave holdings. Within our group of ten civil law states, four were not members of the Confederacy. And, within the group of eleven Southern states, five, including Georgia, North Carolina, South Carolina, Tennessee and Virginia, were not civil law states. When we control for the Southern effect with climate, membership in the Confederacy, or slaves as a share of the population in 1860, the civil law effect remains strong and statistically significant.

The reason for the greater instability of the constitutions in civil law states is not clear. We speculate that the instability is driven both by the uncertainty in property rights

in land associated with the change in national governments, and with the statute orientation of the civil law legal system. More work remains to be done on this issue.

The rest of this paper is organized as follows. In the next section, we compare civil law states with other American states. In section 3, we provide evidence on the determinants of constitutional instability. In section 4, we discuss the potential impact of constitutional instability on state legal systems. We then conclude.

2. Civil Law

Fifteen American states were originally settled by France, Spain, or Mexico, all countries with civil law legal systems. Five – Illinois, Indiana, Michigan, Ohio, and Wisconsin – were acquired by Great Britain prior to the American Revolution. The remaining ten – Alabama, Arizona, Arkansas, California, Florida, Louisiana, Mississippi, Missouri, New Mexico, and Texas – were acquired by the United States. Shortly after acquisition of the territory, all of the states except Louisiana adopted common law.[1]

In Berkowitz and Clay (2004a), we found that controlling for a number of other variables of interest, having been one of the ten civil law states acquired after the American Revolution had a statistically significant negative effect on the quality of courts in 2001. In this section, we discuss the effects that the difference in legal traditions may have had on these ten states' constitutions.

To understand a possible effect of the two legal traditions, it is useful to understand the role of statutes in the civil law and the common law. Tetley (1999) compares their function:

> Although statutes have the same paramountcy in both legal traditions, they differ in their functions. Civil law codes provide the core of the law - general principles are systematically and exhaustively exposed in codes and particular statutes complete them ... Common law statutes, on the other hand, complete the case law, which latter contains the core of the law expressed through specific rules applying to specific facts … This difference in style is linked to the function of statutes. Civilian statutory general principles need not be explained, precisely because they are not read restrictively (not being exceptions), but need to be stated concisely if the code is to be exhaustive. Common law statutory provisions need not be concise, because they cover only the specific part of the law to be reformed, but must be precise, because the common law courts restrict rules to the specific facts they are intended to cover.[2]

State constitutions are composed of two types of provisions – framework provisions and statutory laws. Framework legislation covers governmental principles, processes, and institutions. Some examples of framework provisions include: "The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled The Legislature of the State of Texas." Texas, Article 3, Section 1, 1876.[3] "The power of the government of this state is divided into three distinct branches – legislative, executive, and judicial." Montana, Article 3, Section 1, 1972.

The statutory laws have been called 'superlegislation' by Friedman (1988) or 'particularistic' legislation by Hammons (1999) and are in contrast to framework legislation. These laws have been upgraded to constitutional status and are not observed in the federal constitution. Hammons offers some examples of particularistic provisions: "All telephone and telegraph lines, operated for hire, shall each respectively, receive and transmit each other's messages without delay or discrimination, and make physical connections with each others lines, under such rules and regulations as shall be

prescribed." Oklahoma, Article 9, Section 5, 1907. "The people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste." Florida, Article 10, Section 16, 1968.

To the extent that the civil law tradition influenced the writers of the state constitutions, the result is longer constitutions with more statutory components. More broadly, the existence of statutory components in the constitution creates demand for constitutional change among the affected groups as the political and economic climates change over time. This constitutional change may come in the form of an amendment or as part of a broader set of changes associated with the adoption of a new constitution (Friedman, 1988).

Given the demand for amendment generated by the superlegislation, we might expect that it would be easier to amend the constitution in civil law states. The difficulty of amendment depends on a number of factors, including the number of votes required to pass an amendment (a majority, 3/5, 2/3, or 3/4) and how many times the amendment must receive such a vote (once or twice). The degree of state-level political competition is likely to matter as well, because it will generally be easier to pass amendments if the legislature is dominated by a single party.

Table 1 provides summary statistics for the forty-eight states in our sample. We exclude Alaska and Hawaii because they are not part of the Continental United States, and because they have very different histories than the other forty-eight states. Between 1970 and 1990, the average state has amended its constitution 2.0 times per year; and the

average state has replaced its constitution every 78 years. The average state constitution in 1990 was about 28,000 words, which is substantially longer than the length of its original constitution (11,400 words). Roughly 30 percent of the provisions in state constitutions in 1997 are particularistic. For passage of an amendment, most states require a supermajority in the legislature, but do not require that the amendment be passed in two successive legislative sessions and do not allow popular constitutional initiatives.

The first two sections of Table 2 compare constitutions for civil law states and the other thirty-eight states.[4] Although civil law states did not have significantly longer initial constitutions, the constitutions of civil law states were almost twice as long as other states by 1941, and they were more than twice as long by 1990. Consistent with this, civil law states have more particularistic legislation. They also have constitutions that are easier to amend in the sense that they only require passage in a single legislative session. Finally, they have statistically significant lower levels of state-level political competition than other states.

All three factors – the length of the constitution, the ease of amendment, and the lower level of political competition – suggest that civil law states would amend their constitutions more frequently, and they do. We calculated amendment rates from the inception of the current constitution (adopted prior to 1941) to 1941, the inception of the current constitution (adopted prior to 1991) to 1991, and during the time period between 1970-1990.[5] The fact that civil law states differ significantly from other states for all three measures suggests the differences are both robust and persistent. The increase in

the rate from 1941 to 1991, both of which include the entire history of amendments for the current constitution, and the even higher rate for 1970-1990 indicates that the amendment rates for both groups have increased over time. Civil law states also replace their constitutions more frequently.

The third section of Table 2 compares the retention of judges, the funding of the judiciary, and the quality of courts in civil law and other states. Hanssen (2004a,b) argues that states using partisan elections to appoint and retain judges have less independent judges than states using other appointment and retention systems. In 1912, both types of states used partisan elections as the primary mode of electing and retaining judges. Civil law states were, however, statistically significantly more likely than common law states to still be using them between 1970 and 1990. Civil law states also, on average, spent less than other states on the judiciary as a share of the state budget from 1970 to 1990, although the difference is not statistically significant. Finally, based on a telephone survey conducted in 2001 and 2003 of senior corporate attorneys at companies with at least $100 million in annual revenues, state courts in the average civil law state were rated as less effective than state courts in other states. (The survey ranked state courts on eight categories on a scale of 0 (worst) to 4 (best).)[6]

3. Determinants of the Amendment Rate and Constitutional Instability

As we noted in the introduction, although there is political science literature on state constitutional amendment rates, there has been little work on the determinants of the amendment rate. In this section, we present the results of regressions of constitutional

instability on both initial conditions and contemporary factors. We use the amendment rate during 1970-90 to measure constitutional instability. We present additional evidence on the ability of initial conditions and contemporary factors to explain variables associated with constitutional instability, including the amendment rate as of 1991, the share of particularistic content in the 1997 constitution, the duration of the constitution as of 1990, and the length of the 1990 constitution.

We examine three other initial conditions that, together with civil law, may affect the amendment rate: i) the year when the state entered the union, ii) the population at the time of first census, and iii) the climate of the state. Territories and states tended to borrow heavily from other states' constitutions when devising their own. For example, the 1859 Oregon constitution borrowed heavily from the 1851 Indiana constitution as well as from nine other state constitutions.[7] The process of accretion was likely to make later constitutions longer than earlier ones. This was compounded by increasing concerns about the behavior of state legislatures. Friedman (1973) described the evolution of state constitutions:. "State constitutions grew longer and bigger … The new constitutions tried to control the problem of bad laws through … antilaws – that is (constitutional) laws against (legislative) laws."[8]

Population and climate indirectly measure political structure. More populous states at the time of their first census may have had a greater concentration of interests than less populous states. These interests may have been better able to insert superlegislation into the constitution during the constitutional convention. This is consistent with findings by Mulligan and Shleifer (2004). In their model, the importance

of population arises from the fact that regulation entails fixed costs. Using data from the U.S. states as well as cross country data, they find that population is an important explanatory variable in regressions on the amount of regulation that a governmental unit has.

Climate is related to differences in political structure that arise from different disease environments and agricultural systems. We measure climate by interacting a state's annual average temperature, humidity, and precipitation and then dividing by 10,000 to lower the magnitude of this variable. In both the cross country context and the U.S. context, similar climate measures have been found to be strongly associated with the quality of legal institutions and of economic outcomes (Acemoglu et al., 2001; Engerman and Sokoloff, 2002). We believe that states with warmer and wetter climates had more concentrated political elites and that these elites demanded more particularistic legislation.

If what we are capturing with climate is really slavery, the question arises whether we would be better off using a dummy variable for states that were members of the Confederacy (the South) or measure the share of slaves in the state population just prior to the Civil War. There are two advantages to employing the climate variable. First, the climate variable is exogenous while membership in the confederacy and slave population are likely to be correlated with omitted state variables. We do, however, also report results for membership in the Confederacy and the percentage of the 1860 population that were slaves.[9] Second, the climate variable may better capture some features of slavery in the United States than membership in the Confederacy and/or slave population. For

instance, climate may better capture variations in the intensity of large-scale (slave-based) agriculture tied to soil quality. Climate may also capture the fact that slavery extended well beyond the Confederacy during the eighteenth and early nineteenth centuries (see Wright, 2003).

Columns (1)-(3) in Table 3 investigate the determinants of constitutional instability as measured by the log of a state's constitutional amendment rate between 1970-1990 (hereafter, the amendment rate), controlling for contemporaneous rules and political competition.[10] The contemporaneous rules are: i) that an amendment to the state constitution be approved by a supermajority; ii) that it be passed in two legislative sessions, and iii) that the state citizen can also initiate constitutional change (see Lutz, 1994). These rules are measured as of 1990.[11] Contemporaneous political competition is measured over the period 1970-1990.

Column (1) estimates the association between contemporaneous rules and political competition and the 1991 amendment rate. Despite plausible importance of formal rules, the only variable that is statistically significant is political competition, which has the expected negative sign.

The second column adds the log constitution length as of 1990 to the variables in column (1). As predicted, constitution length is strongly positively associated with the amendment rate, and political competition is no longer significant.

The third column adds other initial conditions to the variables in column (1). Here civil law and log initial population have the expected positive signs and are statistically significant. These results suggest that initial conditions are critical, as neither

the rules in 1990, nor political competition during 1970-1990 are significant once we control for either initial constitution length or initial conditions.

Columns (4)-(7) in Table 3 further investigate the association between initial conditions and the amendment rate. Column (4) estimates the direct effect of initial conditions on the amendment rate, and as predicted, civil law states, states with warmer, more humid climates, and states that entered the union later all tend to have statistically significant higher amendment rates. States with higher initial populations also have a higher amendment rate, although this effect is not statistically significant. The point estimate for the civil law variable in column (4) suggests that having been a civil law state is associated with roughly an 80-percent standard deviation increase in the amendment rate. This is, for example, the difference between Florida, where the annual amendment rate is 2.45, and Delaware, where the annual amendment rate is 1.9.

In columns (5) and (6) we replace climate with the South dummy (membership in the Confederacy) and then percentage of the 1860 population in slavery variables, and find that our results about the impact of civil law origins in column (4) are robust. It is also notable that the percentage of slaves is statistically significant and the South dummy is not.

Column (7) presents a simple test of the hypothesis that the initial conditions influence the amendment rate primarily through their impact on the length of the constitution. The constitution length in 1990 has the expected strong and significant positive association; and, interestingly, no initial condition is individually statistically significant and they are also jointly insignificant (the p-value for the null hypothesis that

the initial conditions are jointly insignificant is 0.242). This suggests that initial conditions influence the amendment rate primarily through their impact on the length of the constitution.

Table 4 shows that our results about the importance of initial conditions are robust to alternative measures of constitutional instability and rigidity. In columns (1)-(3) and (10)-(12), we measure constitutional instability with the annual amendment rate as of 1991 and the length of the state constitution in 1990. In columns (4)-(6), we use the particularistic share of the constitution as of 1997 to measure instability: particularistic legislation both reflects past behavior by interest groups and demand for future change by interest groups adversely affected by the legislation. In columns (7)-(9), we use log duration of the average constitution for a state as of 1990 to measure stability. The results in columns (1), (4), and (10) show that, as expected, civil law and climate always have a statistically and quantitatively significant positive impact on instability. The results in column (7) show that civil law and climate have a statically significant and negative impact on stability. In columns (2), (3) (5), (6), (8), (9), (11), and (12) we provide additional evidence about whether or not the civil law effect disappears once we account for the Southern influence. We do this by replacing the climate variable with the South dummy variable (i.e., membership in the Confederacy), and the percentage of 1860 population in slavery. All of the results that we have obtained with respect to civil law are robust. It is also notable that the signs of the South dummy and the percentages of the slave variables are, as expected, the same as the climate variable. The South dummy is

statistically significant in only two of the four regressions, while the percentage of slaves variable is statistically significant in three of the four regressions.

Although the foregoing analysis provides evidence that civil law states have significantly less stable constitutions as measured in a variety of ways, it does not answer the question of why they have less stable constitutions. The short answer is that we do not know. We do know that property rights were very uncertain because of the change of governments. The size of the land grants by Spain, France, and Mexico had been large because the areas involved were considered relatively unattractive frontier regions (see Clay, 1999). The United States agreed in principle to respect these private property rights, and set up land claim commissions to evaluate the validity of land claims in specific regions during the period when these states entered the Union. Table 5 shows that the average acreage of the land claims were large, ranging from 300 acres in Missouri to nearly 20,000 acres in New Mexico. We speculate that the large size of the grants and the uncertainty of property rights encouraged those who were substantial landholders prior to statehood to protect their landholdings following statehood. For example, during the period of transition to statehood and during early statehood, the Creoles of Louisiana were concerned that the adoption of common law in the area of private law (land, estates, marriages, etc) could weaken their rights and the value of assets that they had accumulated under the French and Spanish regimes. Thus, they used their position in the legislature to push for the retention of civil law as precedent for key private laws (see Fernandez (2001) for a detailed account). The results of the attempts of landholders to secure their landholdings during the transition to statehood may have led

to the development of quite different political institutions or cultures in these states than in other states.

We also know that civil law systems are more statute oriented, and that the adoption of the initial state constitution in civil law states came shortly after the codification efforts in France (Merryman, 1985).[12] So it is plausible that the writers of the constitutions were influenced by these features of civil law. This influence may have manifested itself in longer constitutions. Table 2 shows, however, that the initial state constitutions for civil law states were similar in length to the initial state constitutions for other states. It was only later that the states diverged. Whether this divergence is attributable to the civil law legal system, uncertainty about property rights in land, or to yet some other factor is unclear.

4. Constitutional Amendment, Judicial Review, and Instability of the Legal Framework

To understand just why constitutional instability and rigidity is important for institutions, it is useful to analyze the Federalist Papers and early U.S. court decisions. Alexander Hamilton laid out principles for the judiciary of the new government of the United States in the Federalist Paper 78 (1788).

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority …. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[13]

Hamilton is concerned here with the *judiciary's ability to overrule the legislature on matters related to the Constitution*. Although Hamilton is writing specifically about the federal government, his remarks apply equally to the states.

In *Marbury v. Madison* (1803), Chief Justice John Marshall reaffirmed the courts' right to rule legislation unconstitutional. As a result of this landmark decision, state supreme court judges routinely review the constitutionality of state laws. In 1996, state supreme courts heard on average eleven constitutional challenges to state law and ruled that two of the eleven were unconstitutional.[14] Emmert (1992) identified 3,024 cases of judicial review in the state supreme courts between 1981 and 1985, which represents a rate of about twelve cases per year. In a study of Washington State covering 1890 to 1986, Sheldon (1987) also found an average of twelve cases of judicial review per year. In four areas of law--campaign and election law, workers' compensation law, welfare law, unemployment compensation law--Langer (2002) documented over 400 cases during 1970-1993.

Constitutional instability may negatively affect the judicial system in two ways. First, it may affect the propensity for judicial review, since judges may be less willing to engage in legislative review if they believe that the outcome may be a modification of the constitution. Judges involved in judicial review play both defensive and offensive (activist) roles. Their defensive role involves maintaining the balance among the three branches of government, particularly protecting the judiciary from the other two branches, and protecting the basic rights of citizens. Drawing on cases of judicial review between 1776 and 1819, when the judiciary tended to be quite defensive, Sheldon (1987)

found that "of the eighteen invalidated laws, six dealt with court organization and procedure and four were invalidated for denial of trial by jury."[15] Activist roles extend beyond this defensive role to make (or unmake) policy.

Langer (2002) offers two interesting examples of activist decisions from state supreme courts. In *Jones v. Milwaukee County* 485 N.W. 2nd 21 (1992), the Wisconsin Supreme Court found that waiting periods for welfare assistance was constitutional under both the United States and Wisconsin state constitutions. Thus the Wisconsin court reinforced legislative policy. Its decision was used in several other state courts in similar cases. The next year in *Mitchell v. Steffen* 504 N.W. 2nd 198 (1993), the Minnesota supreme court struck down as unconstitutional legislation that required individuals to meet durational residency requirements in order to receive general assistance work readiness benefits. Thus in the latter case, the state supreme court clashed directly with the state legislature on the matter of welfare spending.

When the judiciary strikes down legislation, the state legislature may respond. Possible responses including revising the law to meet the constitutional standard, revising the constitution itself through constitutional amendment, working to defeat the judge at the next reappointment opportunity, starting impeachment proceedings against the judge, and/or cutting the courts' budgets. State legislatures have at one time or another taken all of these actions.[16]

In 1999, the Superior Court Chief Justice of New Hampshire discussed the effect of legislative retaliation, "When there is legislative retaliation for decisions, independence is compromised."[17] Using data from 1970-1993 covering four areas of

law, Langer (2002) shows that the possibility of retaliation empirically affects state supreme court judges' behavior. The possibility of retaliation is measured with a number of variables including the difficulty of passing a constitutional amendment, the term length of judges, and the retention of judges by the legislature or the governor. The possibility of retaliation affects judges' decisions both to hear cases involving judicial review and to strike down legislation as unconstitutional.

A second more general way in which constitutional instability may affect judges is through uncertainty. Uncertainty makes it more difficult to offer consistent rulings over time and to use precedent, since the precedent may refer to or rely on constitutional provisions that have subsequently changed. James Madison, Alexander Hamilton's friend and colleague, wrote in 1787 about the instability of states' legal frameworks. Although Madison was discussing laws and not the laws embedded in constitutions, his opinions on both subjects are not difficult to discern.

> Among the evils then of our situation may well be ranked the multiplicity of laws from which no State is exempt. As far as laws are necessary, to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion, which might be abused, their number is the price of liberty.[18]

He also viewed legal stability as critical: "We daily see laws repealed or superseded **…** this instability becomes a snare not only to our citizens but to foreigners also."[19]

Table 5 provides evidence about the association between constitutional instability and court quality. Quality of courts during 2001-2003 is regressed on four different constitutional instability measures. We control for a state's ability to afford good institutions by including gross social product for 1986-1989. In each case, constitutional

instability (or stability) has the expected sign and is statistically significant. Clearly, these results do not establish causality, since the measures of constitutional instability are potentially endogenous. It does, however, indicate that constitutional instability is associated with low quality courts.[20]

5. Conclusions

In this paper we have argued that having been settled by a civil law country is an important determinant of constitutional instability among the continental American states. Over time, civil law states tended to adopt relatively long constitutions that had a relatively large share of superlegislation. As noted by Friedman (1988), superlegislation creates a demand in state legislatures for amending and even replacing state constitutions. The inclusion of statutory content of constitutions in civil law states created an environment of persistent constitutional instability that has the potential to undermine judicial decision making. Measures to limit superlegislation within state constitutions could lead to greater stability and possibly generate improvements in political freedoms, the courts, and even economic outcomes. Whether this lesson drawn from the continental American states applies more generally to countries such as Iraq and the post-socialist countries in the Former Soviet Union is an open question and an area for future research.

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[1] The five states that were acquired by Great Britain from France prior to the American Revolution – Illinois, Indiana, Michigan, Ohio, and Wisconsin – were lightly settled and had civil law for a much shorter period of time than the other ten states. In Berkowitz and Clay (2004a), we found that the effects on legal institutions of having been settled by a civil law country were stronger in the ten states that had civil law after the American Revolution than in the five states that had civil law prior to the American Revolution.

[2] Tetley (1999), p. 703.

[3] All quoted in Hammons (1999), p. 839.

[4] The other states include common law states and settler states that were lightly populated and without any particular legal tradition until the American settlers established American common law institutions.

[5] During 1970-90, Georgia, Louisiana, Montana, North Carolina and Virginia replaced their constitutions in 1983, 1975, 1973, 1971 and 1971.

[6] See Berkowitz and Clay (2004b) for a detailed analysis of these surveys conducted by the Institute for Legal Reform of the U.S. Chamber of Commerce.

[7] Friedman (1973), p. 347.

[8] Friedman (1973), pp. 346-7.

[9]In our sample, climate is highly correlated with membership in the confederacy (0.71) and with the share of slaves in the state population as of 1860 (0.75).

[10] We obtain very similar results if we use the amendment rate for the operating constitution as of 1991.

[11] It is notable that between 1962 and 1992 almost none of these rules have changed.

[12] We owe Paul Mahoney a debt of gratitude for forcing us to explore this issue further.

[13] Hamilton, Madison, and Jay (1961), p. 524.

[14] Langer 2002, p. 1.

[15] Sheldon (1987), p. 72.

[16] Langer (2002) pp. 11-12, 34-39 offers examples of all of these.

[17] Quoted in Langer (2002), p. 11.

[18] Madison (1787), section 9, pp. 348-57.

[19] Madison (1787), section 10, pp. 348-57.

[20] See Berkowitz and Clay (2004b) for more detailed discussion on the issue of courts.

Table 1: Summary Statistics

Variable	Description	Average	Std Dev	Min	Max
State Constitutions					
Constitutional amendment rate, 1970-90	The number of times that the state constitution has been amended per year during 1970-90. Source: Book of States.	1.98	1.65	0.3	9.65
Constitutional amendment rate as of 1991	As of 1991, the number of times that the current state constitution has been amended divided by number of years in effect. Source Lutz, 1994	1.41	1.39	0.25	8.07
Duration of constitution	As of 1991, the number of constitutions that a state has used divided by years/100 of statehood. Source: Lutz, 1994.	0.777	0.413	0.16	2.11
Length of original state constitution	Number of words. Source: NBER constitution project and Lutz, 1994.	11.4	9.3	1.07	58.2
Length of state constitution, 1941	Thousands of words. Source: the Book of States.	17.2	10.6	5.8	63.2
Length of state constitution, 1990		28.8	26.6	6.6	174
Particularistic content in constitution	Share of sentences in constitution as of 1997 coded particularistic versus framework oriented. Source: Hammons, 1999.	0.305	0.149	0.04	0.73
Super-majority, 1990	One if super-majority required for amending constitution, zero otherwise.	0.646	0.483	0	1
Two legislative sessions, 1990	One if two sessions required, zero otherwise.	0.292	0.459	0	1
Constitutional Initiative, 1990	One if popular initiative allowed, zero otherwise. Source: Book of States.	0.354	0.483	0	1
Judges and Courts					
Variable	Description	Average	Std Dev	Min	Max
Retention by partisan elections, 1970-90	Share of years during 1970-90 that appellate judges were retained by partisan elections.	0.195	0.376	0	1

Table 1 – continued					
Retention by merit system, 1970-90	Share of years during 1970-90 retained by merit system.	0.301	0.435	0	1
Partisan elections, 1912	1 if retained by partisan elections, 0 otherwise. Source is Source for retention is Hanssen 2002a, b	0.750	0.438	0	1
Judiciary share of state budget, 1970-90	Source: US Census Bureau, Annual Surveys of State and Local Government Finances	0.68%	0.35%	0.21%	1.59%
Quality of state courts	Telephone survey among nationally representative sample of senior attorneys conducted in 2001 and 2003. Averaged over eight categories in each year are ranked from 0 (worst) to 4 (best) for states in which the attorneys are familiar. Source: Institute for Legal Reform of the U.S. Chamber of Congress-States Liability Ranking Study, 2002 and 2003.	2.30	0.361	1.15	3.04
Initial Conditions					
Civil-law State	States originally settled by France, Spain, or Mexico, and that were acquired subsequent to the American Revolution. Source: Berkowitz and Clay, 2004a.	0.208	0.410	0	1
Climate	Annual temperature* humidity*precipitation* (.0001). Source: Statistical Abstract of the United States 1970.	13.1	7.50	1.99	39.7
South	Membership in the Confederacy. Source: Encyclopedia Britannica Online	0.229	0.425	0	1
Slave Population	% of 1860 population that were slave. Source: Mitchener and McClean, 2003.	10.3	17.7	0.00	57.2

Table 1 – continued Political Competition					
Log Initial Population	Log of population at the census closest to year when a territory entered the Union and year of entry. Source: Historical Statistics of the United States, 1975	-0.369	2.38	-3.91	3.80
Union date		1834.7	41.9	1787	1912
Ranney index, 1970-90	Within-state-party competition. Measured by adding the share of seats held by Dems. in the upper and lower state legislature, the Dem. share of vote for the State governor and whether or not the Dems control both houses in a year. This is divided by 4 and yields an index ranging from 0 (total Rep. control) to 1 (total Dem. control). The measure is then folded so that it is increasing in party competition (0.5 is when 1 party controls and 1.0 is when the two parties exactly split). Source: Hanssen (2004).	0.823	0.090	0.630	0.928

Table 2 – Comparison of Civil Law and Other States			
Constitutional Instability			
	Means for Civil Law States[a]	Means for Other States[a]	Difference in means[b]
Length of Initial Constitution (thsds of words)	12.12 (2.41)	11.16 (1.59)	0.96 (0.775)
Length of 1941 constitution	26.31 (5.07)	14.77 (1.15)	11.54* (0.001)
Length of 1990 constitution	50.87 (14.22)	22.97 (2.51)	27.90* (0.002)
Amendment rate, 1970-90	3.565 (0.835)	1.432 (0.205)	2.133* (0.001)
Amendment rate as of 1991	2.538 (0.694)	1.118 (0.149)	1.420* (0.003)
Amendment rate as of 1941	1.357 (0.482)	0.607 (0.105)	0.750* (0.022)
Duration (years/100) of constitution as of 1991	0.448 (0.075)	0.863 (0.066)	-0.415* (0.004)
Particularistic content in constitution as of 1997	0.449 (0.054)	0.267 (0.019)	0.182* (0.000)
Rules for Amending Constitutions and Political Competition			
Super-majority as of 1990	0.600 (0.163)	0.658 (0.078)	-0.058 (0.740)
Two legislative sessions as of 1990	0.000 (0.000)	0.368 (0.079)	-0.368* (0.022)
Constitutional initiative as of 1990	0.500 (0.167)	0.316 (0.076)	0.184 (0.288)
Ranney, 1970-90	0.759 (0.034)	0.840 (0.013)	-0.081* (0.000)
Judges and Courts			
Retention of Judges by partisan elections, 1912	0.800 (0.133)	0.737 (0.072)	0.063 (0.689)
Retention by partisan elections, 1970-90	0.527 (0.154)	0.108 (0.047)	0.420* (0.001)
Spending on judiciary as a share of state budget, 1970-90	0.56% (0.10%)	0.71% (0.06%)	-0.15% (0.221)
Quality of courts, 2001&2003	1.88 (0.125)	2.41 (0.042)	-0.529* (0.000)

Notes: Other states include common law, settler and pre-Revolution Civil Law states (Berkowitz and Clay, 2004a. There are 10 civil states and 38 other states in the sample. Because of Nebraska had a non-partisan legislature during 1970-90, we cannot calculate its Ranney index.

[a] Standard errors are in parentheses

[b] A two-sided two-sample t-test with equal variances is performed. P-values are reported in the parentheses, * denotes significance at the 5-percent level, and ** is at the 10-percent level.

Table 3: Determinants of Constitutional Instability							
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
1990 Rules: Super-majority	0.167 (0.227)	0.221 (0.197)	0.180 (0.243)				
Two legislative sessions	-0.244 (0.251)	-0.128 (0.220)	-0.060 (0.297)				
Constitutional initiative	0.149 (0.237)	-0.054 (0.212)	0.100 (0.231)				
Ranney index, 1970-90	-2.57* (1.18)	-0.862 (1.12)	-0.807 (1.58)				
Log length of 1990 constitution		0.594* (0.155)					0.447* (0.161)
Civil Law			0.614* (0.284)	0.614* (0.260)	0.658* (0.271)	0.594* (0.270)	0.393 (0.254)
Climate			0.024 (0.023)	0.035** (0.018)			0.018 (0.017)
South (membership in the Confederacy)					0.399 (0.276)		
Slavery (% 1860 Population in Slavery)						0.012** (0.0067)	
Log Initial Population			0.0776 (0.0595)	0.086 (0.055)	0.0736 (0.0551)	0.074 (0.054)	0.072 (0.051)
Union entry date			0.0058 (0.0043)	0.0074** (0.0038)	0.0047 (0.0033)	0.0054 (0.0033)	0.0049 (0.0037)
Constant	2.45* (0.950)	-0.822 (1.18)	-10.2 (8.17)	-13.8** (7.17)	-8.32 (6.13)	-9.73 (6.13)	-10.2 (6.79)
P-value of F-test for joint exclusion of 1990 rules	0.381	0.476	0.769				0.242
Adjusted R^2	0.099	0.321	0.193	0.235	0.204	0.227	0.339

Point estimates for regression coefficients and standard errors (in parentheses) are reported; and * denotes significance at the 5-percent level; ** is at the 10-percent level. This convention holds for all proceeding tables.

Table 4: State Constitutions, Alternative Measures of Instability and Rigidity						
Column	(1)	(2)	(3)	(4)	(5)	(6)
	Dependent Variables					
Explanatory Variables	Log amendment rate as of 1991			Particularistic content in constitution as of 1997		
Civil Law	0.675* (0.280)	0.679* (0.288)	0.588* (0.285)	0.092** (0.049)	0.104** (0.053)	0.087** (0.052)
Climate	0.0337** (0.0189)			0.0094* (0.0033)		
South		0.464 (0.294)			0.108** (0.054)	
Slavery			0.0152* (0.0070)			0.0033* (0.0013)
Log Initial Population	0.120* (0.059)	0.112** (0.059)	0.114** (0.0570)	-0.0104 (0.0104)	-0.0137 (0.0107)	-0.0135 (0.0103)
Union entry date	0.0071** (0.0041)	0.0048 (0.0036)	.0059 (0.0035)	0.0012 (0.0007)	0.0005 (0.0007)	0.0007 (0.0006)
Constant	-13.5** (7.73)	-9.00 (6.53)	-11.0** (6.47)	-2.08 (1.36)	-0.606 (1.19)	-0.980 (1.17)
Adjusted R^2	0.222	0.211	0.247	0.368	0.315	0.315

Table 4-Continued						
Columns	(7)	(8)	(9)	(10)	(11)	(12)
	Dependent Variables					
Explanatory Variables	Log duration of constitution, as of 1990			Log length of 1990 Constitution		
Civil Law	-0.518* (0.182)	-0.403* (0.173)	-0.346* (0.167)	0.495* (0.229)	0.690* (0.249)	0.637* (0.250)
Climate	-0.029* (0.012)			0.037* (0.015)		
South		-0.641* (0.176)			0.124 (0.253)	
Slavery			-0.0177* (0.0041)			0.0054 (0.0062)
Log Initial Population	0.0155 (0.0383)	0.0139 (0.0351)	0.0153 (0.0334)	0.031 (0.048)	0.0070 (0.0505)	0.0092 (0.0500)
Union entry date	0.0027 (0.0027)	0.0034 (0.0021)	0.0027 (.0021)	0.0057** (0.0034)	0.0011 (0.0031)	0.0017 (0.0031)
Constant	-4.87 (5.01)	-6.40 (3.91)	-5.10 (3.79)	-7.91 (6.32)	0.862 (5.62)	-0.242 (5.67)
Adjusted R^2	0.419	0.498	0.540	0.263	0.169	0.179

Table 5: Confirmed Private Land Claims
[to June 30, 1904]

State	*Number of Claims*	*Area of Claims in acres*	*Acres per Claim*
Louisiana	9,302	4,347,891.31	467
Missouri	3,748	1,130,051.62	302
Mississippi	1,154	773,087.14	670
Florida	869	2,711,290.57	3,120
California	588	8,850,143.56	15,051
New Mexico	504	9,899,021.67	19,641
Alabama	448	251,602.04	562
Arkansas	248	110,090.39	444
Arizona	95	295,212.19	3,107

Source: From the Report of the Public Lands Commission (Coville et al, 1904) http://memory.loc.gov/gc/amrvg/vg57old/vg57.html Image 84. Land grants for Texas are not reported because Texas was briefly independent and therefore handled land grants itself (the state retained rights to the land).

Table 6: State Courts and Constitutional Instability				
Column	(1)	(2)	(3)	(4)
	Dependent Variable is Quality of State Courts, 2001-03			
Log amendment rate, 1970-90	-0.149* (0.0672)			
Particularistic content, 1997		-0.808* (0.334)		
Log duration, 1990				
Log length of constitution, 1990			0.294* (0.0781)	-0.254* (0.0695)
Gross social product, 1986-89	0.00869* (0.00337)	0.00630** (0.00351)	0.00678* (0.00314)	0.00789* (0.00313)
Constant	1.54* (0.323)	1.95* (0.378)	1.78* (0.307)	2.35* (0.384)
Adjusted R^2	0.174	0.189	0.304	0.293

Gross social product is the average index (100 is average) for 1986, 88 and 89. The source is Advisory Commission, 1991. RTS: State Revenue Capacity and Effort. Washington, DC.