Introduction

COUNTRIES AROUND THE WORLD exhibit striking differences in per capita income. For example, in 2008, income in the United States, Singapore, and Switzerland was roughly forty times higher than income in Nepal and Uganda. There are also differences within countries. In the United States in 2000 income in the state of Connecticut was almost twice as high as income in the state of Mississippi. In Russia, income in the city of Moscow was six and a half times higher than income in the neighboring Ivanovo oblast. What drives the disparities?

The disparities appear to be driven in part by political and legal institutions.² Political institutions such as legislatures influence key aspects of the economy, including the rights individuals hold vis-à-vis land, labor, capital, materials, and intellectual property. Legal institutions—in particular courts—play an integral role in defining and enforcing rights. This discussion pushes the question back one level. What drives differences in political and legal institutions across countries?

A recent literature suggests that differences in institutions and income are driven by a combination of geographic and historical factors. Gallup, Sachs, and Melllinger (1998), Mellinger, Gallup, and Sachs (2000), Sachs and Malaney (2002), Sachs (2003), and Nunn and Puga (2009) argue that geography influences income through its effects on public health, productivity, trade costs, population growth, and investment. Diamond (1997) makes the case that distance from historically critical trade routes and centers of knowledge influences income through its impact on the diffusion of technology and knowledge.

Several studies argue that geography and the disease environment at time of settlement have influenced the character of institutions in former European colonies. Engerman and Sokoloff (1997 and 2005) argue that climate and soil

¹For countries, the data are gross national income adjusted for purchasing power parity from the World Bank. For the American states, the data are from the U.S. Census Bureau. For the Russian regions, the data are from various sources in the Russian statistical agencies: see Berkowitz and DeJong (2011).

²This work owes a debt to earlier studies of institutions, notably, North (1966), Davis and North (1971), North (1981), North (1990), Ostrom (1990) and Greif (2006).

shaped the subsequent character of political institutions. In colonies that were warm and rainy and had soil suitable for sugar and other staples, "bad" political institutions representing the narrow interests of wealthy elites emerged. In colonies that were colder and dryer and had different soil conditions, "good" political institutions representing broader interests were established. Acemoglu, Johnson, and Robinson (2001) provide evidence that the disease environment at time of settlement shaped the quality of institutions that protect property rights. In colonies where early settlers had a good chance of surviving, "good" institutions that protected property rights and limited the power of the government to expropriate emerged. By contrast, in colonies where early settlers were likely to contract life-threatening diseases, "bad" institutions that allowed settlers to easily extract resources emerged.

Historical factors such as legal and governmental institutions also appear to have been influential.³ France and many other European countries inherited or appropriated a civil-law legal system early in their histories. Although civil law is conventionally referred to as a legal system, it represents a particular approach to governance that goes well beyond the courts.⁴ Through colonization, these countries spread civil-law legal systems to many other parts of the world, including North America, South America, Asia, and Africa. England, for a whole host of historical reasons, developed a quite different legal and governmental system that came to be known as common law. Through colonization, it too spread common law to many other parts of the world.

Documenting how and why geography and other historical factors have had a persistent influence on political and legal institutions is challenging. The challenge arises because many countries lack the detailed qualitative and quantitative evidence necessary to document persistence and to test the relevance of alternative mechanisms. Lacking data on political institutions, Sokoloff and Engerman (2000) investigate a variety of indirect measures such as the timing and intensity of the extension of the voting franchise, the funding of public schools, and the allocation of land grants to immigrants in the Americas. Acemoglu and Robinson (2006) use a model to explain persistence of political institutions even in the face of large changes in the franchise. Glaeser and Shleifer (2002) and Klerman and Mahoney (2007) use historical evidence on England and France to show how legal origins shaped the evolution of legal

³Coatsworth (1993), Easterly (2006), Engerman, Mariscal, and Sokoloff (1998), Levine (2005), and Young (1994) describe political institutions that were created by European settlers and endured after colonization.

⁴See LaPorta et al.'s (2008) survey article.

procedures and judicial independence.⁵ Our attempts in two earlier papers to understand how and why colonial legal institutions have had persistent effects on American state constitutions and state courts (Berkowitz and Clay 2005, 2006) were a major motivation for this book.

This book uses detailed historical evidence to analyze how and why geographical and colonial initial conditions have affected the evolution of legislatures and courts in the American states.⁶ The American states have relatively diverse geographic and colonial initial conditions, well-documented historical experiences, and rich data on politics and courts going back to the 1860s. At the same time, a focus on the American experience avoids the problem of analyzing countries that often differ along many different dimensions and have had wildly different historical experiences. The primary goal of this book, then, is to understand political and legal institutions. In the conclusion, however, initial conditions are used to shed light on the contribution of political and legal institutions to long-term growth.

Figure 1.1 outlines the structure of the argument in the book. It is useful to begin by considering the two types of institutions of interest—state legislatures and state courts—near the top of the figure. Political competition in state legislatures is of interest because it is thought to lead to better economic and social outcomes. In the international context, Gryzmala-Buesse (2007), Jackson et al. (2005), Rodrik (1999), and Remington (2010) have found strong positive associations between the extent of political competition and outcomes such as government efficiency and corruption, the entry and subsequent growth of new firms, the provision of public goods, tax compliance, and manufacturing wages. The relationship between political competition and economic and social outcomes in the United States has been the focus of considerable discussion, but causal inference has been difficult. Besley, Persson, and Sturm (2010) use the 1965 Voting Rights Act as a source of exogenous variation—the federal government forced many southern states to allow registration of practically all individuals of voting age. They show that political competition was associated with growth through its influence on probusiness policies such as lower state taxes, higher state infrastructure spending, and the increased likelihood of a state having a right-to-work law.

⁵See also Banerjee and Iyer (2005), Iyer (2010), and Dell (2009).

⁶The analysis focuses on the forty-eight continental states. Alaska and Hawaii are not geographically contiguous, entered the union much later, and have had very different histories than the other states.

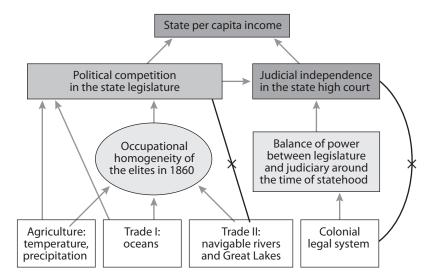


Figure 1.1. Outline of the Argument.

Judicial independence in the state high court is also related to important political and economic outcomes. Using a large sample of countries, La Porta et al. (2004) have shown that judicial independence is associated with stronger security of property rights, lighter government regulation, less state ownership, and more political freedom. A determinant of judicial independence in the American states is whether judges are elected. Former U.S. Supreme Court justice Sandra Day O'Connor has warned of the threat to judicial independence created by the "flood of money into courtrooms by way of increasingly expensive and volatile judicial elections." Moreover, the available evidence suggests that courts in states where sitting judges face partisan elections issue higher tort awards, rule more frequently against out-of-state businesses, have a higher likelihood of siding with state agencies in challenges to regulations, have a lower likelihood of enforcing constitutional restrictions on deficit financing, and also have more punitive sentencing outcomes.

⁷The United States because it is the only country that allows high (state) level judges to be elected.

⁸Carey (2009).

⁹See Besley and Payne (2003), Tabarrok and Helland (1999), Hanssen (1999), Bohn and Inman (1996), and Huber and Gordon (2004).

Levels of interparty competition in state legislatures and the levels of independence of judges in the state's highest courts have been highly persistent over the period 1866–2000. Interparty competition is measured by examining the division of seats between the Democrats and the Whigs and later between the Democrats and the Republicans. This division is measured by the Ranney index of political competition. The index runs from 0, when one party holds all of the seats, to 100, when the parties each hold the same number of seats. The level of independence of judges is measured on a nine-point scale that captures what a state high court judge needs to do to remain on the bench. Having to run for reelection in a partisan race is considered the lowest level of independence, because judges may feel pressure to make politically popular decisions, even if they consider the decision to be legally incorrect. Having a lifetime appointment is considered the highest level of independence, because judges can make whatever decisions they believe are correct with virtually no political ramifications.

Figures 1.2 and 1.3 demonstrate the extent of this persistence of interparty competition and judicial independence. Persistence is measured by examining the correlation in political competition or judicial independence over time. If relative levels are persistent—states with high levels of political competition or judicial independence had high levels in other time periods—then the correlation between time periods should be high. Conversely, if they are not particularly persistent, then the correlation will be low. Figure 1.2 shows that the political competition in state legislatures in 1900–1918 was quite highly correlated with other subperiods during 1880–2000. The period 1866–1878 differs, primarily because many southern states had relatively high levels of competition under Reconstruction. Figure 1.3 presents an analogous figure for judicial independence in the state's high court. The high correlation of judicial independence in 1900–1918 with all of the other subperiods is striking.

The fact that levels of competition in state legislatures and independence of judges on state high courts are so persistent is surprising given the many changes that have occurred over the historical period 1866–2000. Population growth, immigration, urbanization, internal migration, the development of manufacturing, wars, the Great Depression, and the New Deal are only a partial list of the changes. Yet apparently these changes had limited effects on political competition in state legislatures and the independence of judges on state high courts.

One outcome of particular salience to many policymakers is per capita income. State legislatures and state courts are believed to shape per capita income. Per capita income, like relative levels of political competition in the state

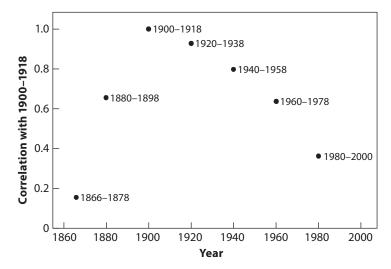


Figure 1.2. Persistence of Political Competition in State Legislatures, 1866–2000. The Ranney index is used as a measure of political competition. Its construction is described in chapter 3. The Ranney index runs from 0 (no political competition) to 100 (highest possible political competition). Because Nebraska had a unicameral legislature for most of 1866–2000, it is not possible to measure its Ranney index. Thus, Nebraska is dropped from the sample. Louisiana is dropped because it kept a civil-law system after entering the union. Eleven additional states are dropped for lack of data. This leaves 35 states in the sample. The results are similar if we include these 11 states and conduct the analysis for 1910–2000.

legislature and the independence of judges on the state high court, is highly persistent. Figure 1.4 plots the correlation of per capita income in 1900 with six other years from 1880 to 2000. Although our primary focus is on state political and legal institutions, the last chapter briefly examines their influence on state per capita income.

The high degree of persistence suggests that conditions early in a state's history may have played a formative role in shaping political and legal institutions. The left side of figure 1.1 outlines the initial conditions that we argue shaped political competition in state legislatures and the mechanism through which the initial conditions acted on the legislature. The initial conditions represent state endowments that help determine a state's suitability for agriculture and for trade. States with moderate or warm temperatures and higher levels of precipitation were generally better suited for agriculture than states with

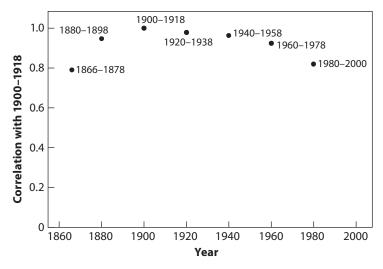


Figure 1.3. Persistence of State High Courts' Judicial Independence, 1866–2000. The judicial independence index runs from 1 (partisan elections and least independent) to 9 (life time tenure and most independent). This index was constructed by Epstein, Knight, and Shvetsova (2002) and is discussed in detail in chapter 5. Louisiana is dropped because it kept a civil-law system after entering the union. For consistency with the previous figure, Nebraska is dropped because it had a unicameral legislature. Eleven additional states are dropped for lack of data. This leaves 35 states in the sample. The results are similar if we include these 11 states and conduct the analysis for 1910–2000.

cooler temperatures or low levels of precipitation. Similarly, states that were relatively close to the ocean and to internal water sources such as navigable rivers and the Great Lakes were better suited to trade than states that had more limited access to water transportation.

The intuition that initial conditions related to agriculture and trade may have shaped political competition is not especially novel. What is novel is that this book establishes a mechanism through which agriculture and trade acted on political competition in the state legislature. To understand the mechanism, one has to understand how seats in state legislatures were allocated. For most of the nineteenth and twentieth centuries, seats in state legislatures were allocated on the basis of geographic units such as counties and not population. Counties typically had a comparative advantage in either agriculture or trade. Thus the wealth of local elites was typically grounded in one of these two areas. Local

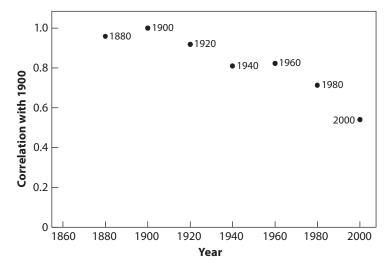


Figure 1.4. Persistence of State Per Capita Income, 1880–2000.

In 1880 there are data for 45 states of the 48 continental states. In all other years there are data for all 48 continental states.

elites tended to control who served in the state legislature. The two types of elites tended to have different interests and thus support different political parties. Economic activities in counties tended to change slowly over time. So an agricultural county tended to have agricultural elites who tended to send individuals with the same party affiliation to the state legislature. Similar trajectories occurred in counties with merchants or other types of elites. States with more occupationally diverse elites had higher levels of political competition in the state legislature than states where the elites were more homogeneous.

The wealth of the elite has been offered as a mechanism through which initial conditions might shape political competition. ¹⁰ States with wealthier elites would have more limited political competition, because the elites would more fully control politics. States with less wealthy elites would have greater political competition. These elites would choose not to devote resources to controlling politics or, if they did devote resources, would be less effective at controlling competition.

¹⁰This link is explicit in Engerman and Sokoloff (1997 and 2005), and implicit in Acemoglu, Johnson, and Robinson (2001) and much of the literature on the South.

Using data from the 1860 Census of Population and data on state political competition for 1866–2000, the relationships between occupational homogeneity and political competition and wealth and political competition are investigated. Occupational homogeneity of the elite in 1860 was strongly negatively related to political competition from 1866 through the end of the 1970s. In contrast, wealth of the elite had a variable relationship with political competition. In most periods the effect was small and positive, but in two periods it was large and negative.

We argue that the occupational homogeneity caused political competition. As the arrows in figure 1.1 suggest, temperature, precipitation, and distance to an ocean could in principle influence political competition in the state legislature through other channels. The distance to internal water transportation—navigable rivers and the Great Lakes—on the other hand, became much less important with the rise of the railroad. This change was sufficiently dramatic that internal water transportation was arguably only acting on political competition through the occupational homogeneity of the elite. Thus, using internal water transportation as a source of exogenous variation, occupational homogeneity of the elites is shown to have had a causal effect on political competition in state legislatures during 1866–1978 and, in some specifications, during 1866–2000.

The influence of the occupational homogeneity of the elites in 1860 persisted for interrelated reasons. Economic activities in counties tended to change slowly over time. As the underlying mix of economic activities changed, the mix of elites changed, but it took some time for new elites to grow powerful enough to elect individuals with other political affiliations. Persistence was greatly aided by the fact that geographic units were rarely reapportioned to reflect shifts in population. When combined, economic and political factors created strong persistence in the political composition of the state legislature.

One question is how slavery and the Civil War fit into the preceding discussion. Controlling for slavery does not substantially alter our results. Occupational homogeneity remains strongly negatively related to levels of political competition in the state legislature from 1866–1978, although the magnitude of the negative effect is smaller than it is without controls for slavery. Clearly slavery and the Civil War had an important influence on American political history. Few, if any, scholars would argue that it did not. Our point is that occupational homogeneity had an important influence on political competition in state legislatures above and beyond slavery. Some northern states, including Vermont, Indiana, Iowa, Kentucky, and New Hampshire, had high levels of

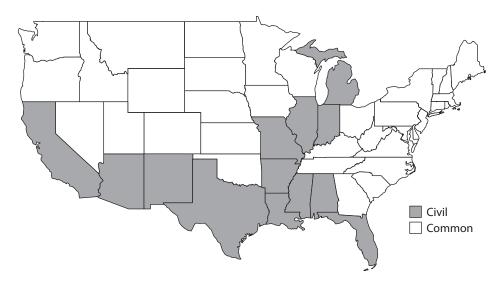


Figure 1.5. Civil-Law and Common-Law States.

The terms "civil law" and "common law" refer to states' colonial legal systems. All of the civil-law states except Louisiana ultimately adopted common law. The details of the classification of states are presented in chapter 2.

occupational homogeneity and low political competition over time. And some southern states, including Tennessee, Virginia, North Carolina, and Louisiana, had lower levels of occupational homogeneity and higher levels of political competition over time.

Turning to the right of side of figure 1.1, we argue that the colonial legal system was an initial condition that shaped courts. Many American states were first settled by European countries other than England. Thirteen states had operational civil-law legal systems at some point after 1750. Figure 1.5 shows the location of these states. All but one of these states, Louisiana, would adopt common law around the time of statehood. By the late eighteenth century, civil-law and common-law legal systems differed in many respects. One important respect in which they differed was the balance of power between the legislature and the courts. In common-law systems, legislatures and courts were relatively more equal. In civil-law systems, the legislature was relatively dominant and the judiciary subordinate. If civil law had a persistent affect, despite the adoption of common law everywhere except Louisiana, judges should be less independent in civil-law states.

For the twelve states that adopted common law after having had civil law, the influence of civil law comes through the balance of power and not through other channels. In particular, the influence is not coming through the survival of civil-law laws or procedures. Lawrence Friedman (1986) argues persuasively that, with a few exceptions related to property and family law, the common law completely "obliterated" civil law. Unfortunately, it is not possible to directly observe the balance of power. The historical record shows that individuals with civil-law backgrounds were active in early legislatures and constitutional conventions. Individuals with common-law backgrounds may have preferred a more dominant legislature or subordinate judiciary for other reasons, including the negative effects of the transition in legal systems on the courts or perceived benefits to having a balance of power that differed from the balance of power in most common-law states. Whatever the circumstances, the balance of power between state legislatures and courts appears to have been established during this early period. The reasons for persistence are less clear than they are for politics. Legislators may not have revisited the issue of the appropriate balance of power very often. When the issue was revisited, considerable weight may have been placed on how things always had been done.

The arrow in figure 1.1 runs from political competition in the state legislature to state courts, because state courts have historically had little influence on political competition in the legislature, whereas state legislatures have historically had tremendous influence on state courts. This influence arises because state legislatures make laws regarding the operation of state courts and provide funding for state courts.

Landes and Posner (1975) offer a theory linking levels of political competition to the structure of state courts. Their theory was formalized by Maskin and Tirole (2004) and Hanssen (2004b).¹¹ These authors argue that a dominant political party will prefer a more subordinate, less independent judiciary. For example, judges who face competitive reelection are likely to be more deferential to party officials in their decision making than the same judges would be if they held lifetime appointments. As political competition rises, however, the majority political party may at some point prefer appointed judges, because they may be more likely to preserve the majority party's policy legacy if the party becomes the minority party. The threshold will depend in part on the legislature's ability to screen for judges whose beliefs and preferences match those of the party in power. If they can perfectly screen for judges, then the

¹¹ See also Epstein et al. (2000) and Ramseyer (1994).

legislature will be indifferent between elections and appointment, because these judges will behave in the same way under elections and appointment. If screening is imperfect, however, then increases in political competition will at some point lead legislatures to switch to appointment. This model is extended to allow legislatures with different colonial legal systems to have different preferences regarding judicial independence. The primary implication is that the threshold level of political competition required to induce the state legislature to switch to a more independent judiciary is higher in civil-law states than in common-law states.

Using data on judicial retention systems, judicial tenure, the adoption of intermediate appellate courts, and judicial budgets, we investigate the implications of the model. Civil-law and common-law states differ in ways predicted by the model. Because it retained civil law, Louisiana is excluded from the analysis. Civil-law states had less independent state high court judges and lower expenditures on their courts. They adopted intermediate appellate courts—which provide more oversight of lower courts—at lower population levels. Civil-law states required larger increases in political competition to move away from partisan elections and to increase judicial independence more generally. Finally, they responded to changes in judicial independence differently. Common-law states tended to increase judicial budgets when they moved from election-based to appointment-based retention, while civil-law states tended to hold budgets constant. These differences hold even when controls are included for slavery and the timing of entry into the union. The results are similar if the years of civil law are used instead of a variable for whether the state had a civil-law or common-law colonial legal system.

The influence of civil law persisted for two related reasons. The model suggests that legislatures will not have incentives to make changes to judicial independence if levels of political competition are relatively stable. Moreover, in practice making a change to retention procedures does not only involve the legislature. Retention procedures for high court judges are specified in state constitutions. So any changes typically have to be ratified by the state constitutional convention or voters or both. These two factors imply that change will be comparatively rare.

We conclude that initial conditions played early and enduring roles in shaping political and legal institutions in the American states. Having made this argument, the book examines the effect of state political and legal institutions on an important economic outcome, state income per capita. Many of the initial conditions that influence political competition also influence income, so it desirable to try to separate the two effect. Per capita income in 1900 will capture, albeit

imperfectly, the suitability of the state for agriculture and trade. If we control for per capita income in 1900, judicial independence has a strong positive association with per capita income in 2003. State political competition is not directly important for per capita income in 2003, in part, because it is hard to disentangle political competition and state per capita in 1900. However, a more through exploration of the effects of political competition and judicial independence on economic and social outcomes is beyond the scope of this book. The evidence from state per capita income adds further credence to the idea that political and legal institutions are important for long-run growth.

The book makes contributions to the literatures on institutions, American political history, and American legal history. It contributes to the literature on institutions by providing detailed evidence on the persistence of institutions over a long period of time in a large number of geographic units, on the mechanisms through which initial conditions shaped early institutions, and on the reasons for persistence. No work that we are aware of has been similar in scope. Previous research in this area, while extremely interesting, has provided limited information on persistence, mechanisms, and reasons for persistence. For example, Acemoglu, Johnson, and Robinson (2001) document that the initial conditions faced by European settlers in European colonies are strongly associated with the quality of institutions protecting property rights at the start and the end of the twentieth century. Banerjee and Iyer (2005) and Iyer (2010) highlight the relationship between British colonial institutions and measures of institutions and outputs in India. ¹² Sokoloff and Engerman (2000) use proxies in their analysis of the role that initial conditions played in shaping institutions in North and South America. In all of these cases, the data are quite sparse for the period before the late twentieth century.

The book adds to the literature on American political history by offering a richer conception of what influenced the historical trajectories of state legislatures.

¹² They document the "institutional overhang" of British taxation systems and British direct and indirect rule that were eliminated in the mid-nineteenth century. This book documents and explains the persistent influence of defunct legal origins. While Banerjee and Iyer focus on the influence of history on economic outcomes, this book focuses on how history has influenced the evolution of political and legal institutions. Our book is also related to the work of Dell (2009), who analyzes the impact of history on districts within Peru. Dell documents that the mita, a forced labor system imposed by Spain on Peru and Bolivia between 1573 and 1812, has affected contemporary child stunting and consumption in matched (bordering) districts. She then argues, using available historical data, that the influence of the mita has persisted through its impact on land tenure and roads. Dell focuses on the impact of a particular historic institution for mobilizing labor on economic outcomes. Our study focuses on the impact of initial conditions on the evolution of broadly defined state institutions, including courts and legislatures.

The vast majority of the political history literature examines politics in a specific body, the U.S. Congress; in specific locations such as cities, counties, and states; or over specific, usually short, time periods. To the extent that works are comparative and focused on multiple state legislatures over longer periods, much of the attention has been devoted to the split between the North and the South following the Civil War or to dating specific shifts in state politics. This book goes beyond the North-South split and shows how the early occupational homogeneity of the elite also shaped the subsequent evolution of political competition in the states. Early occupational homogeneity helps explain variation in levels of political competition across states in the North and the South. The book also provides evidence that the persistent effect of these elites was the result of economic and political factors, including the malapportionment of geographically based political districts.

Finally, the book adds to the literature on American legal history by offering a more nuanced story of the development of American state courts that allows a greater role for colonial legal history. Scholars have written about the transition from civil law to common law in specific states and about the continuation of certain civil-law practices primarily relating to marriage and property. But the dominant narrative has been quite dismissive of the effects of civil law, arguing that any effects were swept away by the tidal wave of Americans who entered the territory previously held by France, Spain, or Mexico. This book suggests that the story is more complicated. Civil law appears to have influenced the balance of power between the state legislature and state courts in these states. The structure and funding of court systems in civil-law states are systemati-

¹³This literature is vast and interesting, but it is not about the historical trajectory of state legislatures.

¹⁴Despite Key's (1949) seminal work, remarkably little comparative work has been done on explaining differences in levels of political competition across states over long periods of time. Scholars have tended to focus on differences in competition as explaining differences in policy outcomes over a relatively short period. To the extent that differences in political competition are analyzed, the explanatory variables tend to be contemporary demographic variables. For example, Patterson and Caldeira (1984) take up precisely the question that we are interested in, but examine a short period of time and use demographic variables to explain differences. Elazar (1966) takes up this question as well and considers historical factors. Unfortunately, his work is largely descriptive in terms of political culture, its relationship to political competition, and its relationship to political outcomes more broadly. As is discussed in chapter 3, his political culture variable is almost linearly related to average state temperature.

¹⁵ See Arnold (1985), Banner (2000), Cutter (1995), Fernandez (2001), Langum (1987), Bakken (2000), and Friedman (1986).

¹⁶ See Friedman (1986). Other major legal histories of the period such as Horwitz (1977) never even discuss civil law.

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cally different than in the court systems in common-law states. The book provides evidence that civil-law state legislatures made changes to their judicial retention systems under different conditions than common-law state legislatures did. Moreover, the response in terms of expenditures following changes in retention systems differed across common-law and civil-law states.

The book begins by describing the initial conditions, then discusses states legislatures, state courts, and finally per capita income. Colonial legal systems are the subject of chapter 2, and chapter 3 introduces the other initial conditions. This ordering allows us to investigate whether colonial legal systems were related to political competition in the state legislature. Chapter 4 presents the mechanism, occupational homogeneity of the elite, through which initial conditions acted on political competition in the state legislature. Chapters 5 and 6 present a theory of how political competition and colonial legal systems influence judicial independence, and they investigate empirically the extent to which the two factors influenced judicial independence. Chapter 7 links political and legal institutions to state per capita income.