

The EVOLUTION *of a* NATION

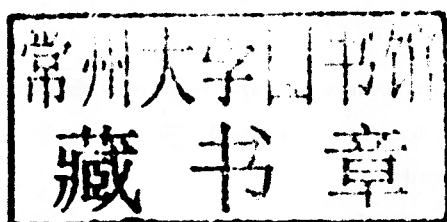
How Geography and Law Shaped
the American States

Daniel Berkowitz & Karen B. Clay

The Evolution of a Nation

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Our editor, Joel Mokyr, challenged us to write a book that the union of economists, historians, legal scholars, and political scientists can read. We hope we have risen to that level. Joel's careful reading and thoughtful prodding helped us clarify our arguments and presentation. Joel was aided by two anonymous reviewers who offered detailed and constructive comments on two complete drafts. While Joel and the reviewers worked much harder than anyone should expect, we take full responsibility for any of the shortcomings in this book.

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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.¹ 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 Mellinger (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

³ Coatsworth (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.

⁴ See 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.

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

⁶ The 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.

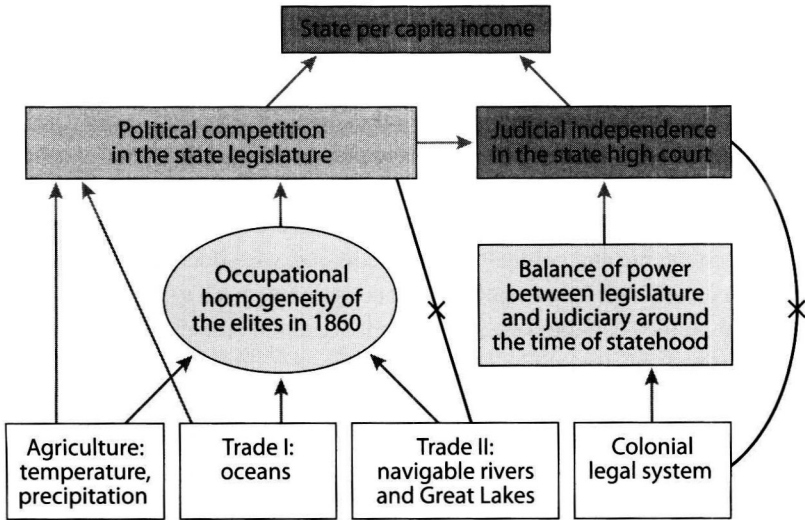


Figure 1.1. Outline of the Argument.

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.⁷ 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."⁸ 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.⁹

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

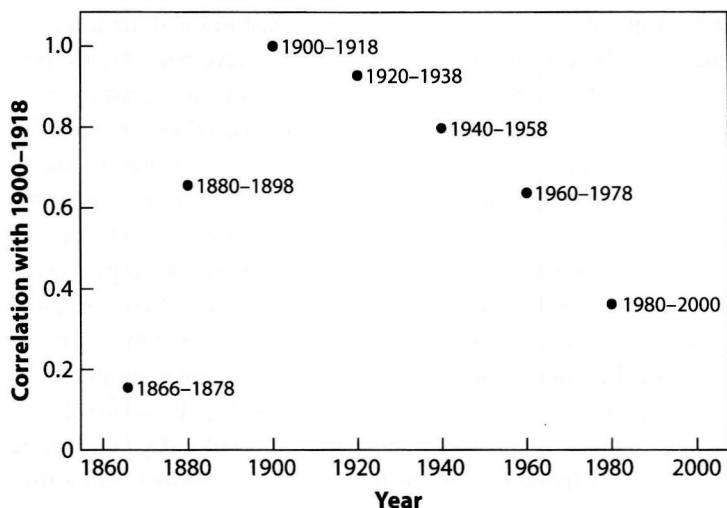


Figure 1.2. Persistence of Political Competition in State Legislatures, 1866–2000.

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

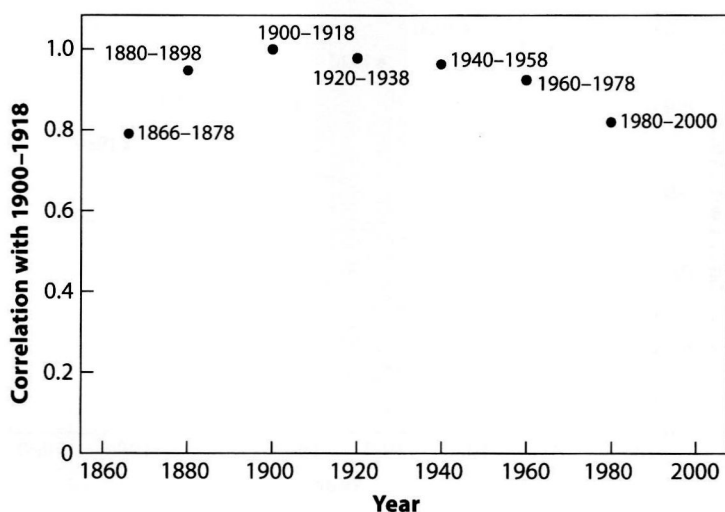


Figure 1.3. Persistence of State High Courts' Judicial Independence, 1866–2000.

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