No Law without a State

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Abstract

What explains cross-country differences in the quality of institutions, such as judicial independence and government regulations of economic life, and in desirable social and economic outcomes, such as a low degree of corruption and high degree of rule of law? In some of the most widely cited publications in the field of economics and political science, scholars have claimed that such cross-country variation is to a large extent explained by a country’s legal origin (common law or civil law tradition). It is claimed that because of stronger legal protection for outside investors and less state intervention, common law countries have achieved higher levels of economy prosperity and social life than civil law countries. To a large extent, this hypothesis has been corroborated by much empirical evidence. This paper proposes an alternative interpretation of the cross-country differences observed. Building on scholarly studies of state formation developments, the basic proposition of this paper is that the state formation process affects the character of the state infrastructure to be either patrimonial or bureaucratic, which in turn affects institutions and social outcomes. We argue that this fundamental distinction of state formation precedes the legal origins of a country and thus offers superior explanatory power. This argument is tested empirically on a set of 31 OECD countries. It is shown that the state infrastructure is indeed more influential than the legal traditions on a set of institutional variables (formalism, judicial independence, regulation of entry and case law) as well as on a set of social outcomes (corruption, rule of law, and property rights).
Introduction

What explains large cross-country differences in the quality of institutions, such as judicial independence and government regulations of economic life, and in desirable social and economic outcomes, such as a low degree of corruption and high degree of rule of law? Recent years have seen an explosion of literature searching for the answers by studying the influence of legal traditions. The highly influential and widely cited *Legal Origins Theory* (La Porta, Lopez-de-Silanes and Shleifer 2008) or the *Law View* (Levine 2005) argues that the legal traditions established in Europe centuries ago explain contemporary cross-country differences in institutions and socio-economic outcomes.

The Legal Origins Theory (LOT) divides the world in two main legal traditions: the *common law tradition*, which originates from the English law and covers Great Britain and its former colonies; and the *civil law tradition*, which originates from the Roman law and includes France and its former colonies; Scandinavia; Germany and countries influenced by German Law. According to the LOT, common law and civil law countries have distinct styles of governmental control of the economy, and different institutions supporting these styles. Through mechanisms of stronger legal protection of outside investors and less state intervention, common law countries have been more successful in both economic and social development than civil law countries (La Porta, Lopez-de-Silanes and Shleifer 2008). This literature has thus given theoretical and empirical strength to Hayek’s (1960) classical argument regarding the advantage of English legal institutions in comparison with French legal institutions.

This study proposes an alternative explanation of cross country variations in institutional quality and economic and social outcomes. Our argument emphasizes
differences in state formation processes in pre-modern Europe, which resulted in different administrative structures (what have been called “state infrastructures”). We believe in turn this fundamental process of state formation best explains cross-country variation of institutional quality and economic and social outcome today. The term ‘state infrastructure’ refers to the organization of the “means of administration” in the state (Ertman 1997, 8). We maintain that the LOT scholars have failed to see that in order for a legal tradition - or any specific law - to have an impact, at least a semi-functional state is a prerequisite. Therefore the state formation process precedes the legal tradition of any country and, as we explain below, can affect legal traditions, institutional quality as well as social outcomes.

The argument builds on Avner Greif’s critique of the constitutionalist view prevailing in political economy, in which he points out that the relationship between constitutional rules and prosperity is spurious. Underlining the fundamental importance of the administration, Greif writes that “a ruler’s policy choices are, in absence of an administration to implement them, nothing but a wish” (Greif 2008, 17-18). In Grief’s view the power of the administrators is, under certain circumstances, decisive for both constitutional rules and prosperity. Following Weber’s (1978) pioneering analysis of the importance for both economy and society of how the administration is organized, this study’s main premise is that the development of a certain kind of state infrastructure is an essential feature explaining institutional, economic and social development of a country.

Influenced by Weber, Thomas Ertman (1997, 10), distinguishes between two types of state infrastructures: the *patrimonial* type, developed in countries like France, Spain, Portugal, Poland, and Hungary; and the *bureaucratic* type of for example the
German States, Britain, and Denmark. The historical moment when these principles of administration was institutionalized (before 18th century for most European countries) represents the critical juncture of our proposition. The main theoretical argument is that the characteristics of the state infrastructure created a path affecting posterior institutional development of the country and societal and economic outcomes because it constrains (with the bureaucratic type) or enables (with the patrimonial type) subsequent rulers capacity to implement her or his will.

This study shares with the LTO the approach of treating the protection of property of non-elites, independent courts, and clear rules for the economy as fundamental for prosperity. However, it differs in two important respects. First, we argue that legal traditions can not be treated as exogenous, but should rather be seen as an outcome of the ruler/administrators power balance. Second, the causal mechanism, shared by us and the LOT, is in our view not of legal but of political nature. The legal tradition should therefore be seen as a part of a political project including also institutions and affecting social and political outcomes. In short, we argue that there is no reason for a ruler to voluntarily restrict her room for manoeuvre by introducing property rights and court independence or restrain from arbitrary economic intervention. Instead, it is a product of a political struggle between the ruler and her administrators.

We provide several straightforward empirical tests of our hypothesis in relation to the LOT. We assess the explanatory power of both hypothesis in relation to several indictors of the strength of judicial institutions, government regulation and quality of institutions on 31 advanced democracies in the OECD. We find that the LOT loses most of its explanatory power when taking into account differences in state formation, and that
the evidence suggests that state formation is a strong and relevant predictor of the strength of a wide array of salient judicial and political institutions.

**A Critique of the Legal Origins Theory**

As mentioned above, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny have in a series of articles (1997, 1998, 1999) posited theoretically and demonstrated empirically, a prevailing effect of a country’s legal tradition on a large set of desirable institutions and social outcomes. La Porta, Lopez-de-Silanes and Shleifer (2008) have later summarized the evidence of those and other articles in the same field and suggested what they call the Legal Origins Theory.

The LOT divides the world into two broad legal traditions. First, the common law tradition, originating from England, was subsequently exported to the British colonies. This tradition relies on legal principles (instead of strictly following codified laws), and on an adversarial and oral dispute resolution (instead of an inquisitorial and written one) (Glaeser and Shleifer 2002, La Porta, Lopez-de-Silanes and Shleifer 2008). Second, the civil law tradition, although originally inspired by Roman law, is most often associated with Napoleon’s codification in the early 19th century. The goal of the Napoleonic Code was to micro-manage judges’ decisions with detailed instructions that eliminated their margin of manoeuvre (Levin 2005, 63). Thus, in civil law countries judicial discretion is lower and in comparison with common law countries, there is “more emphasis on the rights of the state” and “less emphasis on private property rights” (Levine 2005, 65). After Napoleon’s codifications, the civil law tradition was adopted in all French colonies. Napoleonic armies, through conquest, also exported it to most Continental Europe,
including the Iberian colonial powers – Portugal and Spain – who, in turn, exported it to all Latin America and their territories in Africa and Asia.

The LOT claims that these two legal traditions have produced divergent rules protecting investors and guaranteeing equal treatment for all economic agents (La Porta, Lopez-de-Silanes and Shleifer 2008, 307). The economic effects of legal origins have been detected in several dimensions and in a large number of studies. In one of the most encompassing empirical surveys, La Porta, Lopez-de-Silanes and Shleifer (2008; see also Mahoney 2001, 27) find that common law gives investors better protection (which, in turn, leads to more financial development), limits state interventionism in the economy (which, in turn, leads to lower levels of corruption and smaller unofficial economies), and creates less formalized and more independent judiciaries (which in turn secures property rights).

We argue that there are three major shortcomings in the Legal Origin Theory. First, although legal traditions might be regarded as exogenous for British and French colonies, it is difficult to argue the same for the old world. The countries conquered by Napoleon were only under French influence under a brief period, after which they could have resorted to their past legal traditions. The LOT also fails to explain why the colonies of countries like Spain and Portugal adopted the civil law tradition in the early 19th century. The former Spanish and Portuguese colonies took advantage of the Napoleon conquest to become partially or completely independent political units. It is thus problematic to assume, as the LOT does, that while many Portuguese and Spanish colonies were breaking with their colonial rulers, they were compelled to adopt the new legal system. La Porta, Lopez-de-Silanes and Shleifer (2008, 286) argue that the rulers of
the new independent nations looked “mainly to the French civil law …for inspiration”.

But the question is why did they copy the country they had just broken with instead of, let’s say, the country they wanted to become (e.g. the US)?

The idea of the legal tradition as exogenous becomes even more problematic in the adoption of the Civil Law in Japan (in its German version) and in Russia and Turkey (in its French version). As La Porta, Lopez-de-Silanes and Shleifer (2008, 286) admit, this adoption was “largely voluntary”, which also goes for countries that have been under the influence of Japan, Russia and Turkey.

All in all, when establishing the foundations of the legal systems of their countries, many (if not most) rulers have had a certain margin of manoeuvre. Therefore, we argue that the legal tradition a country has adopted is endogenous to the political system and, in particular, to the will of the ruler. It is thus plausible to assume that certain rulers (e.g. those with a state interventionist agenda) under certain circumstances (e.g. lack of checks and balances) may have preferred, for example, the French version of the civil law over the German version or over the common law. Our claim is that these choices are connected to the state formation and what consequences this has had for the institutional evolution of the country.

A second shortcoming of the LOT regards its causal mechanisms. Upon closer inspection, LOT appears less grounded in “legal” mechanism than its name would otherwise suggest. It is not how the judiciary system operates, or particular judicial decisions that distinguish between common law and civil law countries. As La Porta, Lopez-de-Silanes and Shleifer (2008, 286) state, the main problem of civil law is that it is associated with a “heavier hand of government” than common law countries. In other
words, the LOT’s main causal mechanism is not of legal-judicial nature, but of political nature.

The political dynamic becomes obvious when looking at the historical development of legal traditions. The civil law was used by Napoleon as a political tool to expand state interventionism in the French society (Levine 2005, 63). In codifying laws and procedures and transforming judges into state-employed servants (that is, the essence of the Civil Law tradition), the purpose of Napoleon was “to control judicial decision in all circumstances” (La Porta, Lopez-de-Silanes and Shleifer 2008, 304). Napoleon’s civil law endeavour was not an isolated reform but part of a larger interventionist enterprise (Woloch 1994; La Porta, Lopez-de-Silanes and Shleifer 2008, 304). The civil law was thus the result of a rulers’ political strategy. As the LOT scholars acknowledge, it developed “because the revolutionary generation, and Napoleon after it, wished to use the state power to alter property rights and attempted to insure that judges did not interfere” (Mahoney 2001, 505).

Analyzing Napoleon’s codification of laws uncovers the political dynamics even more. LOT tends to overlook the fact that Napoleon made a explicit choice: he had several options within the Roman law as a source of inspiration for his Code. Within those alternatives, Napoleon chose an extreme version known as the “Justinian deviation” after Eastern Roman Emperor Justinian (Dawson 1968; Levine 2005). More than a millennium earlier, Emperor Justinian shared the goal with Emperor Napoleon that the state (or, more precisely, the ruler) should have an ability to directly shape their societies. In terms of state interventionism, Napoleon was continuing what was started by his Bourbon predecessors: Louis XIII (1610-43) and specially le Roi Soleil Louis XIV (1643-
1715) with the *dirigiste* policies of his Finance Minister Colbert. Unlike other rulers within the realm of the former Roman Empire (e.g. Italian city states, pre-Louis XIII France, or the medieval kingdoms of Aragon and Catalonia), Justinian, Louis XIV, Napoleon, and the rulers who voluntarily adopted Civil Law principles, all had a state interventionist agenda and were able to implement it. This is thus the theoretical puzzle that must be addressed: why did some rulers have the ability to put in place mechanisms for systematic state interventionism while others could not?

A third shortcoming of the Legal Origins Theory regards the emergence of the Common and Civil Law traditions. There are two main types of explanations why this occurred and both have flaws. Inspired by Hayek (1960), several authors consider that common law countries protect private property more than civil law countries as a result of cultural or ideological differences between England and France (La Porta, Lopez-de-Silanes, Shleifer and Vishny 1999, Mahoney 2001, La Porta, Lopez-de-Silanes, Shleifer 2008). According to Hayek (1960), the English worldview has traditionally regarded freedom as the absence of coercion while the French worldview has preferred to emphasize the “attainment of a social purpose” (1960, 58). Therefore, different legal systems would emerge as a result of those distinct philosophies of freedom.

The main problem with this account comes from the fact that it hard to distinguish between cause and consequence. More precisely, is the higher individualism in England the result of a less interventionist state? Or is it the other way around? The scholars who argue that “Hayek might be right” (Mahoney 2001, 1) lack a convincing theory as to how cultural values (e.g. social purpose vs. individualism) predated the English and French states.
Other authors consider the emergence of the two legal traditions a result of historical accidents, or critical junctures, at a particular point in time. The most prevailing explanation focuses on the contrast between the political events in 17th century England – in particular during the Glorious Revolution – and those in the 18th century France (Mahoney 2001, Klerman and Mahoney 2007, La Porta, Lopez-de-Silanes and Shleifer 2008). Since English lawyers and judges were on the same (and winning) side as the property owners in the fight against a proto-absolutist monarchy, they forced the Crown to introduce an independent judiciary which could guarantee property rights. Accordingly, English courts gained the ability to review administrative acts. On the contrary, the French judiciary was largely monarchist and “ended on the wrong side of the French Revolution” (La Porta, Lopez-de-Silanes, Shleifer 2008, 303). The members of the judiciary should merely be, as Napoleon famously put it, automata who would implement codified laws (ibid.). Nevertheless, this standard explanation does not address the more fundamental question: why was the French judiciary so monarchist and the English so anti-monarchist to start with? Why, in Mahoney’s (2001: 11) terms, the judges were “heroes” in constitutional development in England and “villains” in France?

Using the same type of explanations, other scholars shift the focus some centuries back, to the 12th and 13th centuries, seen as key to understand English-French differences in their approach to law (Dawson 1960, Glaeser and Shleifer 2002). As a consequence of being a relatively peaceful country, English nobles, unlike their French counterparts, were capable of imposing the Magna Carta (1215) which restricted the Crown and helped preserving the independence of the judiciary. Nonetheless, the historical review of the period by Avner Greif (2008: 29-30) challenges this explanation.
Greif casts doubts on the ability of Magna Carta to really constrain ruler’s behaviour. The historical analysis of Greif shows us that the Magna Carta, cannot be considered as a critical juncture establishing a path dependence (i.e. of protection of individual freedoms from Crown’s opportunistic interferences). Similar to our argument, Greif demonstrates that what prevented English kings from abusing property rights was not the Magna Carta, but the fact that English kings lacked large body of loyal state servants who could implement their wishes, instead they needed to strike deals with their relatively independent administrators. As a matter of fact, Greif notes that, when King John gained enough strength (with the support of the Pope and after gathering his own military forces), he invalidated the original 1215 Magna Carta, and the posterior one (confirmed in 1225) imposed less constrains on the Crown. What kept the rule of law in England since then onwards was not the Carta itself, but the lack of a large body of administrators immediately and directly accountable to the ruler.

In sum, we intend to address the three shortcomings discussed here. In order to build a plausible explanation for the impact of past institutions on social outcomes today, we need a theory that, first, provides us an historically rooted explanation; second, that describes the political (and not legal) mechanisms through which a “heavier hand of government” is possible in some polities and not in others; and third, offering us a convincing critical juncture creating a robust path dependency. Together the criticism put forward here point towards the possibility that the relationship between legal traditions and high quality institutions and desirable social and economic outcomes, observed by LOT scholars, might be spurious. This would be the case if there is an underlying factor, such as a power struggle between the ruler and her administrators that affect both a
countries legal traditions and the quality of its institutions. The next section will make such a proposition.

The State Infrastructure Proposition

Our proposition starts from the premise that there is a “fundamental dilemma” explaining failure and success of societies (North 1981, 25; see also Weingast 1993); the conflict between rulers’ self-interest and societal efficiency. This means that the main problem a society faces is that of constraining the ruler to avoid direct confiscations of wealth, ad hoc modification of property rights, and favourable treatment of certain interests or any violation of impartiality. Solving that problem, or to be more precise, minimizing its costs as much as possible, since the problem as such is logically impossible to solve, as Miller and Hammond (1994: 5) show – is the essence for an efficient operation of markets.

According to political economy literature after North and Weingast’s (1989) path-breaking analysis of the Glorious Revolution, the solution to this dilemma is a constitution that limits the powers of the ruler (e.g. a Parliament such as the one that emerged after the 17th century English civil conflicts). However, as mentioned in the previous section, recent developments in economic history have questioned that constitutional rules have an independent effect on the consolidation of the rule of law in a country. As Greif and his co-authors (2006, 2008; Gonzalez de Lara, Greif and Jha 2008) have shown, using several historical accounts, the separation of powers established in a constitution is not self-enforcing. The most effective constraint of rulers’ behaviour is instead based on her “limited physical capacity to implement policy choices, including abuses” (Gonzalez de Lara, Greif and Jha 2008: 2).
Grief (2008) points out that all rulers need to delegate to administrators, such as individuals, organizations, armies, administrative corps, public agencies, private firms or tax collectors. It is the limited physical capacity of the ruler to control these administrators, and not written laws that for example prevented English kings from abusing their powers. To support his argument Greif (2008) uses narratives from the period of state-building in Europe. The mechanism through which executives are constrained is, for example, revealed when the Spanish ambassador in England describes how the English state works to his masters the kings Isabella and Ferdinand. He reports that the English king (Henry VII, 1457-1509) “would like to govern England in the French fashion but he cannot (…) the difference between us [in England] and France consists chiefly in this: … we are [as] remarkable [as they] for good laws, but are shamefully neglectful in their execution” (ibid, 47-48). In other words, the difference between England and France did not lay so much in policy-making as in policy-implementation. As Greif (2008) shows, the English kings, unlike their French counterparts, lacked an encompassing body of directly accountable administrators ready to undertake their (frequently state interventionist) policies.

Supporting this view, it is striking how the proponents of constitutionalism (e.g. North and Weingast 1989 and the large scholarship inspired by their work) almost exclusively focus their analyses on England, neglecting other less successful constitutional monarchies, like Hungary or Poland-Lithuania. All three countries were examples of constitutional monarchies (Ertman 1997; see also Finer 1997), but Hungary – with constant political and military crisis – and Poland – which went from being the richest Eastern European country in the 16th century to be one of the poorest two
centuries afterwards – lagged clearly behind England’s political and economic success. More generally, there were 25 constitutional monarchies and Republics in operation in late 15th century Europe (Herb 2003), and most of them imploded and were replaced by authoritarian and highly interventionist rulers. In other words, it seems implausible that constitutionalism in itself has the ability to constraint despotic trends of rulers, which would make England exception rather than the rule.

We consider Grief’s criticism relevant also for the legal traditions. A relatively unconstrained ruler is thus in our view the explanation behind the choice of legal tradition, the quality of institutions and in long run also to desirable outcomes. González De Lara, Greif and Jha’s (2008, 105) describes how rulers depend on their administrators, and that “the rule of law can therefore be a manifestation of equilibria with administrators sufficiently powerful to constrain rulers”. We think of the relationship between the state infrastructure, and institutions and social outcomes in the same way. We consider the state infrastructure to be a historically rooted manifestation of the equilibrium between the ruler and the administrators, which either constrain or enable the rulers possibilities to change institutions and arbitrary intervene in economic and social life. This is not far-fetched. For example, we note that La Porta et al admit that the state infrastructure should affect government efficiency, and thereby the desirable institutions and outcomes, but they fail to see the full consequences of this insight (1999: 232).

Following scholars studying state formations (see for example Ertman 1997; Hinze 1975; Tilly 1975; Mann 1986; Ziblatt 2006), but contrary to the LOT, we thus argue that state formation processes and the organization of the administration created under this process explain the cross country patterns revealed by the LOT (La Porta et al
1999; La Porta, Lopez-de-Silanes and Shleifer 2008). It is important to start the development of our hypothesis by emphasizing that, while there is a great deal of controversy regarding what factors that are affecting the state formation process itself – it might be geo-political conditions (Hintze 1975), wars (Tilly 1985), the timing and sequencing of the state formation (Ertman 1997) – there seems to be consensus that “state building in medieval and early modern Europe [is] capable of explaining variations in political regime and administrative and financial infrastructure within the dominant form of the territorial state, which account for nearly all of the continent’s polities at the end of the early modern period” (Ertman 1997, 4). This study leaves the controversy regarding the roots of state formation aside, while building on the profound consequences of state formation processes.

We follow Ertman (1997), who uses “state infrastructure as one of two dimensions to classify the outcome of the state formation process in the 18th-Century Europe (Ziblatt 2006 uses “infrastructural power” to describe a similar phenomenon; see also Mann 1986). Similar to Weber, Ertman (1997) dichotomizes the state infrastructure dimension in one patrimonial and one bureaucratic category. In patrimonial states positions were filled with patronage-based candidates, selected according to their loyalty to the Crown. In patrimonial states officials tended to own their administrative positions, and local elites controlled the economy. As the literature on state-building points out, patrimonial infrastructures are private and informal patron-client based, but is also easily accountable to the ruler (Silberman 1995, Lapuente 2007). In the bureaucratic states, the administrative apparatus is “paradoxically, much less accountable in a direct fashion” (Silberman 1993, 5) because “principals” (i.e. rulers) are more limited to choose the
“agents” working for them (Lapuente 2007: 2). Administrative positions in bureaucratic states are thus not personal, but filled “with candidates possessing special educational qualifications” (Ertman 1997, 9).

As mentioned, there is a lot of controversy in the literature on why some rulers chose (or were forced) to work with more independent administrators. Despite that these explanations are subject to debate, most authors agree on two main premises which represent the backbone of our proposition. First, that two distinct types of state infrastructure emerged that would fit into the classical division of administrations established by Weber (1978): i) the *patrimonial* (sometimes called patronage-based) and the ii) *bureaucratic* (sometimes called merit-based). Second that these state infrastructures acquired during the state formation process creates a path dependency difficult to change.

The mechanism for that path dependency would be the following. Once a patrimonial administration is established, subsequent rulers will not experience many constraints to appoint core supporters to high, middle, or even low, managerial positions all throughout the administrative apparatus. On the contrary, once a bureaucratic autonomous structure – with selection, promotions and firings decided meritocratically – is in place, it is much more difficult for future rulers to bypass it tame it via widespread replacements of civil servants. As Shefter (1977) argues, a large “coalition in favour of bureaucratic autonomy” of civil servants and army officials (in occasions with external support from social interests groups such as professional organizations of business associations) becomes an insurmountable obstacle for subsequent rulers aiming at overturn it and make it “directly accountable”.

In those countries where these coalitions of bureaucrats became entrenched, there was a fast consolidation of an impersonal law which limits the possibilities for arbitrary interventions by the ruler, as noted by the scholars of the period (Ertman 1997, 9). The fundamental importance of “impartiality” of government institutions for the quality of government (Rothstein and Teorell 2008, 169-173), and of “impersonality” for the creation of a social order necessary for the modern state (North, Wallis and Weingast 2009, 21-27) has been increasingly noted in the literature. Building on these insights, it seems reasonable that if a state infrastructure has a more “impartial”, or “impersonal” character gives us even more reason to believe that this also affects the institutions and social outcomes.

In sum, the state formation process affects the character of the state infrastructure to be either patrimonial or bureaucratic. With a patrimonial infrastructure the ruler is relatively unconstrained, while a bureaucratic infrastructure forces institutions such as judicial independence and property rights upon the ruler, which, in turn, fosters the rule of law and helps curbing corruption. In the next section we will put this proposition to an empirical test.

Sample, Methods and Data

In the empirical section we investigate if there is a relationship between the state infrastructure, and on the one hand a set of institutions capturing state intervention (procedural formalism, judicial independence, regulation of entry, case law), and on the other hand a set of social outcomes closely related to the quality of government (corruption, rule of law, and property rights).
Our selection of these two type of variables are based on the following reasons:

As we argued in the previous section the LOT and the State Infrastructure Proposition both assume that institutions supporting or limiting state interventionism is of key importance. According to both theories, it is mainly through “the heavier hand of government” that the causal mechanism could be observed (La Porta, Lopez-de-Silanes and Shleifer 2008, 286). Consequently, the first group of variables represents four variables most obviously related to this “heavier hand”. The second group of variables more directly represents the social outcomes of fundamental importance for a society (for the relevance of property rights see North 1981; for an overview of the impact of quality of government see Holmberg, Rothstein and Nasiritousi 2009). Obviously these outcomes are inter-related, but they are conceptually distinct enough to be tested separately. A full description of the dependent variables including sources and descriptive statics is located in the appendix 2.

We analyse the impact of the legal origins and the state infrastructure on a sample of 31 OECD countries. It should be noted that this is a more limited sample than the one used by La Porta et al (1997, 1998, 1999; La Porta, Lopez-de-Silanes and Shleifer 2008). There are two main reasons for limiting our sample to OECD countries. First, we maintain that it is within this group of countries that legal and state origins matter most, and we thus believe that confining the sample to this groups serves as the most apt test between the legal origins theory and our proposition. In the world sample of La Porta, Lopez-de-Silanes and Shleifer (2008) countries with failed states are weighted equally to countries with well-functioning states. We believe it unreasonable to expect either the legal tradition or the state infrastructure affect institutions and social and economic life
when there is little state infrastructure established in the first place, and we therefore consider the OECD more appropriate. Second, we can account for the coding of the countries that we employ in this study much more confidently than if we were to include a global sample. That La Porta et al include countries such as Sudan, Somalia and Zimbabwe in their analysis and coded them as either common or civil law for example is problematic given the virtual lack of an administrative infrastructure, including a minimal administration of justice. And while the case can be made that colonial origins do have an impact on the state and legal systems, we argue that the uncertainty in the coding process and a lack of solid theoretical justification for coding in the vast majority of cases in the analysis of La Porta et al is likely to lead to severe problems of “conceptual stretching” (Sartori 1970).

A note should also be made regarding the coding. As mentioned in the theoretical section we use the character of state infrastructure to capture our main independent variable. This variable is dichotomized and the two categories are: (0) the patrimonial state infrastructure; and (1) the bureaucratic state infrastructure.

The coding is based primarily on Ertman (1997), but also on the previous comparative analyses of state apparatuses by authors like Weber (1978) and Mann (1986; 1993), and on classifications of administrative traditions made by Painter and Peters (2010) and Meyer-Sahling and Yesilkagit (2010). The time period for which the coding refers to is the 18th century (Ertman 1997, 10). We believe that a coding of this period serves the purpose of this paper well, since it defines state infrastructure prior to the industrial revolution, just before the modern state, but after the state formation process in most OECD countries.
In order to give some details of the coding, we will start by discussing one of the clearest examples of bureaucratic state infrastructure according to Ertman (1997), namely Britain. Similarly, the countries belonging to what comparative public administration scholars define as Anglo-American administrative tradition – Ireland, Australia, New Zealand, the US and Canada – have also been coded as bureaucratic. The reason is that, as pointed out in the literature (Peters 2003, 12), their administrative systems have decisively being influenced by the British (see Painter and Peters 2010, Meyer-Sahling and Yesilkagit 2010). A similar relationship can be found in the territories belonging to the Napoleonic tradition (Peters 2008, Painter and Peters 2010) – for example France, Belgium, Spain, the Italian states – which are classified by Ertman (1997) as having developed a patrimonial state infrastructure. Therefore, they are coded as such in this paper, together with other two historical clear examples of patrimonial state infrastructure according to Ertman (1997): Poland and Hungary.

Taken together, this means that compared to the legal origins dichotomy, our coding of the bureaucratic state infrastructure includes all the common law countries plus nine countries from the civil law category. Of these, five are Scandinavian, three Germanic (Austria, Germany and Switzerland) and one country belongs to the French legal tradition (the Netherlands). The coding of the Scandinavian countries is probably unproblematic with the historically two leading Scandinavian powers, Denmark and Sweden, as the prime examples of an absolutist bureaucratic and a constitutional bureaucratic country, respectively (Ertman 1997, 10). Also the German Territorial States are clearly regarded as bureaucratic by both Ertman (ibid.) and Mann (1993, 447 pp.), and Germany is thus coded as such here. When it comes to the two other states from the
German legal tradition (Austria, and Switzerland) and the Netherlands they are according Painter and Peters (2010, 22-23) all three part of *Rechtsstaat* tradition. Consequently, Germany and the three other members of this tradition according to the literature, Austria, Switzerland and the Netherlands are coded as bureaucratic.

When it comes to the classification of non-Western countries it is a little bit more problematic, but one of the main insights from the review of non-Western administrative traditions by recent accounts in administrative history is the lack of a consolidated bureaucratic meritocracy outside Western administrative legacies. While “meritocracy has an uncertain status” in the administrative tradition of Central and European countries under Soviet influence (Painter and Peters 2010, 27), and Latin American states (of which Mexico is represented in the OECD sample analyzed here) were formed with an administration which was “patrimonial at its core” (Dwivedei and Nef 2004) and with strong clientelism (Heredia 2002).

Finally, the classification of three OECD members not belonging to any Western administrative tradition deserve special attention, because of the lack of clear guidance in the work of either Ertman (1997) and comparative public administration scholars regarding their state infrastructure. These three are the Czech Republic (with historical roots in the Germanic tradition, but sharing many experiences with other Central and European countries), and Japan and South Korea (the two most known examples of the Confucian or East Asian administrative tradition). Although these countries will be treated in separated robustness checks in the empirical analysis, they are originally coded as having a patrimonial state infrastructure. The reason is that, even if the literature acknowledges that the public administrations in these countries is the result of complex
processes of layering and nowadays they can be considered as hybrid combinations of patrimonial traditions and European meritocratic rules, historically meritocratic rules were prone to de facto nepotism and patrimonialism (Painter and Peters 2010). For further details, a full list of the countries classified, along with their coding can be found in the appendix 1.

Testing the impact of legal or state variables that occurred hundreds of years ago on institutions and outcomes today is admittedly challenging. Although we acknowledge that our empirical tests are somewhat modest in what they can demonstrate, we argue that the best test of our theory against the LSO is to follow the design of the La Porta, Lopez-de-Silanes and Shleifer (2008) article. We thus employ a parsimonious empirical strategy. We follow their format by employing cross-section OLS with robust standard errors with a minimum amount of control variables taken from their analyses. With a relatively homogenous sample such as the OECD there are obviously a number of factors that one has naturally controlled for such as a certain level of development and strength of democratic institutions. We follow La Porta, Lopez-de-Silanes and Shleifer (2008) and run primarily straightforward models, employing GDP per capita (log) on all models as a control. In the second set of dependent variables (the so called ‘outcomes’) we also check for impact of three additional control variables. These control variables are included as they are used by La Porta, Lopez-de-Silanes and Shleifer (2008) and represent alternative explanations for state interventionism. The first is a control for ‘union density’ from Botero et al (2004). Second, we control for ‘proportional representation’ which is taken from the Database of Political Institutions (Beck et al 2006). Third, as La Porta, Lopez-
de-Silanes and Shleifer (2008) do, we also test the relevance of ‘left power’, which is taken from Botero et al (2001).

**Empirical results**

We test the effects of legal traditions and state infrastructure on the institutions indicating state interventionism in Table 1. Here we take the coding for common law countries (*Common*) and compare it to our coding (*Bureaucracy*). We do so due to the causal mechanism behind both theories, which is the ‘heavy hand’ of the state produces worse outcomes and institutions. While La Porta et al test the three forms of civil law (French, German and Scandinavian) against the common law, we simply put the two groups (Common Law and Meritocratic Bureaucracy) up against one another to see which better distinguishes itself from their comparison groups (Civil Law and Patrimonial Bureaucratic countries respectively).¹ In models 1-4 we test our hypothesis on one aspect of government regulation, namely ‘regulation of entry’, which measure the number of steps (log) it takes to start a new business (from Djankov et al 2002), which ranges in our sample from 0.65 (Canada) to 2.71 (Mexico), with higher numbers equating to more regulation. We find that both variables are significant in explaining variance in the dependent variable, yet *Bureaucracy* is slightly stronger. Countries with a meritocratic bureaucracy have one average .71 less steps (more than a full standard deviation) than patrimonial bureaucracies while Common Law countries have .57 less than the various forms of Civil Law.

***Table 1 about here***
In models 2-4 we examine the impact of the two theories on the strength of judicial institutions. The variables ‘Tenure of Judges’ and ‘Case Law’ range from 0.5 - 1 and 0-1 respectively in our data. In explaining variance in both variables (models 3 and 4), Bureaucracy clearly outperforms the LSVS Common Law country explanation, with such countries having longer judge tenure by 0.21 and more prone to basing the source of current law on case law by 0.5 as compared with patrimonial countries. Compared with the various forms of civil law countries, Common fails to reach statistical significance in either model 3 or 4. However, with respect to formalism in check collection (Model 2 - variable ranges from 1.57 (New Zealand) to 5.24 (Spain), the difference between common and civil law countries is roughly twice that of the gap between bureaucratic and patrimonial countries (1.01 vs. 0.53), though both are significant at least the 90% level of confidence.

***Table 2 about here***

Table 2 shows the head to head comparison of the affect on the quality of government dependent variables between the state infrastructure and legal origins variables. For the purposes of the final presentation of the results we include only GDP per capita (Log) in models 1-3 in Table 4. We run the same type of model as in Table 1, with the bureaucratic variables against the standard common law dummy variable used to indicate legal systems, and then a second model which runs the bureaucratic variables
against the more detailed coding from the La Porta, Lopez-de-Silanes and Shleifer (2008) publication.

We find that in each model, the state infrastructure variable remain significant at the 99% level of confidence in each of the six models with coefficients all in the expected (positive) direction. With respect to corruption and rule of law we find that the difference between Bureaucratic and Patrimonial countries is roughly 0.9 and 0.8 (both over a full standard deviation in that data for our sample) while the difference between common and civil law countries is negligible. Moreover, regarding the strength of property rights specifically (ranges from 3-5 in the sample); Bureaucratic countries have stronger protections than Patrimonial countries by 0.5, while the difference between common and civil law countries is again indistinguishable from zero. In fact, in regard to all three dependent variables in Table 2, none of the legal origins variables remain significant in any of the 3 models, suggesting a stronger explanatory power in the state origins explanation empirically on outcomes. As anticipated, countries with higher levels of economic development have lower levels of corruption, stronger rule of law and property rights on average.

***Table 3 about here***

Clearly in a sample of only 31 countries, the coding of only a few cases can have significant impact on the results. We take seriously the potential problems posed by the uncertainty of several cases, namely the coding of the Netherlands, Czech Republic, Japan and South Korea. In Table 3, the robustness of results are checked by replicating Table 2 with alternative codings. In each of the 9 models in Table 3 the results are
strongly robust to the coding changes. It is worth mentioning that the switching of the Netherlands into the Patrimonial group has the largest effect on the results (e.g. narrows the gap between meritocratic and Patrimonial states) while the inclusion of the Czech Republic into the Meritocratic group plays little to no role compared with the original coding in Table 2. However, the state infrastructure demonstrates much stronger empirical explanatory power than that of the LOT even in the face of coding changes.

**Conclusions**

This paper has suggested an alternative and historically rooted interpretation of the empirical patterns observed by La Porta et al. (La Porta et al 1997, 1998, 1999; La Porta, Lopez-de-Silanes and Shleifer 2008, 302). While their theory (LOT) considers well-functioning institutions, such as judicial independence, and desirable social outcomes, such as low corruption, to be the result of a country’s legal tradition, this paper claims that they are affected instead by the type of state infrastructure established during the state formation process.

This study has pointed out three shortcomings in the LOT. First, one can question how historically well rooted their explanation is, and, in particular, up to which extent the dynamics of legal adoption were exogenous to state-builders’ self-interest. We see many instances in which rulers enjoyed notable margin of manoeuvre to choose the type or sub-type of law tradition which best suited their preferences. Therefore, the theoretically relevant issue is to explain why certain rulers opted for certain versions within long-lasting wide legal frameworks. Third, the basic causal mechanism of the LOT is political, rather than legal. What makes civil law environments less business-friendly are not
particular legal procedures, but the existence of a systematic “heavier hand of government.” Thus we need to understand why some states, irrespective of the nature of the incumbent, have historically exhibit systematic heavier hands of government over their societies. Third, the LOT does not offer a clear convincing critical juncture that creates a path dependency. When did common law (e.g. England) and civil law (e.g. France) countries start to depart from each other, giving birth to two distinct path dependencies?

We believe these shortcomings have been addressed in this study. Inspired by Grief’s (2008) argument of the importance of rulers with limited abilities to control administrative power, and building on scholarly studies of state formation processes (Ertman 1997; Mann 1986; Tilly 1985; Weber 1978), the paper develops the state infrastructure proposition. The paper suggests that the state formation process affects the character of its state infrastructure to be either patrimonial or bureaucratic, which affects institutions and social outcomes.

Moreover, we have presented empirical evidence to suggest that the explanatory power of our state infrastructure hypothesis is superior to that of the LOT with respect to a set of institutional variables (formalism, judicial independence, regulation of entry and case law) as well as on a set of social outcomes (corruption, rule of law, and property rights). When tested vis-à-vis each other, state infrastructure (i.e. bureaucratic or patrimonial) trumps out the effect of legal origins that has been traditionally found as relevant in the comparative literature on quality of government. In addition, the paper maintains that, even if both legal traditions and the state infrastructure affect some particular institutions – such as for example regulation of entry –, it is likely that the state
infrastructure is more fundamental, given the absence of a clear predictive theory in the LOT literature. We regard this as important positive contributions of this paper.

Finally, to get some intuitive feeling of how realistic our proposition is we might consider the policy implications from the state infrastructure proposition for states in the making, such as Afghanistan or Iraq. And as a matter of fact, there is an increasing consensus that the mere importation of Western constitutional and legal rules, including democratic institutions, has fell short of the initial expectations. A growing number of analysts point out towards state building – and, in particular, towards the enactment of a merit-based non-corrupt bureaucracy – as the key reform that should have gained much more pre-eminence in the process of rebuilding both countries from the very beginning. It should be self evident that the mere introduction of common law (like the adoption of a democratic constitution) without a state building process before it would not have the desired consequences for the economic and social life in Afghanistan. As Sheri Berman (2010) notes, it is not so much Western countries’ adoption of constitutional or legal rules what should inspire the current efforts to rebuild Afghanistan, but it is “Early modern Europe, for example – the birthplace of the modern state – [which] offers numerous lessons for contemporary policymakers to ponder”. In line with this argument, it is the contention of this paper that the creation of a bureaucratic state infrastructure is of crucial importance and have long-lasting effects for a polity.
# Tables and figures

## Table 1: Legal vs. State Origins: Government Regulation & Judicial Institutions

<table>
<thead>
<tr>
<th></th>
<th>Government Regulation</th>
<th>Judicial Institutions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Regulation of Entry</td>
<td>Check Collection</td>
</tr>
<tr>
<td><strong>Bureaucracy</strong></td>
<td>-0.71***</td>
<td>-0.53*</td>
</tr>
<tr>
<td></td>
<td>(-3.81)</td>
<td>(-1.80)</td>
</tr>
<tr>
<td><strong>Common Law</strong></td>
<td>-.57***</td>
<td>-1.01***</td>
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<tr>
<td></td>
<td>(-3.21)</td>
<td>(-4.19)</td>
</tr>
<tr>
<td><strong>GDP(log)</strong></td>
<td>-0.04</td>
<td>-0.01</td>
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<td></td>
<td>(-0.24)</td>
<td>(-0.02)</td>
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<tr>
<td><strong>Obs.</strong></td>
<td>29</td>
<td>30</td>
</tr>
<tr>
<td><strong>Rsq.</strong></td>
<td>0.75</td>
<td>0.5</td>
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</table>

Note: Sample limited to OECD countries only. OLS regression with robust t-statistics in parentheses.

*** p<.01, **p<.05, *p<.10
Table 2: Legal vs. State Origins and Quality of Government Outcomes

<table>
<thead>
<tr>
<th></th>
<th>Corruption</th>
<th>Rule of Law</th>
<th>Property rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bureaucracy</td>
<td>0.91***</td>
<td>0.77***</td>
<td>0.51***</td>
</tr>
<tr>
<td></td>
<td>(7.70)</td>
<td>(5.76)</td>
<td>(7.08)</td>
</tr>
<tr>
<td>Common Law</td>
<td>-0.07</td>
<td>0.06</td>
<td>-0.08</td>
</tr>
<tr>
<td></td>
<td>(-0.42)</td>
<td>(0.73)</td>
<td>(-0.78)</td>
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<tr>
<td>GDP(log)</td>
<td>0.90***</td>
<td>0.98***</td>
<td>0.97***</td>
</tr>
<tr>
<td></td>
<td>(7.86)</td>
<td>(7.60)</td>
<td>(8.05)</td>
</tr>
<tr>
<td>Obs.</td>
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<td>31</td>
<td>31</td>
</tr>
<tr>
<td>Rsq.</td>
<td>0.88</td>
<td>0.85</td>
<td>0.89</td>
</tr>
</tbody>
</table>

Note: corruption is an average of the World Bank score from 1996-200 (taken from LPSV 2008), property rights is an index from the Heritage Foundation (1-5) from 2004, and rule of law is the average from the World Bank (between 2002-2006). All quality of government dependent variables are coded so that higher values equal better quality of government. Sample limited to OECD countries only. Robust t-statistics in parentheses. ***p<.01, **p<.05, *p<.10
Table 3: State vs. Legal Origins and Quality of Government Outcomes: Robustness Checks

<table>
<thead>
<tr>
<th></th>
<th>Corruption</th>
<th>Rule of Law</th>
<th>Property rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bureaucracy</td>
<td>0.56**</td>
<td>0.88***</td>
<td>0.58**</td>
</tr>
<tr>
<td></td>
<td>(2.56)</td>
<td>(6.68)</td>
<td>(2.64)</td>
</tr>
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<td>Common Law</td>
<td>0.06</td>
<td>-0.07</td>
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</tr>
<tr>
<td></td>
<td>(0.28)</td>
<td>(-0.45)</td>
<td>(0.54)</td>
</tr>
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<td>GDP(log)</td>
<td>1.22***</td>
<td>0.99***</td>
<td>1.14***</td>
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<td>(6.32)</td>
<td>(6.99)</td>
<td>(6.05)</td>
</tr>
<tr>
<td>Obs.</td>
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<td>31</td>
<td>31</td>
</tr>
<tr>
<td>Rsq.</td>
<td>0.79</td>
<td>0.87</td>
<td>0.79</td>
</tr>
</tbody>
</table>

Note: Sample limited to OECD countries only. OLS regression with robust t-statistics in parentheses. Higher scores in each of the dependent variables indicate better government outcomes (e.g. lower corruption, stronger rule of law and property rights).

*** p<.01, **p<.05, *p<.10
References


Appendix 1

Coding of Sample

<table>
<thead>
<tr>
<th>OECD country</th>
<th>Original LPLV Coding</th>
<th>Common Law Dummy</th>
<th>State infrastructure Dummy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
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<td>1</td>
</tr>
<tr>
<td>Austria</td>
<td>German</td>
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<td>1</td>
</tr>
<tr>
<td>Belgium</td>
<td>Civil (Fr.)</td>
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<td>0</td>
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<td>1</td>
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<td>Switzerland</td>
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<td>1</td>
</tr>
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<tr>
<td>Denmark</td>
<td>Scandinavian</td>
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</tr>
<tr>
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<td>Civil (Fr.)</td>
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<td>0</td>
</tr>
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<tr>
<td>France</td>
<td>Civil (Fr.)</td>
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<td>0</td>
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<tr>
<td>United Kingdom</td>
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<td>1</td>
</tr>
<tr>
<td>Greece</td>
<td>Civil (Fr.)</td>
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<tr>
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Appendix 2: Correlations

Correlations Among Legal and State Origins Coding: OECD Sample

<table>
<thead>
<tr>
<th>Bureaucratic (0/1)</th>
<th>Common Law (0/1)</th>
<th>LPLS Ukcommon</th>
<th>LPLS French</th>
<th>LPLS German</th>
<th>LPLS Scandinavian</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.51</td>
<td>0.51</td>
<td>-0.53</td>
<td>-0.26</td>
<td>0.45</td>
<td></td>
</tr>
</tbody>
</table>

Note: bold numbers represent a significant correlation of 95% or greater.
Appendix 3

Data and Sources

Regulation of Entry (Djankov et al. 2002.) - The number of steps to start a new business (log). Mean: 1.85, St. Dev: 0.65, Min: 0.69, Max: 2.71.

Formalism Check Collection (Djankov et al. 2003) – Based on an index built from data from a survey 109 countries inquiring about legal procedures regarding the eviction of a residential tenant for non-payment of rent and the collection of a check returned for non-payment. Mean: 3.28, St. Dev: 0.83, Min: 1.57, Max: 5.25.

Tenure of Judges (La Porta et al. 2004) - Measures the tenure of judges in the highest court in any country. The variable takes three possible values: 1 if tenure is life-long, 0.5 if tenure is more than six years but not life-long, and 0 if tenure is less than six years. Mean: 0.88, St. Dev: 0.22, Min: 0, Max: 1.

Case Law (La Porta et al. 2004) - A dummy taking value 1 if judicial decisions in a given country are a source of law, 0 otherwise. Mean: 0.68, St. Dev: 0.47, Min: 0, Max: 1.

Corruption (World Bank – Kaufmann et al 2008) – a composite index of international risk assessments, NGO’s, IGO’s and citizen surveys measuring the extent to which corruption is perceived to be present in a given country. We take the average between 2002 and 2006. Mean: 0, St. Dev: 1, Min: -2.5, Max: 2.5. OECD sample: Mean: 1.43, St. Dev: 0.82, Min: --0.39, Max: 2.4.

Property rights (Heritage Foundation 2004) - A rating of property rights in each country in 1997 (on a scale from 1 to 5). The more protection private property receives, the higher the score. The score is based, broadly, on the degree of legal protection of private property, the extent to which the government protects...
and enforces laws that protect private property, the probability that the government will expropriate private property, and the country’s legal protection of private property. Mean: 4.35, St. Dev: .79, Min: 3, Max: 5

**Rule of Law (World Bank – Kaufmann et al 2008)** - a composite index of international risk assessments, NGO’s, IGO’s and citizen surveys measuring the strength of the rule of law in a given country by such aspects as independence of courts, trust in police, level of organized crime, strength of property rights and contract enforcement, and human trafficking. Mean: 0, St. Dev: 1, Min: -2.5, Max: 2.5. **OECD sample:** Mean: 1.30, St. Dev: 0.63, Min: --0.38, Max: 1.97.

**GDP per capita (log) (- World Development Indicators)** - GDP per capita in Purchasing Power terms. Various years following La Porta et al (2008)

**Proportionality (Beck et al 2006)** - Index of proportional representation. Equals 2 plus 1 if candidates are elected based on the percent of votes received by their party ("pr") minus 1 if legislators are elected using a winner-take-all / first past the post rule ("plurality") minus 1 if most seats are plurality ("housesys"). Average of 1975-2000.

**Union density (Botero et al. 2004)** – Measures the percentage of the total workforce affiliated to labour unions in 1997.

**Left Power (Botero et al. 2004)** - Chief executive and largest party in congress have left or center political orientation.
Notes

1 While there is a fair degree of correlation between the ‘common’ and ‘bureaucracy’ groupings (0.51), the level of multicollinearity is not severe. We provide the correlations between our ‘bureaucracy’ variable and each of the four law groups from the LSVS article in the appendix.

2 Upon running all models with the three control variables, we found them neither to influence the results in a meaningful way, nor turn up statistically significant.

3 Netherlands is thus coded as Patrimonial, while Czech Republic, Japan and Korea are coded as Meritocratic in Table 3. In addition to Table 2, we replicated Table 1 as well. The results were completely robust when including the Czech Republic in the Meritocratic bureaucracy group and while the results are slightly weaker when the Netherlands is switched to Patrimonial, yet not substantially. The inclusion of Japan and Korea into the Meritocratic group actually strengthen our results in models 1, 3 and 4 from Table 1.