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Journal of Comparative Economics 35 (2007) 294–308

Journal of COMPARATIVE ECONOMICS

www.elsevier.com/locate/jce

Juries and the political economy of legal origin

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Received 10 December 2006; revised 9 February 2007

Roe, Mark J.—Juries and the political economy of legal origin

Legal origin has been brought forward as a key influence on modern finance, because common law institutions protect investors better than do civil law institutions, it is claimed. These institutional differences are said, in the legal origin explanation, to have been hard-wired into nations centuries ago. Daniel Klerman and Paul Mahoney challenge the legal origin description of the jury as emerging and achieving prominence in 12th- and 13th-century England while remaining unimportant in France. That contrast has been offered as a key difference between common and civil law, one dependent on the differences in relative power between the English monarch and the French one in the 13th century. But the investigation of the jury here should give pause to those promoting the overall legal origin thesis. The first reason to hesitate is that the jury is not central to protecting outside investors in common law nations. Indeed America's premier corporate court—the Delaware Chancery court—sits without a jury, and the usual view in legal circles is that the jury's absence (and the resulting decision-making by expert judges, not juries) is a strength of the court, not a weakness. The second reason is that Britain did *not* generally transfer the jury system to its colonies, because to have done so would have conflicted with its colonial goals. That is not a secondary point: political economy issues regularly trump issues like legal origin—colonial policy was just one example of how political goals displace secondary institutions. The third reason is that analysis for the jury differences between civil and common law nations depends on political economy differences centuries ago. But if political economy differences determined institutional differences in the earlier centuries, it is plausible that political economy differences in the intervening centuries would also have affected financial outcomes. Indeed modern political economy differences that lead some nations to support capital markets and others to denigrate them could explain modern financial differences as much as, or more than, 13th century political differences. *Journal of Comparative Economics* **35** (2) (2007) 294–308. Harvard Law School, Griswold 502, Cambridge, MA, USA.
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JEL classification: F54; G18; G30; G38; K22; N20; O16

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doi:10.1016/j.jce.2007.04.002

Keywords: Colonial institutions; Civil law; Common law; Corporate and securities regulation; Economic development; Financial development; Juries; Legal origin; Political economy of property protection; Property rights

0. Introduction

Legal origin—common law versus civil law—is important to the past decade's finance theory. Peculiarly, the theory has not had traction in the academic legal literature, which might be surprising given academic disciplines' understandable tendency to see their own issues as central and determinative. What legal academic commentary that the theory has provoked has either been skeptical that the legal origins channels that the law and finance literature promotes are really so important or skeptical that origin could be as important as modern political economy considerations. That is, while the legal literature hardly denigrates law's importance, it has doubted the importance of legal origin to financial development. Mahoney (2001), although sympathetic in part (particularly to the idea of a detrimental statist nature of civil law), denigrates the idea that civil law codification can be as important as the legal origin theory had hypothesized, since so much of American corporate and commercial law is codified. Coffee (2001) sees the propensity of some countries to disrupt their stock markets, which would have provided the needed investor protections regardless of underlying legal institutions, as central. Roe (2000, 2006) shows that, while property rights and investor protection are important, legal origin differences cannot explain the institutional differences, since common law countries use non-common-law institutions, such as securities regulators, and not just common-law-oriented fiduciary duties. He shows that modern political economy forces are likely to explain modern financial and investor protection differences in wealthy nations better than legal origin.

In *Legal Origins?* Klerman and Mahoney investigate central elements of Edward Glaeser and Andrei Shleifer's (2002) analysis of how differences between common and civil law emerged in the 13th century, critiquing a paper called, simply enough, "Legal Origins." There, Glaeser and Shleifer said that the English judiciary was decentralized relative to the French and that political differences between England and France at the time best explained that relative decentralization. The relative power of the king in each nation differed, the barons feared the king more than one another in one nation (and one another in the other nation), and each nation's economic structure differed, with large contiguous land holdings in France giving the 13th century French barons more power and autonomy than the British barons.

I had much admired Glaeser and Shleifer's investigation and explanation, because it focuses on power and politics in the 13th century as explaining legal structure outcomes, despite that I am not a fan of the legal origins strand in the law and finance literature overall, as the citations in the first paragraph of this note suggest. I am skeptical of their big picture story because, first, it exaggerates the impact on financial outcomes of differences in legal style, when there are much more important—and more modern—explanations for the differences than legal origin. It also privileges corporate legal institutions in finance, which while important are usually less critical than whether the polity has an ongoing antagonism to, or affinity for, capital markets. If the polity likes capital markets, then capital markets will tend to get the supporting institutions that they need. While older legal institutions are important, they are only part of the story and probably not the central one. Equally importantly, the differences in institutions between the legal origins are not so wide that either one is disabled or privileged in achieving the goals sought, such as investor protection primarily and property protection more broadly. Indeed, common law countries use regulators, such as the Securities and Exchange Commission, and codes, such as the

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