American Civil Law Origins: Implications for State Constitutions and State Courts

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Abstract

Ten American states were settled by France, Mexico or Spain and had civil law legal systems in place at the time of the American Revolution. We argue that this initial condition had persistent effects on state constitutions, because under civil law legal traditions, laws were spelled out in a legal code that judges administer. When these states entered the Union and adopted common law, their civil law tradition led them to adopt state constitutions that were longer and more detailed than common law state constitutions. This greater length and specificity of these constitutions created demand for constitutional change as preferences and circumstances changed. Constitutional instability is likely to have a negative impact on state court quality because it has the potential to both weaken judicial review and to destabilize the legal framework. Using four separate measures of constitutional instability and controlling for a set of covariates, we quantify the substantial negative impact of constitutional instability on state courts.

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1. Introduction

Legal institutions play critical roles in the functioning of economic and political systems. To explain variation in contemporary legal institutions, scholars have begun to examine the importance of initial conditions (see La Porta et al (1999), Djankov et al (2003), Botero et al (2003), Acemoglu et al (2001), Engerman and Sokoloff (2002), Iyer (2003), Berkowitz and Clay (2004a)).

One question is precisely how initial conditions might effect contemporary legal institutions. The influence could be direct in the sense that initial conditions led to the selection, for example, of low quality judges. This effect might persist, because individuals with the skills to become high quality judges choose other occupations. Alternatively, the influence could be indirect in the sense that initial conditions led to the adoption of specific policies or practices that remain in place. If the effect is acting through specific policies or practices, then there is the opportunity for change.

Using data from the U.S. states, we examine the indirect effect that initial conditions have on the quality of state courts through the instability of the state constitutions. The initial condition of greatest interest to us is the legal system in place in the state or what would become the state at the time of the American Revolution. Ten states were controlled by France, Spain or Mexico and had civil law legal systems (civil law states). The remaining 38 states had a common law legal system or were unsettled.

We focus on state constitutions, because they provide critical components of the institutional framework within which state courts operate. Unlike the federal constitution, the state constitutions are not particularly stable. They are amended on average 1-2 times per year, although the rate varies substantially across states. We expect civil law states to

amend their constitutions more frequently than other American states. This arises, because under the civil law legal tradition, laws are spelled out in a legal code that judges administer. This led to civil law state constitutions that were in fact longer and more detailed than common law state constitutions. The greater length and specificity of these constitutions appears to have created a demand for constitutional change as preferences and circumstances changed.

Constitutional instability can negatively affect state courts in two ways – through its effect on judicial review and through the stability of the legal framework. Judicial review, the right of the courts to determine the constitutionality of state laws, is an important function of the state supreme court. State supreme court judges are, however, less likely to accept cases that require judicial review and less likely to decide that a statute is unconstitutional, if the legislature is likely to override their decision through a constitutional amendment. Thus, the threat of amendment limits the independence and quality of the state supreme court. Frequent amendment also makes it more difficult for state judges at every level to render consistent, informed decisions.

Empirically, we begin by evaluating the effect of being a civil law state and a number of other initial conditions including climate, initial population, and date of entry into the Union on the state constitutional amendment rate. We then use these initial conditions as sources of exogenous variation when we estimate the impact of constitutional instability on the quality of the state courts in 2001 and 2003. The amendment rate, although important, is by no means the only determinant of the quality of state courts. We control for a variety of other variables that have been identified as

important, including judicial independence and the state's ability to pay for good institutions.

We find that civil law is a powerful source of exogenous variation in constitutional instability. This enables us to identify instability's strong negative causal impact on the quality of state courts. Our result holds for four different measures of constitutional instability, including two complementary measures of the average annual state constitutional amendment rate, the average duration of a state constitution, and the share of particularistic (statutory versus framework) legislation in a state constitution. We find that the civil law tradition is associated with a roughly a one standard deviation increase in the constitutional instability (close to the difference between Louisiana, which has a relatively high rate, and Utah). And, civil law, via its indirect influence on constitutional instability, lowers the quality of courts by almost a half of a standard deviation (slightly less than the difference between Maryland, which has relatively high quality courts, and Florida).

Our paper is related La Porta et al.'s (2003) study of constitutional rigidity in 77 countries. They show that rigidity (what we would denote low instability) is associated with more political freedom. They argue that this finding is consistent with the argument that a rigid constitution bolsters judicial review. La Porta et al. use persistent rules to measure constitutional rigidity. In the case of American States, however, we find that these rules are relatively unimportant. Initial conditions and, in particular, civil law legal origins are much more important determinants of constitutional instability.

The rest of this paper is organized as follows. In the next section, we describe civil traditions in the American states and discuss their implications for state constitutions

and state judicial policy. In section 3, we discuss the potential impact of constitutional instability on courts. In section 4, we provide evidence on the determinants of constitutional instability. In section 5, we estimate the impact of constitutional instability on courts. 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.

In Berkowitz and Clay (2004a), we found that controlling for number of other variables of interest, having been a civil law state after the American Revolution had a statistically significant negative effect on the quality of courts in 2001. That paper, however, did not address the mechanisms through which having had civil law 150-200 years ago would affect the quality of courts today. In this section, we discuss the effects that the difference in legal traditions may have had on the original state constitutions and on judicial independence.

To understand the effects of the two 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.[1]

To the extent that the civil law tradition of codification influenced the writers of the original constitutions, it would result in longer original constitutions. In fact, longer constitutions tend to include laws that have been upgraded to constitutional status and are not observed in the federal constitution. These statutory laws have been called 'superlegislation' by Friedman (1988) or 'particularistic' legislation by Hammons (1999) and are in contrast to framework legislation. Framework legislation covers governmental principles, processes, and institutions. Hammons offers the following examples of the two types of legislation from current constitutions.[2] Framework provisions: "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. "The power of the government of this state is divided into three distinct branches – legislative, executive, and judicial." Montana, Article 3, Section 1, 1972. 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,

[1] Tetley (1999), p. 703.
[2] All quoted in Hammons (1999), p. 839.

and other marine animals from unnecessary killing, overfishing, and waste." Florida, Article 10, Section 16, 1968.

The existence of superlegislation in the constitution creates demand for change in the form of an amendment or as part of a broader set of changes associated with the adoption of a new constitution among the various interest groups affected by this superlegislation (see Friedman (1988)).. Given the demand for amendment generated by the superlegislation, we might also expect that it would be easier to amend the constitution in civil law states. Lutz (1994) created an index of the difficulty based 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). Thus, we expect that civil law states will require fewer votes to pass an amendment or require that an amendment only be passed by one rather than two successive legislative sessions.

Table 1 provides summary statistics for the 48 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 48 states. As of 1991, the average state has amended its current constitution 1.4 times per year; and the average state has replaced its constitution every 78 years. The average state constitution is substantially longer than it was originally, and roughly 30 percent of the provisions 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 initiatives.

Berkowitz and Clay (2004a) 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. Specifically, in regressions on the quality of courts, controlling for a number of factors, the five states that had civil law prior to the American Revolution were not statistically different from states that had always had common law. This is not surprising, because the five states that had civil law prior to the Revolution were lightly settled and had civil law for a much shorter period of time. Thus, we will focus on the ten states that had civil law after the revolution and refer to these states as civil law states.

Table 2 compares civil law states and the other 38 states along these same dimensions.[3] As predicted, we see that on average civil law states have longer constitutions and amend their constitutions more frequently. We calculated rates from the inception of the constitution to 1941 and to 1991 and during a specific interval, 1970-90.[4] 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 have less durable constitutions, more particularistic legislation, and constitutions that are easier to amend in the sense that they only require passage in a single legislative session.

[3] 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.
[4] During 1970-90, Georgia, Louisiana, Montana, North Carolina and Virginia replaced their constitutions in 1983, 1975, 1973, 1971 and 1971.

Judges in the civil law tradition are much less powerful, because the civil law views their primary role as administrative. Tetley (1999) describes who acts as judges in the two traditions: "Common law judges, who are called to play an important role in deciding what the law is, are appointed from among experienced practising lawyers. Civil law judges, whose main function is adjudicating, are appointed fresh from specialised schools."[5] Given the primacy of the legislature and the administrative role of judges in civil law, we would expect civil law states to be slower to adopt judicial reform than common law states.

Table 2 also compares the retention of judges and the funding of the judiciary in civil law and other states. Hanssen (2002a,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.

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

Alexander Hamilton laid out principles for the judiciary of the new government of the United States in the Federalist Paper 78 (1788).

[5] Tetley (1999), p. 705.

> 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.[6]

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.[7] 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.

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 basic rights of citizens. Drawing on cases of judicial review between 1776 and

[6] Hamilton, Madison, and Jay (1961), p. 524.
[7] Langer 2002, p. 1.

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."[8] Activist roles go beyond this 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 cutting the courts budgets. State legislatures have at one time or another taken all of these actions.[9]

In 1999, the Superior Court Chief Justice of New Hampshire discussed the effect of legislative retaliation, "When there is legislative retaliation for decisions,

[8] Sheldon (1987), p. 72.
[9] Langer (2002) pp. 11-12, 34-39 offers examples of all of these.

independence is compromised."[10] 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 whether judges are retained 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.

James Madison, Hamilton's friend and colleague, wrote in 1787 about the instability of states' legal frameworks. Madison favored brevity and clarity in laws.

> 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.[11]

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."[12]

Madison's discussion of the mutability of state laws is related to Hamilton's concern regarding the judiciary's ability to overrule the legislature on matters related to the Constitution. Changing the state constitution is an important way in which legislatures can overturn decisions by the judiciary.

Unlike the federal constitution, which is rarely changed, state constitutions are frequently changed. As we noted earlier, between the adoption of its current constitution and 1991, the average state had amended its constitution 1.4 times per year. Vermont registered the slowest rate, 0.25 per year, and Alabama had the fastest rate, 8.07 per year.

[10] Quoted in Langer (2002), p. 11.
[11] Madison (1787), section 9, pp. 348-57.
[12] Madison (1787), section 10, pp. 348-57.

In some instances, states have gone further and adopted new constitutions. Up to 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 11 times. We expect that this instability of state constitutions, whether measured by amendment rates or replacements, has a negative impact on state courts, because it undermines judicial review and also creates legal uncertainties that raise the cost to state judges of determining and enforcing decisions.

4. Determinants of the Constitutional Amendment Rate

Although there is a large political science literature on state constitutional amendment rates, there has been little work on the determinants of the amendment rate. The paper of greatest relevance is Lutz (1994). Lutz argues that a state's rate of constitutional amendment is related to two factors: i) how difficult it is to amend the constitution and ii) the original length of the constitution measured in words. As we discussed in section 2, difficulty of amendment depends on whether a supermajority is required for passage, the number of consecutive sessions in which the amendment must pass, and whether popular initiatives are allowed.

Despite the fact that the original length has been identified as a factor in constitutional instability, the determinants of the original length have received almost no attention. We examine four determinants: i) whether a state had a civil law legal system after the American Revolution, ii) when the state entered the union, iii) the population at the time of entry, and iv) the climate of the state.

Civil law states had longer original constitutions, because of the tendency towards codification in civil law. The civil law states may have been influenced by outside events as well, such as the compilation of new codes in France in the very beginning of the nineteenth century. Table 2 shows that the original constitutions of civil law states were twice as long as the original constitutions of all other states. The three states with the longest original constitutions were Alabama (65,400 words), Oklahoma (58,200 words), and Louisiana (47,300 words). The tendency towards codification is most apparent in Louisiana, because it retained civil law. Given the piecemeal nature of existing legislation, the Creole population demanded that the civil law be codified. Jefferson acceded to their demand, and a civil code was adopted in 1808. While the code was not contained in the constitution, codification undoubtedly influenced the constitutional process.

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.[13] 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."[14]

Population and climate indirectly measure political structure. More populous states at the time of first census may have had a greater concentration of interests than

[13] Friedman (1973), p. 347.
[14] Friedman (1973), pp. 346-7.

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. In both the cross country context and the U.S. context, climate has been found to be an important predictor of the quality of legal institutions and of economic outcomes (Acemoglou et al 2001, Engerman and Sokoloff 2002, Berkowitz and Clay 2004a). We believe that states with warmer and wetter climates had more concentrated political elites at the time that the original state constitution was written and that these elites demanded more particularistic legislation.

We measure climate by interacting a state's annual average temperature, humidity, and precipitation and then divide by 10,000 to lower the magnitude of this variable. If what we are capturing with climate is really slavery, the question arises of whether we would be better off using a dummy variable for states that were members of the Confederacy. In previous work (Berkowitz and Clay 2004a), we found that climate had greater explanatory power than a dummy variable for the Confederacy when the dependent variable was the quality of courts. We find that here as well. The relative importance of climate may be attributable to its ability to better capture some features of slavery. For instance, climate may better capture variations in the intensity of large scale (slave-based) agriculture tied to soil quality. It may also capture the fact that slavery

extended well beyond the Confederacy during the eighteenth and early nineteenth centuries (Wright 2003). If an adverse disease environment led to a more concentrated political elite, then climate may be picking that up as well. We show in Berkowitz and Clay (2004a) that our measure of climate is strongly associated with disease.

Table 3 investigates the determinants of constitutional instability as measured by the log of a state's constitutional amendment rate up to 1991 (hereafter 1991 amendment rate). The first two columns include constitution length and the factors identified by Lutz (1994) as affecting the difficulty of amending the state constitution. These include the requirement that an amendment be approved by a supermajority, be passed in two legislative sessions, and the ability of citizens to initiate constitutional change. Despite their plausible importance, the only variable that is statistically and politically important is the length of the state constitution, either originally or in 1992.

The middle two columns explore the determinants of constitution length originally and in 1992. As predicted, civil law states, states that entered the union later, states with warmer, more humid climates, and states with higher initial populations are all positively associated with longer initial and later constitutions. The coefficients on these variables remain positive in the final two columns where the dependent variable is the log of the amendment rate.

The effect of having been civil law state is statistically significant and quantitatively large in all four regressions in columns (3)-(6). Based on the estimates in column (6), having been a civil law state is associated with almost 90-percent of a standard deviation increase in the log of the 1991 amendment rate. This is, for example, the difference between Florida, where the annual amendment rate is 2.41, and Delaware,

where the annual amendment rate is 1.27. It is also notable that climate is statistically significant in three of the four regressions and quantitatively large in all four regressions.

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) and (2), we measure constitutional instability with the annual amendment rate during 1970-90, as opposed to during the entire history of the constitution. In columns (3) and (4), 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. Finally, in columns (5) and (6), we use the log duration of the state constitution as of 1992 as a measure of stability (rigidity). As expected, civil law and climate have a statistically and quantitatively significant positive impact on instability and a statistically and quantitatively significant negative impact on rigidity.

5. Quality of Courts

In this section, we measure the impact of constitutional amendment rates on state courts. To measure the quality of courts, we average the results of the U.S. Chamber of Congress-States Liability Ranking Survey from 2001 and 2003. These surveys were conducted on the telephone using a nationally representative sample of senior attorneys 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.[15] Our measure is the average over 8 categories for each state. The average score was 2.3, and scores ranged from 1.2 (Mississippi) to 3.0 (Delaware). The quality of state judges in the survey in 2001 and 2003 is highly correlated (0.944 and 0.976) with the overall quality of state courts.

To measure the impact of the rate of constitutional instability on courts, we estimate the following equation:

$$(1) \quad CQ = \alpha + \beta CON + \delta JI + \eta SK + \varepsilon$$

where CQ, CON, JI, and SK denote court quality, constitutional instability as measured by the 1991 amendment rate, judicial independence, and state capacity to afford good institutions. We include judicial independence because it is has been identified as a major determinant of judicial behavior (see, for example, Landes and Posner, 1975; Besley and Payne, 2003; La Porta et al, 2003; Gennaioli, 2004). To measure judicial independence, we draw on Hanssen (2002b) who argues that the merit system of retention provides the most independence, the system of partisan elections provides the least independence, and the system by which governors or legislatures re-appoint judges (or judges stand for non-partisan elections) is an intermediate case.[16] We use two dummy variables to measure independence or lack thereof. The first is the share of years during 1970-90 that state appellate judges were retained on the basis of the merit system. The second is the share of years during 1970-90 that judges had to run for office in partisan elections. The omitted category is the intermediate case of appointments and non-partisan elections.

[15] We exclude treatment of class action suits and punitive damages in our calculated average because these two categories cannot be determined in several states.

[16] Hanssen (2002b) notes that retention procedures are very similar to selection procedures and that these procedures for appellate judges are representative of procedures for lower level judges.

We control for the state capacity to afford good institutions, because this it can simultaneously can influence both policy and quality of courts. To measure state capacity, we use an index of state per capita gross social products averaged during 1986-89 from the Advisory Commission on Intergovernmental Relations (1991). In unreported regressions, we used a variety of other measures of state capacity to afford good institutions as controls including state population, an index of state tax capacity per capita, median household income and state budgetary shares for the judiciary. Our results are robust to using these alternative measures.

If we estimate (1) using OLS, point estimates for the causal impact of the constitutional amendment rate on court quality are potentially biased because the amendment rate may be correlated with omitted variables that also influence court quality. For example, if state legislatures that hold judges in low regard also tend to amend constitutions frequently, then the OLS estimate would over-estimate the absolute casual impact of constitutional instability on courts. However, if states that have been amending laws also tend to allocate more resources to courts and to agencies that enforce court decisions, then OLS estimates would under-estimate the absolute causal impact of the amendment rate. Our measures of judicial independence also could be correlated with omitted variables in equation (1), so that OLS would generate biased estimates of their causal impact on courts.

We correct for these problems for this using the following strategy. First, we lag the explanatory variables: the constitutional instability is measured as of 1991; judicial independence is measured during 1970-90, average gross social product is measured during 1986-89, whereas court quality is measured during 2001 and 2003. Second, we

use a vector of initial conditions (civil law origins, climate, log initial population and the date of entry into the union) as instruments for the constitutional amendment rate.

The reduced form first stage regression use to identify CON in equation (1) is

$$(2) \qquad CON = \alpha_1 + \beta_1 INIT + \delta_1 JI + \eta_1 SK + \varepsilon_1$$

where INIT denotes initial conditions (civil law, climate, log initial population and union entry date). We therefore use the four initial conditions in INIT as the over-identifying restrictions in (1). Over-identification, even when the instruments are strong, can create OLS bias in the estimation of the causal impact of constitutional instability on quality of courts (see Chao and Swansson (2003); Hahn and Hausman (2002)). In order to offset this bias, we draw on simulation results in Chao and Swannson (2003, Table 2) and estimate (1) and (2) using limited information maximum likelihood (LIML). [17]

Our results are presented in Tables 5 and 6. In Table 5 we use the log of the 1991 amendment rate to measure constitutional instability. In Table 6 we use three other measures of instability: i) the log of the amendment rate during 1970-90, ii) the log of the duration of the state constitution as of 1991, and iii) the share of particularistic content as of 1997. In Panel A of both tables we report LIML estimates of equation (1) and we also report test statistics that check for the validity of the over-identifying restrictions; in panel B we report corresponding OLS estimates. In Panel C of Table 5 we report the first stage reduced form estimates for the determinants of the constitutional amendment and report test statistics to check for the strength of initial conditions as instruments. (Results for first stage reduced forms corresponding to the estimates in Table 6 are available upon request.)

[17] For a detailed analysis of the impact of policy on courts, see Berkowitz and Clay (2004b).

In Table 5, panel A, the amendment rate has the expected negative sign and is significant at the 5-percent level. Our results indicate that a reduction in the amendment rate from the 75th percentile to the 25th percentile would increase the quality of courts by roughly three quarters of a standard deviation, which is the difference between courts in Wisconsin and New York, or between New York and Florida. It is also interesting to note that partisan elections as of 1980 has the expected negative association with court quality and is statistically significant, and judicial merit retention has the expected positive sign but is statistically indistinguishable from retention by appointment.

Comparing the LIML estimates with the OLS estimates in Panels A and B, it is striking that the OLS estimate suggests that the amendment rate essentially has no impact on courts in OLS; while as already noted, the LIML estimate shows that its impact is very substantial. Thus, the amendment is clearly endogenous in (1) and LIML is warranted.

The test statistics in Table 5, panels A and C validate our identification strategy. The Anderson-Rubin test statistic reported in panel A tests the null that the excluded instruments (the four initial conditions) are not jointly correlated with the error term in the structural equation (1). The p-value is 0.723, so we fail to reject the null of over-identification. The test statistics in Panel C provide evidence that initial conditions are strong instruments. The F-statistic tests the null that the four initial conditions can be jointly excluded from the first stage reduced form regression. The F-statistic is relatively large (3.53) and its associated p-value of 0.016, so we reject this null. Furthermore, three initial conditions (civil law, union entry date and log initial population) are individually significant at the 5-percent level and the fourth, climate, has a p-value of 0.105.

The results in Table 6 verify that our results are robust to alternative measures of constitutional instability and rigidity. It is striking that the constitutional instability (rigidity) has the expected negative (positive) impact on quality of courts, and that this effect is greatly amplified when we use LIML instead of OLS to estimate the structural equation (1). Furthermore, the Anderson-Rubin test verifies that in all three estimates, the over-identification strategy is valid.

The estimates reported in Table 5 enable us to calculate the impact of civil law origins on contemporary courts. Controlling for other initial conditions, judicial independence and state capacity to afford good institutions, a civil tradition has no direct effect on courts; influences courts purely via its influence on the constitutional instability.[18] Thus, we have identified a particular channel by which initial conditions persist. Specifically, civil law accounts increases the log amendment rate by roughly a one-standard deviation (0.798) which, in turn lowers court quality by roughly three quarters of a standard deviation ($\approx$ -0.35*0.80 $\approx$ 0.28), which is slightly less than the difference between the relatively high quality courts in Maryland, a common law state, and the lower quality courts in Florida, a civil law state.

6. Conclusions

In this paper we have argued that initial civil law legal traditions are an important determinant of contemporary court quality in the continental American states. 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

[18] Evidence to this effect is that, by the Anderson-Rubin over-identification test reported in panel A of tables 5 and 6, the four initial conditions are jointly uncorrelated with the error term of the structural equation (1). Evidence that the civil law variable by itself is uncorrelated is available upon request.

legislatures for amending and even replacing state constitutions, Thus, the initial length and statutory content of constitutions in civil law states created an environment of persistent constitutional instability that has undermined state level judicial review and judicial decision making to this day.

One of the policy implications of this study is that measures to limit legislative interference with the judiciary would likely improve the quality of courts. Our study suggests that the cause of constitutional instability is excessive superlegislation in state constitutions. Thus, measures to limit superlegislation within state constitutions could bolster judicial review and the effectiveness of judicial decision making. 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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Table 1: Summary Statistics

Variable	Description	Average	Std Dev	Min	Max
Quality of Institutions					
Quality of state courts	Telephone survey among nationally representative sample of senior attorneys conducted in 2001 and 2003. Eight categories in each year are ranked on a sc ale of 0 (worst) to 4 (best) for states in which the attorneys are familiar, and averages are used for each state. Source: U.S. Chamber of Congress-States Liability Ranking Study, 2002 and 2003.	2.30	0.361	1.15	3.04
Variables related to constitutional instability					
Constitutional amendment rate	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 constitution	Log thousands of words. Source: Lutz, 1994.	2.83	0.524	1.65	4.18
Length of state constitution, 1992	Log thousands of words. Source: the Book of States.	3.12	0.640	1.89	5.16
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, 1991	0.354	0.483	0	1

Table 1-continued

Judges					
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
Retention by merit system, 1970-90	Share of years during 1970-90 that appellate judges were 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%
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
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

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 First Constitution (000s words)	31.60 (4.73)	16.35 (1.45)	15.25* (0.000)
Length of 1992 constitution	50.87 (14.22)	22.97 (2.51)	27.90* (0.002)
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)
Amendment rate, 1970-90	3.565 (0.835)	1.432 (0.205)	2.133* (0.001)
Duration (years/100) of constitution as of 1992	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			
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)
The Judiciary			
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)

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.

[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

Column	(1)	(2)	(3)	(4)	(5)	(6)
Explanatory Variables	Dependent Variable					
	Log Amendment rate as of 1991		Log Constitution Length (1000s of words)		Log Amendment rate as of 1991	
			Initial	1992		
1990 Rules: Super-majority	0.047 (0.220)	0.047 (0.212)			-0.114 (0.243)	
Two legislative sessions	-0.196 (0.246)	-0.218 (0.234)			-0.327 (0.294)	
Constitutional initiative	-0.114 (0.219)	-0.170 (0.212)			0.098 (0.236)	
Log original constitution	0.755* (0.196)					
Log 1992 constitution		0.676* (0.154)				
Civil Law			0.454* (0.179)	0.495* (0.229)	0.572** (0.299)	0.675* (0.281)
Climate			0.030* (0.012)	0.037* (0.015)	0.034 (0.020)	0.034** (0.019)
Union entry date			0.0054* (0.0026)	0.0057** (0.0034)	0.0053 (0.0045)	0.0071** (0.0041)
Log Initial Population			0.020 (0.038)	0.031 (0.048)	0.130* (0.062)	0.120* (0.059)
Constant	-2.029* (0.635)	-1.980* (0.554)	-7.620 (4.931)	-7.910 (6.442)	-9.370 (8.572)	-13.520** (7.732)
P-value of F-test for joint exclusion of 1992 rules	0.779	0.645			0.655	
Adjusted R^2	0.243	0.297	0.329	0.263	0.197	0.222

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: Constitutional Instability and Initial Conditions Alternative Measures of Instability and Rigidity						
Column	(1)	(2)	(3)	(4)	(5)	(6)
	Dependent Variables					
Explanatory Variables	Constitutional instability		Constitutional instability		Constitutional stability (rigidity)	
	Log amendment rate, 1970-90		Log amendment rate, 1970-90		Log duration of constitution as of 1992	
Log original constitution	0.701* (0.172)		0.210* (0.028)		-0.578* (0.137)	
Civil Law		0.614* (0.260)		0.092** (0.049)		-0.518* (0.182)
Climate		0.035** (0.018)		0.0094* (0.0033)		-0.029* (0.012)
Union entry date		0.0074** (0.0038)		0.0012 (0.0007)		0.0027 (0.0027)
Log Initial Population		0.086 (0.055)		-0.0104 (0.0104)		0.0155 (0.0383)
Constant	-1.555* (0.495)	-13.78** (7.17)	-0.288* (0.082)	-2.084 (1.362)	1.236* (0.393)	-4.871 (5.012)
Adjusted R^2	0.249	0.235	0.532	0.368	0.264	0.419

Table 5: Constitutional Instability and Courts: Panel A- Second Stage LIML Structural Estimates Dependent Variable is Quality of Courts, 2001-03	
Log Amendment rate as 1991 (instrumented)	-0.348* (0.115)
Retention by partisan elections, 1970-90	-0.440* (0.146)
Retention by merit system, 1970-90	0.005 (0.115)
Gross social product, 1986-89	0.0043 (0.0035)
Anderson-Rubin over-identification statistic	1.63
P-value of test statistic	0.652
Centered R^2	0.189
Panel B-OLS Regressions of Structural Estimates	
Log Amendment rate as 1991	-0.098** (0.054)
Retention by partisan elections, 1970-90	-0.521* (0.123)
Retention by merit system, 1970-90	0.008 (0.099)
Gross social product, 1986-89	0.0042 (0.0030)
Adjusted R^2	0.412
Panel C- First Stage Reduced Form OLS Regression of Log Amendment Rate as of 1991	
Retention by partisan elections, 1970-90	-0.396 (0.354)
Retention by merit system, 1970-90	-0.291 (0.261)
Gross social product, 1986-89	0.0063 (0.0088)
Civil Law	0.798* (0.307)
Climate	0.047* (0.022)
Union entry date	0.0096* (0.0220)
Log Initial Population	0.119** (0.060)
F-statistic for excluded instruments	4.60
p-value of F-statistic	0.004
Partial	0.315

Table 6: Alternative Measures of Constitutional Instability and Rigidity			
Measure of instability	Log Amendment rate, 1970-90	Log duration of constitution as of 1992	Particularistic content in constitutions as of 1997
Panel A- Second Stage LIML Structural Estimates Dependent Variable is Quality of Courts, 2001-03			
Constitutional instability	-0.400* (0.144)		-1.700* (0.562)
Constitutional rigidity		0.443* (0.143)	
Retention by partisan elections, 1970-90	-0.318** (0.172)	-0.264** (0.155)	-0.433* (0.133)
Retention by merit system, 1970-90	0.074 (0.124)	0.072 (0.104)	0.114 (0.110)
Gross social product, 1986-89	0.0056 (0.0038)	0.0034 (0.0031)	-0.0003 (0.0034)
Anderson-Rubin over-identification statistic	2.42	4.62	4.72
P-value of test statistic	0.489	0.202	0.194
Centered R^2	0.090	0.371	0.342
Panel B-OLS Estimates Dependent Variable is Quality of Courts, 2001-03			
Constitutional instability	-0.085 (0.060)		-0.693* (0.283)
Constitutional rigidity		0.191** (0.108)	
Retention by partisan elections, 1970-90	-0.502* (0.128)	-0.463* (0.132)	-0.503* (0.120)
Retention by merit system, 1970-90	0.023 (0.101)	0.043 (0.101)	0.052 (0.098)
Gross social product, 1986-89	0.0045 (0.0031)	0.0038 (0.0030)	0.0023 (0.0030)
Adjusted R^2	0.395	0.409	0.444