

Does the Law Matter? An Examination of How a State's Definition of Law Impacts Judicial Decision Making

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Only a few studies in political science in the past half decade have taken the decline in common law seriously. This paper assesses whether or not those of us in the discipline should take it seriously. This project employs an original index for the common law in order to assess to what degree a state's definition of the law impacts judicial decision making. The results show that states with a greater commitment to the common law show greater regard for due process rights. This study concludes that a state's definition of the law matters.

Studies of the judiciary seem to be most concerned with how justices make decisions (Langer 2002; Segal and Spaeth 2002; Knight and Epstein 1996). The research has focused on explaining judicial decisions as a function of case facts, the political values of the presiding judges, or institutional design. Each of these theoretical approaches has made important contributions to the field's knowledge, particularly when the U.S. Supreme Court is under consideration. While state courts of last resort have not received quite as much attention as the U.S. Supreme Court, what is known is that factors that seem to be important at the national level are not quite as important at the state level. For instance, much research has been done to show that the political values of U.S. Supreme Court Justices guide their decisions, but "we know for a fact that partisanship among state jurists is not strongly uniform across the country" (Carp and Stidham 1990, 269). In the past decade scholars have taken an interest in state courts, partly due to the revival of the institutional approach (Clayton and Gillman 1999), improved access to data—particularly the State Supreme Court Data Project undertaken by Paul Brace and Melinda Gann Hall—and the active interest taken by such organizations as the National Center for State Courts. This paper seeks to build upon this acquired knowledge and ask the question: How does the definition of law impact the actions of political actors?

Political scientists focus on the impact of institutions and attitudes to determine judicial decisions (Brace and Hall 1993, 1995; Clayton and

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Gillman 1999; Edwards 2003; Whittington 2001). This study does not deny that institutions or attitudes matter, rather it seeks to give new support to the legalist approach. The legalists posit that the law dominates the judicial calculus. Surely the law plays some role but recent research has drawn attention away from the legalist camp (Epstein and King 2002; Segal and Spaeth 1996). This study takes the legalist approach in a different direction by showing that the definition of law a judge labors under determines how that judge will decide. Past attempts at explaining judicial decision-making through the legalist approach have done so with no variation in the law. In this study there is variance in the law which allows for a quantitative test of the legalist hypothesis.¹ I investigate how variance in the law impacts actors.

The development of the American common-law system has received only minor attention from political science. Since the 1950s the topic has been nearly ignored in the discipline. However, this gap shows promise of being filled. Two recent studies focus on the common law, its role in our nation's founding, and the political implications of its subsequent modification since the founding (Stoner 1992, 2003). This paper is concerned with the last strand of inquiry by examining how the common law influences the decisions of judges at the state level. While there have been historical studies on this topic (Horwitz 1977), this is the first study to quantitatively assess the impact common law has on judges. This paper tests the hypothesis of common law supporters who say the common law is a safeguard that protects individual liberty from government intervention. This study goes beyond current attitudinal research by looking away from the U.S. Supreme Court and looking to state courts, and it moves beyond both the national and state judicial scholarship by taking into account how the definition of law impacts judicial decision making.

This study will add to the already extensive body of literature which informs our knowledge of judicial behavior.² I seek not to refute but to add an additional layer to what we already know in order to paint a fuller picture of judicial decision making in an effort to inform our discussion about the relationship between formal institutions and the law. This study investigates these questions by asking what impact the common law has on judicial decision making in state courts of last resort. More specifically, I will show that states with a strong commitment to the common law are more likely to have courts of last resort which are more likely to overturn a lower court conviction or sentence when a due process claim is present in the appeal.

Since this study seeks to understand how the varying definitions of law impact political actors, the implications of this study go beyond judicial politics. If different cultures view the law differently then do institutions and constitutions necessarily have to vary among cultures? If a nation defers to its legislature for lawmaking, and not the constitution or history of the

nation, then what are the effects on that nation's judiciary? What impact on the balance of power do varying definitions of the law have? These are only three questions that can come out of this study should researchers be convinced that the law matters.

I will explore the historical connection between the common law and due process and provide a discussion of the dependent variable for each model. Then I will give a description of the common law index followed by a description of the other independent variables and a brief literature review to justify model specification and measurement. Finally I will conclude with a discussion of the results and the implications.

The Common Law and Due Process

This section will unfold in two parts: (1) a brief history of the common law in order to illustrate that due process is preserved in the common law and (2) a discussion of the dependent variable.

History of the Common Law and the Link to Due Process

In order to appreciate the connection between due process and the common law a brief history of English law is necessary. The due process embodied in the U.S. Constitution and its amendments can be traced back to the Magna Carta. The first version of the document was signed in 1215 by John, King of England and Ireland. In 1225 King Henry III executed Chapter 29 of the Magna Carta which was an extension and confirmation of Chapter 39 in the first version. Both sections embody what Americans now recognize as procedural due process rights.

Beginning in 1205 King John and Pope Innocent III embarked on a struggle that led to King John's excommunication in 1209. In order to have the excommunication withdrawn, King John turned over England and Ireland to the papacy in 1213. King John's actions led to a revolt by the English barons for his violation of feudal law and custom. On June 15, 1215, in order to end the conflict between the barons and himself, King John signed the Magna Carta.

At the heart of the Great Charter were due process protections that would prevent the King from imposing new rules and penalties without first adhering to a fair and proper process. In Chapter 52, King John agreed that anyone who "has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, or from his right, we will immediately restore them to him." Chapter 55 said that "fines, made with us unjustly and against the land of the land, shall be entirely remitted." Chapters 20-22 provided equivalent protection for merchants, freemen, clergy,

and barons. Chapter 39 was the boldest statement of due process. The Chapter reads

No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and the King will not set forth against him, nor send against him, unless by the lawful judgment of his peers or by the law of the land (Magna Carta 1215).

This Chapter protected all freemen from improper deprivation of their lives, liberties, or properties without due process under existing and proper laws. Historian Arthur Hogue comments that, “The common law of the twelfth and thirteenth centuries is in large part the law of land and tenures, the law of property rights and services together with rules of procedure for the administration of justice” (Hogue 1986, 112).

The original charter was short-lived however. On August 24, 1215, Pope Innocent III repealed the charter at the urging of King John. But, even the repeal did not last long as King Henry took over the throne in October 1216 after the death of King John. When the charter was reissued in 1225 it contained 38 chapters and was proclaimed to be a reissue of the original charter. Although the commitment to the original charter was clear, Chapter 29 of the new charter expanded and clarified Chapter 39 of the original. In the new charter Chapter 29 reads

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right (Magna Carta 1225).

The precise meaning of the Magna Carta would be determined by common law judges, the most famous of which was Edward Coke.

Lord Coke dedicated the Second Institute of his four-volume commentary *Institutes of the Laws of England* to the Magna Carta of 1225. Coke was as respected in America as he was in England. Coke writes, “by due process of the common law no man shall be put to answer without presentment before justices, or thing of record, or by due process, or by writ original” (Coke 1979, 50). Coke found the origins of the common law in the Magna Carta. Consequently he viewed the common law as a restraint on the powers of the monarchy and other governmental bodies. Coke understood due process to be found at common law when he writes that no man should be deprived of liberty or possessions, “without being brought in to answer but by due process of the common law” (Coke 1974, 50). Coke goes on to write that, “the law of the land might extend to all, it is said *per legem terra* [by the law of the land]” (Coke 1974, 50).

The colonists brought with them the common law of England and made required reading out of Coke for most colonial lawyers. According to Edward Corwin, in the colonies, Coke “was first on the ground” (Corwin 1928, 394). Coke was the embodiment of the common law. His authority was so strong that later commentators have written, “that it is useless to contend that ‘he was either misled by his sources or unconsciously misinterpreted them,’ for Coke’s mistakes, it is said, are the common law” (Brockelbank 1954, 562). Bernard Siegan writes, “English and American courts accepted and cited Coke’s interpretation of Chapter 29 as authoritative on the meaning of the ‘law of the land’ and the ‘due process of law,’ and numerous U.S. federal and state judicial opinions have cited him in various matters” (Siegan 2001, 12-13).

While Henry’s charter provided provisions, there was no body instituted to provide for the protections. Coke reasoned, as others had, that it would be the role of English judges. “The judges had applied the common law to limit the king’s powers as well as those of localities and guilds” (Siegan 2001, 15). Coke told the Parliament in 1628 that, “Magna Carta is such a fellow that he will have no Sovereign” (Gough 1971, 64). This proclamation is the very idea adopted by the American founding fathers who designed a government to be one of laws and not of men. Coke derived his position from his own analysis of the Magna Carta and from the common law judges. Coke’s position is most famously displayed in *Dr. Bonham’s Case*. Thomas Bonham brought action for wrongful imprisonment against the president and censors of the College of Physicians in London. Coke presided over the case as the Chief Justice of the Court of Common Pleas. The decision of the court was to decide for the plaintiff on the grounds that the statute violated common law principles. The case demonstrates the commitment on behalf of Coke to common law principles. Judges were placed in a new position as a result of the decision. A position in which they could decide on common law grounds even in cases where the parliament had spoken.

This line of thinking did not end with Coke. According to Chancellor James Kent

in republics it [the judiciary] is equally salutary, in protecting the constitution and laws from encroachment. . . . It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; and to give them the firmness to do it. . . . (Kent 1836, 294).

Chancellor Kent made this quote in reference to individual due process rights and the ability, and responsibility, of a common law court to protect those rights. While Blackstone was not as optimistic about judicial authority as was Coke, he still wrote in reference to the common law that

Pursuant of the Magna Carta and by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put on of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none (Blackstone 1979, v. I, 134-135.)

But, Blackstone was not committed to judicial law making. Blackstone recognized the dominion of the Parliament and recognized the courts as a bulwark against Parliamentary action that ran counter to principles of due process found in the Magna Carta.

These common law protections were imported to America. On September 5, 1774, the First Continental Congress declared that the rights of inhabitants of America are secured "by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts pursuant to which the colonial governments were established . . . the respective colonies are entitled to the common law of England" (Tansill 1972, 1-5). Even later Chancellor Kent recognized "It was not to be doubted that the constitution and laws of the United States were made in reference to the existence of the common law . . . the existence of the common law is not only supposed by the constitution, but it is appealed to for the construction of the interpretation of its powers" (Kent 1836, 315-16). Between 1776 and 1792 all thirteen of the former colonies put provisions into their state constitutions that mirrored those found in Chapter 29 of the 1225 Magna Carta. Even the Northwest Ordinance provided a commitment to due process by saying, "no man shall be deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land" (Tansill 1972, 48).

While the story of the common law continues past the founding period and the early republic, any further examination would be outside the realm of this study. This study has given a history of the common law only to the degree it is necessary to draw a connection between the common law and due process and to show that such a connection was present at the American founding. To summarize, due process rights are grounded, if not founded, in the common law tradition. Therefore, if the common law is compromised then so too will be due process rights. These rights were designed to protect the people from the government, and judges were to be the arbiters in claims at common law. The practices and principles of the common law came to the colonies with the English colonists. To varying degrees states have abandoned the common law, something my common law index is designed to capture. The effects of this abandonment are what this paper investigates. What has caused the decline in the common law is a subject for other studies.

Measuring the Dependent Variable

All of the dependent variables, and some of the independent variables, are drawn from the State Supreme Court Data Project (SSCDP) which is a database compiled at Rice University and Michigan State University by Paul Brace and Melinda Gann Hall. I use their database to construct my own which better serves the purpose of the research question investigated here. While the SSCDP includes nearly 21,000 decisions made in all fifty states from 1995-1998 I consider only the decisions made in all fifty states in the year 1998 for all criminal appeals in which a due process claim was present in the appeal.³ The first model focuses on overturned sentences. It is hypothesized that the more committed a state is to the common law the more likely a sentence will be overturned on due process grounds. *Decision on Sentence* is a dummy variable coded (1) for upheld and (0) for overturned. The dichotomy of the dependent variable makes it necessary to use a logit model.

***Hypothesis 1:** In states with a greater commitment to the common law (as indicated on the common law index) court of last resort judges will be more likely to reverse a lower court's sentence when due process claims are present in the appeal.*

The second model also uses a logit model as the dependent variable is dichotomous. The dependent variable is a dichotomous classification on how the court ruled on the appeal, *Decision on Conviction*. It is classified as either (1) if the CLR upheld the conviction or (0) if it overturned the conviction. While there are other ways a court may classify its decision—vacate, remand, affirm in part, reverse in part—these other categorizations are less clear on what the court has actually done, so for clarity's sake I only include opinions that either affirmed or reversed the lower court's opinion.

***Hypothesis 2:** In states with a greater commitment to the common law (as indicated on the common law index) court of last resort judges will be more likely to reverse a lower court's conviction when due process claims are present in the appeal.*

The discussion thus far has assumed a measure for the common law that can be used in the fifty states. Next I will provide a description of how the common law is operationalized.

Operationalizing the Common Law

This study considers how the law affects judicial behavior. The *common law index* is a five-point scale I have created in order to gauge a state's

level of commitment to the common law, and thus let it represent the states' varying definition of the law. Integrated into the discussion of the index construction is a continued discussion of the common law.

The organic nature of the common law makes it difficult to pin it down to a precise definition, but there are some easily identifiable characteristics that aid in the definition. Common law exists when precedents are used to identify law. This is quite different from the Oliver Wendell Holmes, Jr. formulation. Holmes considered common law to be judge made law—as do most undergraduate textbooks—therefore precedent created common law. The more traditional approach said that precedent revealed common law. Precedent was used as a guide to indicate to judges what the previous path had been, as justice demands that similar cases be treated in similar ways. Judges in the common law tradition do not make law; they discover it through a systematic search and application of precedent. Precedent is representative of the community's traditions. The law exists independent of the judiciary. Saying that judges are the creators of common law is akin to saying Moses was the creator of the Decalogue, or that the “inalienable rights” laid out in the *Declaration of Independence* were created by Thomas Jefferson.⁴ James Stoner, in refutation of the Holmesian definition of the common law, says “Common law emphasizes assent rather than domination, the community rather than the state, moral authority rather than physical power” (Stoner 2003, 8). This is the clearest distinction between traditional common law and the way it is currently used in England and America.

The work by Morton Horwitz, in what is now the well-known first chapter of his text entitled *The Transformation of American Law*, documents the transformation that takes place in common law understanding as a result of judges changing their perceptions of their roles. While the causal arrow may not point in the direction he hypothesizes, we can be sure that the changing role of judges and the transformation of common law are correlated. “As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on the self-conscious consideration of social and economic policies” (Horwitz 1977, 2). By the time Holmes hands down his definition of common law one can see the departure from the traditional conception as expressed by J. Otis who said the “grand basis of the common law [is] the law of nature and its author” (Bailyn 1965).

Of course, the common law's connection to due process originated in the Magna Carta, which is codified law. However, there is a difference between the common law derived from the Magna Carta and the American iteration of codification. In England the principles of the Magna Carta were a restriction upon the King and Parliament to be enforced by the Courts. Common law principles were derived from the Magna Carta, which was

superior to general statutory law. In America common law was taken from the courts and put into general statutory law. The American codification movement has been something of a reversal. While common law existed outside of congress and the state legislatures, the American codification movement sparked by Dudley David Field sent common law to the dominion of these lawmakers in order to codify the complex common law. The Field Codes gave rise to a massive movement to codify various aspects of the common law in order to promote uniformity in the law and simplification in the procedures. The intellectual debt to this movement is paid to Jeremy Bentham. The American codification movement removed common law from its natural domain and transformed it. Blackstone offers a critique of codification that must be reiterated here.

When laws are to be framed by popular assemblies, even of the representative kind, it is too Herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counselors. A single legislator or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time from a concise, and perhaps a uniform, plan of justice; and evil betide that presumptuous subject who questions its wisdoms or utility. But who, that is acquainted with the difficulty of new-modeling any branch of our statute laws (though relating but to roads or to parish settlements), will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequences, and set up another rule in its stead? (Blackstone 1979, 267).

This leaves the question: How can the common law be operationalized? The first step in this process is to think of what a common law system would look like in order to select identifying characteristics of the common law system.⁵ Since there is no singular measure for the common law, proxies must be used. The proxies I have selected are added together to create a single common law index. Each of the components of the index is a proxy for a substantive or procedural aspect of the common law that was violated when the reform was enacted. The first characteristic I have identified is based on the previous discussion of codification. Codification runs so contrary to common law principles that excluding a consideration of codification from any measure of the common law would be an insurmountable error. I use the Uniform Commercial Code (UCC), Federal Rules of Criminal Procedure (FRCP), and State Sentencing Commissions (SSC) as indicators of codification.⁶ Each of these reforms represents a move towards codification, but each also represents an area which generally fell into common law jurisdiction prior to codification. The UCC is a codified system laying out the rules of commerce that states adhere to, and serves as the first component of the common law index. Not only is this a good measure of codification in an area that was previously uncoded, but commerce is also an

area that was not considered to be under the control of statutory limitations; instead private litigants would confront each other in a common law setting, with judge and jury deciding what was right according to the community's needs and previous practice (Nelson 1994; Hudson 1996). The common law allows the community and judges discretion in defining crime, handing down sentences, and control over disputes which involve commerce. In the common law system the community was left remarkable flexibility to decide what it considered to be a crime and how serious that crime was to be considered. The common law system trumpeted the spirit of "buyer beware" and settled commercial disputes on these grounds. When private enterprise came into conflict with the local community the courts would step in to decide, but disputes between private citizens were often ignored by the court unless there was a crime involved (Nelson 1994; Hogue 1986). This gives justification for inclusion of the UCC into a measure of common law.⁷

The reason for including the FRCP, the second component of the common law index, is more obvious as the intention of the FRCP was to simplify court procedure by eliminating the aspects that were affiliated with the common law, specifically the method of pleading.⁸ A strict adherence to procedure is necessary for the court to preserve the rule of law, which ties in with the need for a distinction between law and equity, in that the only way to preserve the distinction, is by strict adherence to procedure. The distinction between law and equity has been blurred, partly due to the structure of the judiciary in Article III of the *U.S. Constitution*, points highlighted by the Anti-Federalist *Brutus*. The FRCP has forced the end of common law pleading, as well as a blurring of the line between law and equity.

The SSC limits the ability of courts to hand down sentences which they might consider fit for punishment, a limitation that is obviously contrary to common law practice as it limits the authority of the judge. Common-law practice allowed the judge and jury to decide punishment by placing sentencing decisions in the hand of legislatures, for better or worse, violates common law practice (Hogue 1986; Stith and Cabranes 1998). Since sentencing guidelines come down through legislative statute and commission recommendations, it is important here to quote Chancellor Kent's definition of the common law, "The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature" (Kent 1836, 471). This is the third component of the common law index.

In addition to codification, a strict adherence to procedure is necessary to preserve the rule of law in the common law system. One of these procedures, in addition to the manner of pleading which was eliminated by the FRCP discussed above, was the separation between courts of law and equity.

By merging courts of law and equity the manner of pleading and jurisdiction changes. In a common law system someone seeking an equitable remedy must seek that remedy in a court of equity. A judge deciding cases on legal terms could not give an equity decision. And the reverse was also true. This served as a constraint on judges in that a judge with the power to hear both cases of law and equity is constrained less by the rule of law and judicial procedures, a point the Anti-Federalist *Brutus* makes quite clear in his debate with Hamilton writing as *Publius*. This component of the model emphasizes the point that the common law exists through both substance and procedure. Recognizing that both are inseparable in the common law is necessary for preserving the common law. This is why measures of both procedure and substance are included in the index.

In order to understand a state's commitment to providing a separation between courts of law and equity I consulted the *Book of the States* to help determine whether a state had established separate courts to hear cases at equity and law. The *Book of the States* was used to determine if a state had more than one type of trial court or appellate court; if so, then I contacted the state directly to determine if the different types of courts reflected a division between law and equity. This is the third component of the common law index. The preservation of the distinction between courts of law and equity is a crucial distinction for common law courts as these courts demand that different procedures and standards are adhered to within each courts of law and courts of equity. A loss of the distinction indicates a loss to the commitment to the principles and procedures of common law pleading.

Common law courts were often in charge of defining crime and the severity of crimes. But, certain state constitutions and statutes have eliminated common law crimes. That is, some states do not consider an act a crime unless it is specifically referred to as such by statute or constitution. This component of the index is an indication of common law abandonment on a number of fronts. First, it is a codification of an earlier common law area of law. Second, it shows a state's most direct position on the common law by either eliminating its existence or preserving it. So straightforward this is of a state's position on the common law it could serve as a stand alone indicator of a state's position on the common law. This is the fifth, and final, component of the common law index.

Explanation of the Independent Variables

With the exception of the common law index, most of the variables included in this model are already familiar to those in the field of judicial politics. I have divided the variables into categories of common law, institutional, and attitudinal measures. Before I give an explanation of the variables

used in this study I will give a brief literature review in order to help explain why I have chosen the model specification employed.

I place the independent variables into three categories: common law, institutional, and attitudinal measures. With the exception of common law index, each of these categories represents an existing paradigm within which judicial decisions are currently examined.⁹ The institutionalist school is particularly prevalent among state judicial scholars, thanks in part, to the work of Paul Brace, Melinda Gann Hall and Laura Langer, which is heavily relied on by this study. The new institutionalist approach, as it is called, is also making headway at the national level (Clayton and Gillman 1999). To paint in broad strokes, institutionalists are motivated by the idea that context matters. The environment in which one performs a task influences what action is taken. For instance, one cannot act strictly on ideology if one wishes to form a winning coalition on a diverse bench. For Epstein and Knight (1998), as well as other proponents of the rational choice model which is a variation on the institutionalist approach, there are three basic assumptions which make up the rational choice model: (1) goals, (2) strategic interaction, (3) institutions. By goals the authors mean, “actors make decisions consistent with their goals and interests” (Epstein and Knight 1998, 11). This assumption is not too different from that of the attitudinal model. But Epstein and Knight do not limit goals and interests to policy preferences, although they do consider it to be one of the most influential factors under the goals category, they argue that justices make decisions which increase the perceived legitimacy of the institution.

By strategic interaction the authors mean to say that “judicial decision making is interdependent” (Epstein and Knight 1998, 12). They consider the potential action of other actors in response to their actions. There is no reason to pursue one’s policy preference from a hard line stance and accept no compromise if it will force one to stand alone. The constraints placed on judges may come from other institutions such as the Congress or Presidency, or other justices; the construction of the game that the researcher sets up depends on which actor’s responses are included.

While this current project does not formally follow the rational choice paradigm it does not deny the primary assumptions of the rational choice school. This current project is concerned with decisions of state courts—specifically state courts of last resort—and follows the path created by the recent efforts of Paul Brace, Melinda Gann Hall, and Laura Langer; to name but a few. Brace and Hall (1995) made one of the first sophisticated efforts to integrate the attitudinal, fact pattern, and institutional models.

The nation’s states are the perfect laboratory for such an analysis [one that considers all major sources of voting]. Within these institutions are individual decision-makers with highly diverse backgrounds, experiences and values.

Moreover, because of the sheer volume of cases, these courts address virtually every legal issue and fact pattern likely to arise at the appellate level. . . . State supreme courts also present a wide array of institutional features and configurations, both in terms of structures, and external and internal rules and procedures. Finally, the American states, the environments within which state courts operate are quite diverse (Brace and Hall 1995, 9).

Following this approach is a recent book by Laura Langer (2002) which investigates how state courts of last resort decide cases that raise issues ranging from election law to worker compensation cases. What Langer finds is that the institutional arrangement of each court had a direct effect of the decisions reached by the courts, a finding which complements the results in Brace and Hall (1995).

For quite some time the attitudinal school, which composes the last categorization of variables, has held a prominent place in judicial scholarship, and the most prominent text in this school is *The Supreme Court and the Attitudinal Model* by Jeffrey Segal and Harold Spaeth. The thesis is that “judges decide disputes in light of the facts of the case, given their ideological attitudes and values” (Segal and Spaeth 2002, 231). It seems that all judicial scholars who focus on decision making must confront their thesis, even those in favor of the institutional perspective, in that almost all researchers recognize that political disposition matters, it is only the degree to which it matters which is disputed.

Independent Variables

Institution Measures

Discretionary Docket: This is a dummy variable coded 1 for states that give their CLR a discretionary docket and 0 otherwise. This is a necessary control variable since the structure of courts has been found to influence how judges make decisions. The presence of a discretionary docket allows a CLR to have discretion over what cases it chooses to hear. Since the work of H.W. Perry, judicial scholarship has recognized that deciding what to decide is almost as important as the decision itself. Discretionary docket is expected to increase the likelihood of overturning a sentence or conviction. (Source: Neubauer 2005; *Book of the States*).

Selection Method: *Selection Method* has been used by many studies, and recently there has been some consensus around the measure employed here in that judicial autonomy is a function of length of tenure and selection process. I employ the categorization used by Laura Langer (2002). Those judges elected by popular elections (both partisan and nonpartisan) for fixed terms receive a score of (5), merit selection (4), legislative appointment (3),

gubernatorial reappointment or judicial nominating committee approved by governor and/or legislature (2), and those who receive life-tenure after their initial appointment receive a score of (1). I anticipate that the closer the judges are to the electorate the less likely they will be to overturn a sentence or conviction in a criminal case, even when due process claims are present. This is the result that judges who need to be elected also need to put forward a message of being tough on crime. Thus, it stands to reason, that in a merit system the same will hold true but to a lesser degree than in a direct election. My hypothesis for this variable is based on recent research that shows judges who are seeking reelection are more likely to come down harder on criminals (Huber and Gordon 2004) and other descriptive work that draws the same conclusion. (Source: Langer 2002; *Book of the States*.)

Sentencing Commission: States that have sentencing guidelines established by a sentencing commission leave less autonomy to judges in handing down decisions. Thus, for the first model in this study where probability of overturning a sentence is being studied, it is necessary to include this as a control variable. When sentencing commissions are present it is anticipated that the CLR is more likely to let the lower court's sentencing decision stand.¹⁰ (Source: National Association of State Sentencing Commissions.)

Common Law

*Common Law Index:*¹¹ This is the independent variable which is of the most interest to this study, it is an index which reflects the number of common law features a state has. The maximum score for a state is 5, the lowest is 0. The categories are as follows:

- (1) Abolition of common law crime by state constitution or statute (Yes=0, No=1)
- (2) State sentencing commission (Yes=0, No=1)
- (3) Adoption of codified law in the form of the UCC (Yes=0, No=1)¹²
- (4) Adoption of Federal Rules of Criminal Procedure which eliminate common law pleading (Yes=0, No=1)
- (5) Formal distinction between courts of law and courts of equity (Yes=1, No=0)

States that score higher on the common law index are expected to overturn lower court decisions when due process claims are present. (Source: Author's data.)

Attitudinal Measure

Court Ideology: Court ideology has been used by many studies which address judicial decision making. Some have used party identification,

others use past decisions coupled with descriptions from newspaper editorials (Segal and Spaeth 2002) but Brace, Langer, and Hall (2000) develop a measure—party-adjusted surrogate judge ideology measure (PAJID)—which is better equipped to deal with state judiciaries; and that is the measure used here. This measure is better suited for the states than other measures in that it takes into account many of the unique institutional features of state courts and the varying institutions from one state to the next. This measure increases as the court gets more liberal. A measure of this sort must be included in almost any model seeking to explain judicial behavior given the importance ideology plays in almost all other studies of judicial behavior. The more liberal the court, the more likely it is to overturn a sentence or conviction when a due process claim is present in the appeal (Segal and Cover 1989; Beavers and Walz 1998; Segal and Spaeth 2002). (Source: Brace, Langer, and Hall 2000.)

State Ideology: This is a control variable that is necessary when including a measure of court ideology (Brace and Hall 2001). I use the measure developed by Erikson, Wright, and McIver (1993) which is the same measure used in the Brace and Hall study. The more liberal a state's population the more likely that state's population is to favor protecting due process measures (Liu and Shure 1993).

Results

As stated above, those states that are most committed to preserving the common law will have state courts of last resort that are more sensitive to due process claims and thus more likely to overturn a lower court's decision when due process claims are present. Hypotheses 1 and 2 are confirmed by the results of the respective models. As a state moves higher on the common law scale, the more likely it is that its court of last resort will overturn a sentence or a conviction when due process claims are present in the appeal. When all other variables are held at their mean, and the value for the common law index is moved from its median value of 3, that meaning a state that falls in the middle of the common law index, to its maximum value of 5, the percentage change in the probability of overturning a sentence increases by 29.77 percent and a conviction by 6.3 percent. From these results it appears that the legal environment in which decisions are made greatly influences the judges who are making those decisions. The law matters when judges make their decisions, at least as far as the law shapes the legal environment.

The results for the other variables in Table 1 also tell an interesting story. First, all of the institutional variables reach statistical significance. A court of last resort with a discretionary docket is more likely to overturn a

Table 1. Decision on Sentence when Due Process Claims are Present

Variables	Coefficient (Standard Error)	Percentage Change in Probability of Overturning a Sentence
Common Law Index	-0.547* (0.083)	29.77
Discretionary Docket	-1.217* (0.133)	3.96
Selection Method	0.199* (0.034)	-10.33
Sentencing Commission	0.563* (0.166)	-1.66
Court Ideology	-0.011* (0.006)	4.96
State Ideology	-0.339 (0.679)	—
N=682 Log-Likelihood= -1247.199	Significant with two-tailed Z-test at < 0.01 Percent correctly predicted = 78%	

lower court's decision. This is consistent with expectations and previous research. Court's with a discretionary docket are more likely to give docket space to those cases in which they disagree with the lower court's holding. Also, a discretionary docket helps to alleviate many problems associated with caseload, thus courts with discretionary dockets have the ability to more carefully consider cases and act on their preferences—though not necessarily ideological—if they so choose. The percentage change in the probability of overturning a sentence increases nearly 4 percent when a court of last resort has a discretionary docket.

The second of the institutional variables is selection method, and it is positively correlated with the dependent variable. As anticipated, the closer the court is to the electorate the more likely it is to send out a tough on crime message by not overturning sentences or convictions, as that is the message that will get them elected or retained (Huber and Gordon 2004). The third institutional variable in Table 1, sentencing commission, contributes to a 1.66 percent reduction in the percentage change in the probability of overturning a sentence; which is intuitive if one realizes that a sentencing commission restrains a court of last resort judge, and judges at other levels, in terms of sentencing decisions.¹³ Therefore, a court of last resort judge is less likely to overturn a sentence if that judge works in a state with a sentencing

commission simply because of the increased restraint a sentencing commission places on a judge. So, not only does the legal environment matter, but so too does the institutional environment. This is consistent with all we have learned in the past decade from other state judicial scholars. The major finding of state judicial scholars in the past decade is that institutions matter in determining how judges act—whether it is in granting *cert*, deciding a case, or writing a dissenting opinion—the findings presented here support these earlier findings.

With regard to the attitudinal thesis, the more liberal a court gets on the PAJID scale the more likely it is to overturn the sentence of a lower court when due process claims are present. In fact, the percentage change in moving from the mean value on the PAJID scale to the maximum value on the PAJID scale, while holding all other variables at their mean, will lead to a nearly 5 percent increase in the percentage change in the probability of overturning a sentence. As discussed previously, this finding confirms the conclusions of previous research. Moreover, we can see here that court of last resort judges mimic the behavior of their national counterparts. As demonstrated by such scholars as Segal and Spaeth (2002), a judge votes according to his/her preferences at the national level. At the state level such voting behavior occurs as well. However, at the state level, the substantive impact is much less than the impact made by the legal environment and institutional arrangements.

Table 2. Decision on Conviction when Due Process Claims are Present

Variables	Coefficient (Standard Error)	Percentage Change in Probability of Overturning a Sentence
Common Law Index	-0.167* (0.059)	6.36
Discretionary Docket	-0.139 (0.147)	—
Selection Method	0.009 (0.035)	—
Court Ideology	-0.0009 (0.004)	—
State Ideology	-0.283 (0.764)	—
N=664 Log-Likelihood= -1122.911		Significant with two-tailed Z-test at < 0.01 Percent correctly predicted = 83%

**Table 3. Decision on Conviction and Sentence
when Due Process Claims are Absent**

Variables	Coefficient for Conviction (Standard Error)	Coefficient for Sentence (Standard Error)
Common Law Index	-0.054 (0.083)	-0.053 (0.027)
Discretionary Docket	-0.040 (0.140)	-1.061* (0.131)
Selection Method	0.019 (0.035)	0.226* (0.034)
Sentencing Commission	— —	-0.197 (0.113)
Court Ideology	0.001 (0.003)	-0.015* (0.003)
State Ideology	-0.509 (0.762)	-0.990 (0.685)
N	321	353
Log-Likelihood	-1125.422	-1268.051
Pseudo R ²	0.002	0.055

Significant with two-tailed Z-test at < .01

At this point, some readers may be inclined to think that states committed to the common law are simply more likely to overturn a lower court's decision regardless of the reason for appeal. While this hypothesis has no grounding in history, the legal literature, or theory; it suffices to say that such an objection is possible for some readers. In order to combat such objections, and to show that it is the presence of due process claims that make courts committed to the common law act as they do, I replicate the models, but this time limit the data set to all criminal case appeals from 1998 that do *not* include a due process claim. The results are reported in Table 3.

The results from Table 3 fail to confirm the hypothesis that courts that score high on the common law scale are more likely to overturn lower court decisions in criminal cases regardless of the reason for appeal. This is demonstrated by a lack of statistical significance associated with the common law index in either of the two models in Table 3. This means, as discussed earlier in this paper, that there is a special relationship between due process and the common law. So it is not that courts committed to the common law are simply more likely to overturn a lower court decision on

appeal, but, it is that they are more likely to sympathize with due process claims. Table 3 confirms the results from Tables 1 and 2 to show that a state's legal environment influences judges in their decision making.

Conclusion

This paper began with the idea that how a state conceives of the law matters in judicial decision making. While this is not synonymous with saying the law matters, which is another debate unto itself that this paper does not fully engage, it does say that the legal environment within which judges operate affects their decision making. The common law is antithetical to positive and statutory law, and the philosophy and history associated with the common law are quite different from these other conceptions of law as well. It stands to reason that a state that is grounded in the common law tradition will have officials that act differently when compared to states who have either abandoned or failed to adopt common law principles. This paper shows that at the state level institutional arrangements—in addition to the legal environment—impact judicial decision making. This reinforces the institutionalist approach to state judicial politics. However, the findings also demonstrate that decisions made by state judges are not insulated from ideology. The conclusion supported by these findings is that at the state level the law, ideology, and institutions play an integral part in judicial decision making. However, the most consistent factor in this analysis is the legal environment. This is something no state level judicial study has been able to demonstrate convincingly.

Moreover, this paper shows that the common law does in fact act as it was originally conceived to do, serve as a buffer between the King/Parliament and the people. The common law was a safeguard of liberty by providing substantive and procedural restraints on the government by creating a rule of law and not of men. To some degree this effect is observed in the present analysis if due process is conceived to be—as it ought to be conceived—as a protection of liberty, particularly as a safeguard against wrongful government action (i.e., double-jeopardy, disregarding *habeas corpus*).

What is unique about the common law from a methodological viewpoint is that it varies greatly across the states, making it ripe for all sorts of analysis. The potential for this line of research is perhaps the most interesting component of this study. The discipline now has a new way of examining the question: How does a state's legal environment influence political actors? This is not a question which receives full analysis in this essay in that the only political actors under investigation are judges, but it is the underlying thesis. Studies of the common law can go beyond the judiciary and look at how state legislatures and administrative agencies are influenced

by the common law. Furthermore, one can take advantage of national data to perform a longitudinal study of how commitment to common law at the federal level impacts the decisions of U.S. Supreme Court Justices. Such studies may be able to shed light on questions dealing with judicial autonomy and interaction between the various branches at the national and state level. Given the immense attention being given to due process rights, and the controversial restrictions on those rights by federal legislation, studies such as this one can be beneficial in understanding how these rights may be protected in an environment of heightened security risks.

Also, comparative economists have spent a considerable amount of energy investigating the impact legal origin has on economic achievement.¹⁴ They contend that nations with a common law origin are better at promoting economic achievement. These studies code countries dichotomously as either being of common law, French, Germanic or Scandinavian origin. In light of the present findings we know that even states founded upon the same legal origin can depart from that origin. This means, for the comparative economists, that common law is not a dichotomous variable, Australia and the United States cannot be classified as identical legal structures which is something the comparative economists do. Understanding the evolving nature of the law is something that must be captured in a measure of the common law.

As with any new venture, this study may have opened more questions than answers, which is quite acceptable to this author. This study has not tried to, nor has it, discount any of the earlier efforts that explain judicial behavior. The legal environment is important in determining the choices judges make and therefore how a judge conceives of the law ought to be considered as important as the structure of the judiciary or the ideology of the judge. There is certainly more than one way to conceive of the law than just the common law, but given our nation's origin, it is a good place to start.

NOTES

¹This is a primary advantage of comparative research that has been missed by the legalist scholars who focus only on the U.S. Supreme Court. A comparative context allows for one to adequately capture changes in the laws that are reflected in the legal environment.

²Some of the research has been presented above, but a more thoroughgoing discussion is provided in the sections dealing with variable construction and model specification.

³The matters classified as due process were: cruel and unusual punishment, discovery, entrapment, search and seizure, self-incrimination, and speedy trial. If any of these claims were grounds for appeal, as indicated by a 1 in the SSCDP I included it in my dataset. Certainly it may be true that there may be variation in the way each of these is

treated by the court, but, that assumption does not undercut the validity of the statement that all of these claims are due process matters. Furthermore, there may also be more grounds for due process appeals than the ones included, but used only those available in the SSCDP. While only looking at a single year the results are based on nearly 4500 cases. A binary time-series cross-section model (which would mean drawing on all the years of the database) was not employed because of all of the methodological complications and controversies that surround their use. There are a large number of quantitative studies that look at a single year, for instance, Brace and Hall (2001), from which many of these data are adapted. There is nothing particularly unique about 1998 that should lead anyone to believe that the results here are applicable only to 1998.

⁴Absent from the common law index which I have created is a measure for adherence to precedent. This is intentional. First, all states in the Union allow for their courts of last resort to adhere to precedent and all states view precedent, from a constitutional perspective, in the same way. Allowing for the adherence to precedent is all the common law requires. This means the independent variable would have no variation, the same as if I had coded for states with an adversarial system. Second, the common law does not demand that precedent be adhered to at all costs, only to the degree that it adequately reflects the natural law in a given situation. Judges may depart from precedent, so long as the other common law procedures are adhered to, if the judge and jury deem it necessary in order to preserve an adherence to the natural law. It would be nearly impossible to code a court decision as being consistent or inconsistent with the natural law. Using a measure for adherence to precedent in the way that measure is typically developed in U.S. Supreme Court studies would confuse the issue of common law by reinforcing the modern definition of common law, which confuses the common law with judge made law. However, it is understandable that some may view this as a weakness in the common law index given the current understanding of common law. In rebuttal I defend the index by saying that its current construction accurately assesses a state's commitment to common law even when precedent is not considered, adding also that this is the first effort to operationalize common law in this way, and this index is more sophisticated than any other available substitute. The only other efforts to classify states by common law are based on their legal origin. Basing current legal structure on legal origin does not take into account the fact that states, and indeed politics in general, are dynamic and can deviate from their founding.

⁵I thank Paul Brace for his advice on this crucial issue.

⁶Each of these measures limits judicial discretion and also limits the ability of judges to consult precedent as these laws demand that statute be given authority over precedent, and therefore, the inclusion of these variables might help alleviate some of the concerns of those who still think precedent should be included in the index.

⁷Some portion of the UCC has been adopted by all states; this measure takes into account the extent to which each state has adopted the UCC. It is a dichotomous variable in which 0 indicates complete adoption and 1 indicates only partial adoption.

⁸This was also done with the Federal Rules of Civil Procedure.

⁹Surely no one will deny that there are more schools of thought of judicial decision making, not to mention the countless subsets within each school, but these are outlined given their prevalence in the field and their importance to this study.

¹⁰Sentencing commission is included in the common law index, forcing one to wonder whether multicollinearity is a problem when both measures are used together. The quick answer would be to direct the reader's attention to Table 1, and the last column of Table 3, as these are the two times the variables are used together. In Table 1 multicollinearity should not be suspected as all variables, save one, reach statistical signifi-

cance, something which would not occur if multicollinearity were causing problems. The same also holds for Table 3. But, just to be sure, I ran correlations for each of the independent variables and none of the independent variables have a higher than 0.2 Pearson's R with any of the other independent variables.

¹¹This measure cannot be seen as a proxy for judicial discretion as some have suggested. Whereas judicial discretion is limited by some of these components, it is enhanced by others, specifically the merger of courts of law and equity jurisdiction.

¹²As stated in an earlier footnote, not all states have adopted all of the UCC. States that have adopted all of it receive a score of 0 and 1 otherwise.

¹³The CLARIFY program designed by Michael Tomz, Jason Wittenberg, and Gary King (version 2003) was used to compute values of percentage change in probability. Instead of predicting these values when the dependent variable is equal to 1, which would indicate upholding the lower court decision, I predict the value when the dependent variable is 0, indicating overturning a sentence or conviction. For this reason, a coefficient that is negatively correlated will have a positive impact as indicated in the last column of Tables 1 and 2, and the opposite is true for positively signed coefficients.

¹⁴The most groundbreaking of these studies is La Porta, et al. (1998).

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