REVERSING: UNDOING BAD LAWS AND BAD JUDICIAL DECISIONS

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Abstract: The growth of laws and judicial decisions of questionable economic benefit, and the current debt crisis, pose the question of how bad choices can be reversed. That problem is prominently on display in southern Europe, and indeed throughout much of the first world. Parliamentary systems seem better able to undo bad laws than the U.S. presidential system, with its separation of powers, which does not augur well for America. Bad judicial decisions might be even harder to reverse, because of the conservatism of judges who follow precedent. However, judicial elections in the states appear to offer a solution to the problem. The objections which have been raised against such elections seem less than compelling.

Reversing:
Undoing Bad Laws and Bad Decisions

If I tell you how things are, I have told you why things cannot change.
Edward Banfield

What can be done to slow the pathology I have described? That was Lucky Jim’s question. The essays in this book have found fault with and sought changes to American private and criminal law; and these changes, if they are to come, must come from either judges or legislators. Legislative reform would seem to hold the most promise, since courts, particularly courts with a conservative agenda which would be inclined to reverse pro-plaintiff rules, generally defer to legislators. Yet when one turns to the federal legislative arena there are little grounds for optimism. I explain why here.

Federal Legislation

Two nations emerged from the American Revolution. The first, populist and Republican, was the United States. The second, Tory and monarchical, was Canada. The descendants of the American Loyalists who fled to Canada and gave the country one-half of its founding myths, saw it accede to self-government not through revolution but through a gradual and peaceful transfer of power to elected representatives.
There is another, less obvious, difference between the manner in which America and Canada achieved independence, and this was a consequence of contemporaneous ideas about government. Both countries took their inspiration from the freest country then in existence: Great Britain. But Great Britain in 1867, at the time of the British North America Act that unified Canada and gave it independence, was a different country than it was in 1787 when the Framers gathered in Philadelphia to draft a Constitution.

What the Framers of the American Constitution saw, when they looked to Great Britain, was a divided government, a constitution where sovereignty resided in the King-in-Parliament, composed of the King, the House of Lords and the House of Commons. That wasn’t quite the tripartite division identified by the “celebrated Montesquieu,” with his executive, legislative and judicial branches, but it nevertheless was seen as an example of the separation of powers; and that was the kind of government which, after the rise of democracy, the Framers gave their country.

When Canada acceded to self-government in 1867, the Fathers of Confederation also looked to Great Britain as a model. However, something had happened during the interim. The British Constitution in the time of Disraeli and Gladstone was not the same as that of Blackstone and Chatham. The crucial change came in 1832 with the Reform Act, passed over the initial objections of the King and the House of Lords. From that time onward, the British constitution abandoned the separation of powers, as this was understood by Americans. Instead, it gave Britain a unitary government, with virtually all power residing in the House of Commons. When Walter Bagehot published The English Constitution, in the same year as the British North America Act, it seemed clear to him that the “efficient secret of the English Constitution may be
described as the close union, the nearly complete fusion, of the executive and legislative powers.”

When Canada achieved independence, then, it was taken for granted that both federal and provincial governments should be modeled on the British lines of the day. What Britain offered Canada was a system of responsible, parliamentary government; and what Canada offered the remaining British colonies was a method of achieving independence without a revolution or break with the British connection. The British North America Act was a Canadian creation, drafted in Canada and passed by a British parliament preoccupied with the Second Reform Act and only too happy to let go of a burdensome colony.¹ This was not a model calculated to inflame the passions or result in television mini-series, but it was followed by more than fifty countries with a combined population of over two billion people; and that is no small thing.

A. Constitutional Infirmities

Americans take justified pride in their political institutions and method of achieving independence; but was the Anglo-Canadian model a superior one in the end? American theorists, particularly conservatives, tend to assume without question the superiority of divided government and the separation of powers. The alternative, it seems to be thought, is one-party governance and a quick slide into dictatorship. “The American system of government separates power,” observes Tom Campbell. “It thereby achieves protection for its citizens against the potential of tyranny.”² In Federalist 10, Madison was even more emphatic. “The accumulation of all powers legislative, executive and judiciarly in the same hands, whether of one, a few or many,
and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”

That’s not been our historical experience, however. There are a good many more presidents-for-life than prime ministers-for-life.\textsuperscript{3} Every country from the former Soviet Union which adopted a presidential system has become an autocracy. Only the parliamentary systems remain democracies. The U.S. Constitution seemingly was not made for export. It has served America well, but was that because it was American, and not because of the Constitutional machinery?

Madison’s fears about majoritarian tyranny seem therefore to have been excessive. In addition, the American system of separation of powers suffers from various defects not found in the Anglo-Canadian parliamentary model of government. By making prime ministers accountable to the House, parliamentary systems reduce the agency costs of presidential misbehavior or incompetence.\textsuperscript{4} In recent years we have seen not a few examples of Administrations which would have fallen in votes of non-confidence in a House of Commons. Second, laws are enacted in excessive detail in presidential systems, as a consequence of the competition between the Executive and Legislative branches, where the latter seeks to bind the hands of present and future Executives.\textsuperscript{5} Third, bad laws such as Sarbanes-Oxley are more likely to be enacted when individual Congressmen, and not the Administration, can put their names on bills and take ownership of them. Grandstanding of this kind gives us the bubble laws decried by Stephen Bainbridge. Fourth, the separation of powers promotes wasteful spending at the initiative of individual Congressmen. Divided government empowers hold-outs (especially in the U.S. Senate) who can extract major concessions in return for their support. This is the “commons” problem to which Steven Magee alludes.
While all of these are troubling, our concern is with a further defect: the reversibility problem of presidential government. Bad laws get enacted in both systems, but can more easily be reversed in a parliamentary system.

B. Reversibility

It is generally conceded that America’s immigration system is broken. As noted in chapter 2, it sends valuable immigrants to other countries and weakens our economy. Admitting a greater number of economic immigrants would assist both them and native-born Americans. Immigration would become less contentious and the country would likely become more welcoming to new arrivals. But pray, just when might we expect such a benign reform to be adopted?

Immigration is one example of the reversibility problem. Chapter 2 suggests other examples, notably the burden of America’s debt crisis. As a percent of GDP, total government expenditures (federal, state and local) in the last few years exceed spending during the First World War and amount to three-quarters of our spending on the Second World War. The difference is that today we won’t see much of a peace dividend that comes when a war is over. What we will see are the enormous additional demands placed on Social Security and Medicare as the boomers retire. The question, then, is whether America can reverse course, as Canada did.

In 1994 the Canadian economy was in crisis. The country had a federal debt to GDP ratio of 67 percent (about where America is today), and the Wall Street Journal labeled it an honorary member of the third world. Over the next sixteen years, Canada’s federal debt fell to 29
percent of GDP, almost entirely from spending cuts. Economist David Henderson explains why it would be difficult for America to duplicate the Canadian experience.

There is … one important political factor that would make reform more difficult in the United States than in Canada: the structure of the U.S. political system. In Canada, once the Prime Minister has decided on the budget, the members of his or her Party almost always vote for it. Moreover, under Canada’s Constitution, the government, meaning the ruling party, has sole power to initiate expenditure proposals. Parliament’s only power on spending is to approve the government’s proposals in full, approve them at a reduced level, or reject them. In the United States, by contrast, there are three important players or sets of players: the president, the House of Representatives, and the Senate.7

It will similarly prove difficult to reverse the federal legislation which contributes to the decline in the rule of law. The Sarbanes-Oxley legislation described in chapter 7, the luxurious growth of federal criminal laws seen in chapter 8, the costly entitlement programs deprecated by Richard Epstein in chapter 9, all seem likely to remain features of our political landscape.

Reversing course is always harder than staring afresh. It’s easier to start a new program than to close an existing one; it’s easier to hire a public servant than to fire him. Every time a new program is begun, interest groups coalesce around it. Businesses and groups that profit from it will fight tooth and nail to prevent its repeal. This will happen in both presidential and parliamentary systems, but there are special reasons why reversibility is particularly difficult in the former case.

Getting legislation passed or repealed in America is like waiting for three cherries to line up in a Las Vegas slot machine. Absent a supermajority in Congress to override a Presidential
veto, one needs the simultaneous concurrence of the President, Senate and House. In a Parliamentary system, by contrast, one needs only one cherry. In Canada, neither the Governor-General nor the Senate has a veto power. All that matters is the House of Commons, dominated by the Prime Minister’s party. While his party commands a majority in the House and he enjoys his party’s support, the Prime Minister, like Hobbes’ Leviathan, is immune from the infirmities of divided sovereignty.

The difference between the two systems is magnified by the greater power enjoyed by political parties in parliamentary systems. In the United States, politicians, especially in the Senate, enjoy far greater independence from their parties than M.P.’s do in a parliamentary system. In Canada, Prime Minister Trudeau famously described his backbenchers as “nobodies,” and their lack of power was recently underlined by another Liberal Prime Minister.

Over the last forty years or so, Canadians have seen the influence of individual members of parliament eroded as the power of the prime minister and the executive branch of government grew. … They vote according to the dictates of their party, and too often, when their party is in power, no one in the government cares particularly what they have to say.

Canada and the United States are both eminently democratic countries. However, the centralization of power in the modern Prime Minister’s Office has no parallel in American politics. That’s a particular problem in modern politics, since decentralization of power in a presidential system makes it easier for a coalition of concentrated interest groups, such as trial lawyer groups and the K Street lobbyists of Washington, to shape our laws at the expense of the general welfare. An interest groups bargain, which redistributes wealth from everyone in society
to a small, concentrated and powerful group within society, and which imposes more costs on the former than it benefits the latter, is just the kind of corrupt bargain identified by Steven Magee.

To reverse this, what is needed is a grand coalition, a coalition of the whole of the voters, who will vote for the general welfare rather than the narrow interest of their Congressional district. Mancur Olson called this a “superencompassing majority,”11 one which treats minorities as well as it treats itself and stands in proxy for the nation as a whole. Discovering and empowering such a majority might then be thought the very goal of constitution-making. It was the idea behind Bolingbroke’s idealized Patriot King, who governs “like the common father of his people … where the head and all the members are united by one common interest.”12

Not everyone will endorse a constitutional regime that empowers a superencompassing majority. Some Americans identify less with the nation as a whole and more with the interests of a particular group within the nation. For them, questions of social justice turn primarily on how members of a particular class, defined by race, sex or sexual preference, might fare. They might not be willing to sacrifice the interests of their identity group, or might take the national interest to be nothing more than the sum of the interests of similar progressive groups. Further, those who take a broader view of the national interest might fear that majoritarian coalitions will not be superencompassing, that they will treat minorities unfairly; and that was precisely the problem which separationism’s checks and balances was meant to address. Even if one takes the national interest as the primary good, then, one might see the threat of majoritarian misbehavior as a greater evil than the minoritarian misbehavior of interest groups that prey off the public purse.

If it’s a trade-off between the two kinds of oppression, however, minoritarian misbehavior seems the greater concern. If majoritarian misbehavior were to be feared in America, we might expect to find that minorities have fared poorly in similar parliamentary
countries, such as Britain, Canada and Australia, which lack America’s separation of powers. But without putting too fine a point on it, there is simply no evidence of this.

As for the minoritarian misbehavior of wasteful rules adopted at the behest of narrow interest groups, these seem less of a problem in a parliamentary regime. In a presidential system, where national partiers are weaker, one votes for the Congressman who brings home the bacon to one’s district. In parliamentary systems, national parties are stronger, and with a two-party system and a diverse electorate a party requires broad, national support to be elected. It will therefore have a greater incentive to acquire a reputation that puts what it understands as the common good ahead of wasteful local projects. For their part, voters will have compelling reasons to believe that the party will behave in ways consistent with its reputation. In this way, the party’s interests will be more closely aligned with those of the country, and members of the party will be personally motivated to pursue the country’s collective interests.

Similarly, a Prime Minister’s interests will be aligned with those of his party and through it to the country as a whole. A Prime Minister needs the day-to-day support of his M.P.’s to remain in office. Though he may dominate his party he is ultimately responsible to it, and if he is seen to be a drag on its fortunes can be removed when his party turns against him, as happened to Margaret Thatcher in 1990 and (in Canada) Jean Chrétien in 2003. When he has adopted unpopular measures (e.g., the Iraq War in 2006, Obamacare in 2010), a Prime Minister is more likely to reverse course than a President who is elected for a fixed term and who cannot run for a third term. As such, Prime Ministers internalize their party’s interests, and the party internalizes the country’s interests. One is thus more likely to find Olson’s superencompassing majority in a parliamentary system than in the United States.
C. Parliamentary Moments in Presidential Systems

The concern about separationism might nevertheless be thought to be overstated, given the way in which the shape of American politics might reduce the problem. While the separation of powers tends to produce gridlock, this does not happen when one party scores a hat trick and takes the presidency and both branches of Congress. This has happened more often than one might think, 40 percent of the time since the Second World War, and this helps to explain how, for example, President Clinton passed his tax reform in 1993 with no Republican votes.

That’s not to say that bipartisanship is unknown in Congress. American political parties are not cohesive, and the 1964 Civil Rights bill and NAFTA in 1993 were passed with mainly Republican support. In the past, as many bills were passed in periods of divided government as when one party controlled all three branches of government. However, politics have recently become much more ideological. The smoke-filled backrooms of American politics are no more, their place taken by the energized grass-roots of democratized parties, and divided government is more likely to result in gridlock today.

This also understates the gridlock problem, in failing to account for the filibuster in the U.S. Senate, which since 1975 has permitted 41 senators to limit debate. Since 1979, no party has controlled all three branches and enjoyed a 60-person majority in the Senate, but for a nine-month period in 2009. Obviously, the filibuster is strongly anti-democratic. Sadly, it has been defended on the grounds that it enhances the doctrine of separation of powers at the core of the U.S. Constitution.

D. Pre-enactment Screening versus Reversibility
There is a downside to the dominance of the Prime Minister’s Office in a parliamentary system. Since they require the concurrence of different branches of government, bills might be thought to be vetted more closely in a presidential system. If so, the greater degree of pre-enactment screening under the separation of powers would make it less likely that a truly horrible bill would be enacted. On the other hand, it’s harder to repeal a bad law in a presidential system, which raises the question whether pre-enactment screening is more desirable than reversibility.

Which is preferable is an empirical or historical question. If the separation of powers really served the purpose of filtering out bad laws and bad ideas, then America should have fewer of them than parliamentary systems. Yet if one compares American policies with those of the parliamentary system it most closely resembles, what stands out are strong similarities, not differences: a broad franchise, federal incursion into provincial responsibilities via the spending power, social security, medicare and so on. Where there are differences, some relate to particular cross-country differences (e.g., bilingualism in Canada, affirmative action in the U.S.). And other differences (the litigation regimes of the two countries, for example) are ones where, this book has argued, the Canadian system seems preferable. If America had been helped by separation of powers, one might have expected that it would score it higher than parliamentary systems on measures of freedom—in which case the Heritage rankings seen in chapter 1 might seem an embarrassment.

The question whether reversibility matters more than pre-enactment screening will always give rise to partisan feelings. In the past, conservatives thought that ex ante screening was more important. Progressives, on the other hand, lamented the brake which the separation of
powers placed on new legislation. They looked back fondly to the first hundred days of the Roosevelt Administration in 1933, when the executive drafted bills which Congress rubber-stamped without debate. That was the closest that America ever came to a parliamentary system, and Progressives thought that that was how government should work. However, in 2011, when much of their agenda has been adopted, it is the Progressives who might prefer separationism and conservatives who will see a value in parliamentary government. The federal government is maxed out on its credit card, and we’re not likely to see many costly new initiatives from Washington.

There are nevertheless four reasons, generally free from the partisanship of the moment, why reversibility trumps pre-enactment screening. First, and most obviously, the bad laws passed without separationist screening can more easily be reversed in a parliamentary system. Easier passed, easier mended.

Second, it is easier to identify bad laws with the benefit of hindsight. Bad laws, based on bad ideas, with what are conceded to have bad consequences, are enacted everywhere. In dictatorships, bad laws are often bad from the start. In democratic regimes, bad ideas are typically recognized only after the fact. When one Parliament reverses a prior Parliament, it does so with more information than the prior enacting parliament. It will know better what works and what doesn’t. In America, by contrast, the benefit of hindsight is greatly diminished. To take but one example, no one seemed to expect how the 1965 immigration act would work out. Clearly Ted Kennedy did not anticipate that he would have to sponsor an immigration lottery to bring Irish immigrants to Boston. But that is the law we are stuck with. What separationism has given us is a one-way ratchet in which bad ideas are adopted and then turned into the laws of the Medes and the Persians.
Third, such pre-enactment screening as might occur does not seem greater in the U.S. than in parliamentary systems. Major amendments are quietly inserted at the last moment, escaping the scrutiny of regulators charged with overseeing the bill. Bills passed in the U.S. are significantly longer than their counterparts in a parliamentary system. At the extreme, a statute might be so lengthy as to greatly reduce any possibility of meaningful pre-enactment screening. One might have expected the Chairman of the House Judiciary Committee to have had something to say about Obamacare, whose constitutionality is now before the courts. John Conyers’ difficulty was that it’s a little hard to have an opinion about a bill one has not read. One can’t be unsympathetic, however. “What good is reading the bill if it’s a thousand pages,” said Conyers, “and you don’t have two days and two lawyers to find out what it means after you’ve read the bill?”

Finally, reversibility matters more than pre-enactment screening in the current economic crisis. Had one to choose between a presidential and a parliamentary system without knowing what year or country one was in, the choice might be not be easy. For example, there is empirical evidence that, between 1960 and 1998, presidential systems with their separation of powers were associated with smaller governments and smaller deficits. That period, however, was the high tide of Keynesianism, an illness to which parliamentary systems succumbed more quickly than presidential ones. Prior to that point, there wasn’t much difference between the two systems, as may be seen in chapter 2’s Table 4. In recent years, the United States has caught the same disease, and parliamentary systems are in recovery. The question today, then, is whether things can be turned around.

In sum, the greatest challenge for Western countries is to step back from economically harmful distributionist policies adopted in happier financial times; and this will prove harder to
do in America than in countries with a parliamentary system of government. At the moment, American decline is masked by a free falling Eurozone. It remains to be seen whether it and other countries will pull out before the U.S.

**The Courts**

While the differences between parliamentary and presidential systems are significant, one must be careful not to exaggerate them. Democratic countries, peopled by voters with similar values, tend to end up, if not in a similar place, at least not too far apart. In particular, the Supreme Court has in recent years moved to reduce the burden of excessive litigation. As Kip Viscusi notes, the Court’s *State Farm* decision has been taken to place an upward bound on punitive damages of no more than ten times the amount of compensatory damages, and a subsequent maritime law decision suggested the Court might be even more comfortable with a 1:1 ratio. The Court has also toughened the standards for what counts as expert evidence and limited standing to sue where the plaintiff does not suffer a direct harm. In June 2011, the Court tightened the rules for class action certification in a sex discrimination suit where the plaintiffs were unable to show that the claims of all the members of the class rested on a common contention. In another June 2011 case discussed by Viscusi, the Court rejected an action brought by several states and private groups to enforce EPA regulations.

Whether in presidential or parliamentary systems, federalism provides an important safety value. As O’Connor and Ribstein explain, states that ship business to other states because of inefficient laws have an incentive to cure them, and most states have in fact enacted some kind of tort reform legislation. That explains why interests groups prefer to promote legislation at the
national level, since one cannot exit a national law by moving to another state. Even then, not all federal legislation is plaintiff-friendly, and several recent federal statutes have sought to address the problem of excessive litigation, notably the Class Action Fairness Act of 2005 which expanded federal jurisdiction over class actions to reduce forum-shopping for favorable state courts.\textsuperscript{29}

The opposite mistake is to assume that first world legal systems do converge. As the essays by Jutras, Trebilcock and Bridge have shown, the differences between the private law rules of the U.S. and those of similar countries are substantial. While foreign countries have adopted American-style procedural and substantive rules, they have done so in the context of a very different legal culture, and the gap between America and the rest of the world never seems to narrow. Moreover, while tort reform statutes have been passed by most states, these have often been struck down by state supreme courts, as Michael Trebilcock notes.

A. Are State Courts the Problem?

If a legal rule should be reversed, one might not think to look to state courts for help. The difficulties described in this book are, in many cases, judge-made in state courts, and even if a rule is recognized as inefficient the doctrine of stare decisis restrains a court which seeks to depart from established precedent. In addition, state courts may lack an incentive to adopt the benign rules proposed in this book. State judges, particularly ones who are elected by the voters, might be expected to favor local plaintiffs as against out-of-state defendants, as this amounts to a wealth transfer from outside the state to their home state. Got to keep the base happy.
All state officials have an incentive to effect wealth transfers of this kind.\textsuperscript{30} Left unchecked, such policies may result in the wasteful beggar-thy-neighbor competition decried by Hamilton in \textit{Federalist} 22. For this reason, the Constitution’s Dormant Commerce Clause, discussed by O’Connor and Ribstein, prohibits states from erecting trade barriers against out-of-state firms. Similarly, federal environmental protection legislation prevents an in-state firm from polluting a neighboring state. The same kind of interstate exploitation might arise through an abuse of the litigation system. Where a state court imposes massive punitive damages on an out-of-state firm, as described by Trebilcock and Viscusi (on product liability), what it does is the economic equivalent of dumping pollution onto another state.

Had this been written ten years ago, I might have concluded that interstate exploitation by state courts is endemic in the United States. Now I am less than sure, for the departures from the rule of law discussed in this book are increasingly addressed by many of the same state courts which were the source of the problem. The excessively plaintiff-friendly decisions of which George Priest complained came from judges who were elected by the voters, rather than appointed by governors or legislatures. Within the last ten years, however, these problems have increasingly been resolved by these same courts.

First a word about how states chose their judges. In twelve states (mostly in the east), judges are appointed by politicians. Another twelve states elect judges in partisan elections. The remaining states have modified electoral systems. In some of them, elections are non-partisan and judges run without a party label. In other states, judges are appointed by a “merit” panel and thereafter run for retention.

In the past, the role played by judicial elections, in the shaping of private law rules, did not attract much notice. Some scholars regretted that judges elected in partisan elections were
tougher on criminal sentencing, but there was little discussion about their views on private law issues. Partisan elections were sleepy, low-key affairs, with judges nominated by trial lawyers, from amongst their members, who contributed most of the moneys it took to run a campaign. This blissful pre-lapsarian world came to an end over the last 20 years, especially after 2002 when the U.S. Chamber of Commerce began spending money—big time—on an election for a Mississippi Supreme Court judge.\textsuperscript{31}

What preceded this was the great increase in tort liability described by George Priest, beginning in the 1960s, and the discovery by plaintiffs’ lawyers of favorable jurisdictions that welcomed forum-shopping. The Chamber called these “judicial hellholes,” and one of them was Mississippi, a state with an anti-business judiciary that favored trial lawyers. “Hellhole” has a pejorative ring to it. As Ramseyer and Rasmusen note, Dickie Scruggs preferred to call Mississippi a “magic jurisdiction.” It was one of those states where, according to Scruggs, it was almost impossible for defendants to get a fair trial. In particular, Jefferson County, Mississippi, pop. 7,726, one of the poorest counties in the nation, was especially welcoming for plaintiffs. Indeed, there were almost as many plaintiffs as there were residents in the county.\textsuperscript{32} But all that is gone with the wind. In the last ten years Mississippi has enacted tort reform legislation and (after the Chamber stepped in) the voters turfed out a former president of the Mississippi Trial Lawyers Association from the state Supreme Court.

Since then the costs of judicial campaigns have greatly increased. Both sides have campaigned furiously, with all of the vulgarities of modern electioneering. If anything, it’s worse in judicial elections. A friend of mine, a law-and-economics academic at the University of Alabama, ran for his state’s Supreme Court, and was opposed by trial lawyers. Their television ads told viewers, in a shocked tone, “Did you know that Harold See never even passed the state
bar!” Actually, Harold didn’t have to write the state bar exams. As a law professor in the state, he was waived in. Harold won, as it turned out, but not before learning that the trial lawyers’ ad had backfired on one voter. An old farmer told him “I want you to know that I’m going to vote for you because I hate lawyers.”

B. Are Judicial Elections the Problem?

In recent years, business group have outspent the competition, and judicial elections, which formerly favored trial lawyers, now advantage conservatives. This trend received an assist from the Supreme Court, which in 2002 held that judicial candidates could not be barred from discussing issues that might come before them if elected. Unsurprisingly, the change is unpopular with judges, who now must spend more time campaigning and raising money. The change has also upset the legal ethics community (which had not been conspicuous in objecting to the ancien régime).

Various reform measures have been passed to remove the taint of money and politics from judicial elections. In North Carolina, for example, elections are non-partisan and judicial candidates are not identified by party. The result is that voters go to the polls with essentially no information about who the candidates are or what they believe. Party-line voting for judges might seem a little déclassé, but it does tell voters something about judicial candidates. Brand name advertising offers the same kinds of informational benefits in judicial elections as it does in consumer markets. As Joshua Wright and Eric Helland note, consumer advertisers have an incentive to acquire a reputation that buyers trust, and the same is true of political parties in partisan judicial elections. A party will screen candidates and select those who can competently
contribute to its reputation and its views on civil justice. Voters will know better for whom they are voting, and the judges they elect will better reflect their views. Such a system would seem considerably more faithful to constitutional value of free speech than one which banned party affiliations. As Chief Justice Roberts has noted, “[i]n a democracy, campaigning for office is not a game. It is a critically important form of speech.”

Of course, the disfavored brand would like nothing better than to ban brand advertising. For Number 2, it beats trying harder.

The most widely-copied model for election reform is the “Missouri Plan,” in which judges are first appointed by a merit commission composed of lawyers, judges and political nominees. After sitting for a year, the newly-appointed judge must run in a retention election, in which voters can decide either to retain or dump him. Sometimes they do get dumped, but the Missouri Plan does tend to promote stability and (its proponents argue) integrity and competence on the bench.

Three criticisms of the Missouri Plan and other efforts to weaken voter rights in judicial elections have nevertheless been made. First, it is said that such efforts are politically motivated, and that, as a matter of fact, lawyer-run merit commissions are biased in favor of liberal judges and the plaintiffs’ bar. Missouri itself provided an instructive example of this in 2004, when Republican Gov. Matt Blunt tried to appoint a conservative to the state Supreme Court. Blunt had run on a pledge to rein in a liberal bench, but the merit commission presented him with a stacked choice: two qualified liberals and one less than qualified conservative. If Blunt had rejected all three, the choice would have been left to commission. For conservatives, games of this sort breed cynicism about merit commissions and the ethical watchdogs who complain about judicial elections. Things were fine when the plaintiff’s lawyers dominated the process, but it’s a scandal when the Chamber takes a round or two. At times one is reminded of Citizen Kane.
When it becomes clear that Kane will lose an election, editors at his newspaper sadly abandon the “Kane Elected” headline for “Fraud at Polls!”

Secondly, judges elected in partisan elections do not appear to be of inferior quality. As a proxy for intellectual ability, scholars today look to cite counts, which for judges would be the number of times their opinions are cited by other judges. Individual opinions by appointed judges are more frequently cited than those for elected judges. Nevertheless, elected judges are cited more frequently in total, since they write more opinions; and judges elected in partisan elections are cited most of all.

Another measure of the quality of a judge is his independence. We would want our judges to be free of political bias and to judge each case on its merits. Once again, however, there is not much difference between the two kinds of judges on measures of independence, such as the willingness to write opinions in which one disagrees with ostensible political allies.³⁸

An elected judge’s independence might be in question if he is seen to favor contributors to his campaign. In exceptional cases, this might indeed be a problem. In Caperton v. Massey, for example, the Supreme Court held that a judge’s failure to recuse himself violated the plaintiff’s right to a fair trial, when the defendant’s CEO had spent over $3 million in support of the judge in the previous election.³⁹ One must nevertheless distinguish between such cases and that of the judge who, elected with corporate support, is subsequently found to adopt pro-business views in his decisions. That is not enough to impeach a judge’s independence. Absent the special facts of a case such as Caperton, one should assume that judges act in good faith, and that they receive donor support because of their prior beliefs, and not that they have tailored their beliefs to their donors’ wishes.
Corporations, trial lawyers and individuals support candidates with whom they agree (and water flows downhill). We would therefore expect judges elected with corporate support to be less plaintiff-friendly than merit-appointed judges. However, that’s not evidence of improper bias unless one assumes that merit-appointed judges are free from bias; and that’s just what conservatives deny, since they assert that merit-appointed judges elected by lawyers are excessively plaintiff-friendly.

Thirdly, partisan elections for judges will appeal to those who see the law as political in nature. For Formalists such as Williston, law was a separate discipline, with its own integrity, and clearly distinguishable from the practice of politics. With the decline of Formalist conceptions of the law, and the expansion of the role of courts into matters once thought political, the distinction between law and politics is harder to make. Today, judges manage school boards and prisons; they enforce broad social policies about race and gender; they decide who wins a close election. If these aren’t political decisions, then what is? Formerly this was a point made by Critical Legal Scholars on the left; but now some conservatives say much the same thing. If the bench has become politicized, then why not elect judges directly and cut out the middleman?

C. Judicial Elections and the Rule of Law

We end, therefore, where we began, in search of a definition of the rule of law. I have argued that the rule of law must have a substantive component, that it must embrace private law rules which promote the security of property and of contract rights, that what Ramseyer and
Rasmusen call “judicially sanctioned theft” is inconsistent with the rule of law. But I have also suggested that judicial elections might usefully promote the rule of law, so understood.

Have I been inconsistent? One thing which the rule of law requires is a border between law and politics. Does that mean that Mississippi, where judicial candidates are identified by party label, has a rule of law problem and that North Carolina does not? This sort of reasoning is apt to be thought persuasive by one who thinks that federal judges, appointed by the president with the advice and consent of the senate, are sterilized from politics because they are not elected. If it’s voting that politicizes an office, then what must one say of the voters who comprise the Senate Judiciary Committee? They are, if anything, more politicized and more ideological than most voters; and yet, if anyone upholds the rule of law, it is federal judges. Political inputs don’t necessarily mean politicized outputs.

When given the kind of informed choice which only campaign spending provides, voters tend to elect judges who favor the more conservative civil justice principles of Britain and Canada, as seen in the essays of Michael Bridge and Michael Trebilcock. Members of the judicial ethics establishment who object to this must be thought to regard Anglo-Canadian law as retrograde. They defend a kind of American Exceptionalism which plausibly weakens the substantive rule of law and contributes to American decline.

In sum, I have argued that America’s retreat from the rule of law contributes to its decline. What I have not done is examine the weaknesses of other countries. As I write this, there is increasing unrest in China, and a fiscal crisis in southern Europe which threatens European economic integration. America and its competitors all have their own infirmities. As these are become apparent, what matters is reversibility, through the courts, through the legislature.
Notes to Chapter 10

1 This was a free trade era, when the burdens of colonial possessions were thought to exceed any benefits Britain might derive from them. The idea of imperialism, which we associate with preferential tariffs and Joseph Chamberlain, with the white man’s burden and Kipling, was a subsequent British invention.


9 “There is a sixth doctrine, plainly and directly against the essence of a Commonwealth, and it is this: that the sovereign power may be divided. For what is it to divide the power of a Commonwealth, but to dissolve it; for powers divided mutually destroy each other.” Leviathan, ch. 29 (1660).

10 Paul Martin, Hell or High Water: My Life in and out of Politics 244-45 (2008).


12 Bolingbroke Political Writings 257-58 (David Armitage ed., 1997).


14 See Gary W. Cox and Mathew D. McCubbins, Legislative Leviathan: Party Government in the House 121-22 (2d ed, 20007). The distinction between presidential and parliamentary systems is sharpest when the latter is effectively unicameral (Britain and Canada) and the upper house cannot veto a bill. There are intermediate systems: a bicameral parliamentary system (Australia) or a multiparty parliamentary system, either with proportionate representation (New Zealand) or without (Canada, at times). See George Tsebelis, Veto Players: How Political Institutions Work (2002).


20 Reversibility might introduce a credible commitment problem. To attract investment, whether from natives or foreigners, a state must make an implicit promise not to change the rules of the game. Douglass C. North and Barry R. Weingast, Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England, 49 J. Econ. Hist. 803 (1989). By making it difficult to amend laws, then, the separation of powers might be thought to solve the credible commitment problem and attract investment. However, the sharp decline in America’s share of global foreign direct investment, seen in chapter 2, suggests that investors do not see the U.S. as uniquely able to offer credible commitments. A parliamentary system, in countries with a long tradition of political and economic liberty, where economic stakeholders are well-represented in parliament, where a government is more readily held responsible for economic decline, with moreover a federal system of government, a strong auditor-general, an independent judiciary and central bank independence, might seem as easily able to bond itself to
protect the expectations of investors. For an empirical study of credible commitments and economic growth rates, see Irfan Nooruddin, Coalition Politics and Economic Development: Credibility and the Strength of Weak Governments (2011).

21 For example, the cost which the housing crash imposed on the federal government was greatly increased by an obscure amendment inserted by Senator Dodd (D. Ct.) which made FDIC emergency financing available to insurance companies, most of whom were located in the Senator’s state. Gretchen Morgenson and Joshua Rosner, Reckless$ Endangerment: How Outsized Ambition, Greed, and Corruption Led to Economic Armageddon 40-41 (2011).


31 Prior to then, judicial elections appeared to favor the plaintiffs’ bar. See Alexander Tabarrok and Eric Helland, Court Politics: The Political Economy of Tort Awards, 42 J. Law & Econ. 157 (1999).


North Carolina’s election law, which permitted publicly-financed candidates to receive matching public funds if they were outspent by a privately-financed opponent, must now be thought unconstitutional. McComish v. Bennett, 546 U.S. ___ (2011).


