

## DO JUDGES KNOW BEST?

**DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER.** By Ilya Somin.<sup>1</sup> Stanford, Cal.: Stanford University Press. 2016 (Second Edition). Pp. xiv + 291. \$27.95 (cloth).

*James Allan*<sup>2</sup>

Labels are notoriously slippery tools. Just think of the debate between “natural law adherents” and “legal positivists” on the nature of law. Whether the holders of these two views are in fact disagreeing at all depends on what you take to be the content behind the respective labels.<sup>3</sup> Or take the two camps of legal positivism, the “internal legal positivists” and the “external legal positivists.” Are they in fact disagreeing about whether, at least sometimes, moral norms can be among the legal determinants of the law (so not just social facts determine the law in all legal systems ever to have existed), *or* is this debate merely one of terminology and of no real significance?<sup>4</sup> Again, your answer may be influenced by what you take to fall within the aegis of these two accounts of the nature of law. The point is that we humans cannot think at all without labels, but at times we cannot think well with them.

And that brings me to those of us who think comparatively smaller government tends to produce better human welfare outcomes than bigger government; who favor giving individual humans plenty of scope to make calls for themselves (when it comes to what they can say and much else); and who think the

---

1. Professor of Law, George Mason University School of Law.

2. Garrick Professor of Law, T.C. Beirne School of Law, University of Queensland.

3. For example, Larry Alexander says this: “On this account, positivists and natural lawyers are not disagreeing, for they are each discussing the nature of a different thing. The positivists are discussing law, the natural lawyers, LAW [i.e. non-degraded, true law]. Neither need deny the others’ claims.” Larry Alexander, *Was Dworkin an Originalist?*, in *THE LEGACY OF RONALD DWORKIN* 299, 307 (Wil Waluchow & Stefan Sciarra eds., Oxford, 2016).

4. See James Allan, *A Modest Proposal*, 23 OXFORD J. LEGAL STUD. 197 (2003).

private sector usually out-produces the public sector. That package of views would describe me. Yet I would not describe myself as a “libertarian.” Too many self-described libertarians seem to me to hold core-level views that are grounded in natural rights thinking where I am at core a consequentialist. Likewise, a good many libertarians leave me uncertain that they would be prepared to make anything like the compromises I would make as regards national security and national sovereignty and just generally Hobbesian “we live in a dangerous world” concerns. Thirdly, and no less importantly, most libertarians do not seem to share my views about democracy, by which I mean majoritarian “let the numbers count” democracy.<sup>5</sup> I see it as the least-bad decision-making option available, and certainly a good deal better than the sort of strong judicial review that exists in my native Canada or in the United States, where nearly all (Canada) or probably most (the United States) top judges adopt some version of a “living tree”<sup>6</sup> or “living Constitution” interpretive approach, under which these same unelected judges end up deciding a whole host of social policy issues.<sup>7</sup>

So I am inclined to shun the label “libertarian.” My guess is that the author of this fine book, *Democracy and Political Ignorance*, would welcome it. Yet, as regards the first-order substantive issues related to one’s ideal size of government or the desirable scope individuals ought to be left with to shape their own lives, Professor Somin and I seem to be broadly in agreement. However, on the question of democracy, and when the majority

---

5. See JAMES ALLAN, *DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION* (2014).

6. This phrase was made famous, in the Westminster common law world, by Lord Sankey in the Privy Council case from Canada of *Edwards v. Canada (Att’y Gen.)*, [1930] A.C. 124 (Can. P.C.). This “living tree” term is the broad equivalent outside the United States for what Americans describe as a “living Constitution” approach.

7. The list of such issues in the United States will be well known to readers. In Canada the list includes same-sex marriage (*Halpern v. Canada (Att’y Gen.)*, [2003] O.J. No. 2268 (Can. Ont. C.A.); euthanasia (*Carter v. Canada (Att’y Gen.)*, [2015] S.C.C. 5); the scope of free speech (in *RJR-MacDonald Inc. v. Canada (Att’y Gen.)*, [1995] 3 S.C.R. 199 (Can.), it was held that restrictions on tobacco advertising were inconsistent with the freedom of expression, but this was overruled in *Canada (Att’y Gen.) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 (Can.)); the treatment of those claiming to be refugees (*Singh v. Canada (Minister of Emp’t and Immigr.)*, [1985] 1 S.C.R. 177 (Can.)); whether prisoners can vote (*Sauv. . . v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 (Can.), overruling *Sauv. . . v. Canada (Chief Electoral Officer)*, [2000] 2 F.C. 117 (Can. C.A.)); whether Parliament can prevent inroads into the scope of the one-size-fits-all nationalised health system (*Chaoulli v. Quebec (Att’y Gen.)*, 2005 S.C.C. 35, [2005] 1 S.C.R. 791 (Can.)); and so on.

ought to prevail, we clearly are not. That said, and I will return to say more below, this is a book well worth reading. It is an updated second edition packed with interesting details, with the careful elucidation of arguments and counter-arguments, with the telling *aperçu*, and all in the service of the book's main theme, that voters are on the whole pretty ignorant, and, more to the point, that this ignorance is probably rational from their point of view. Nor is this thesis put forward in the service of arguing for ways to make voters better informed about political matters. Somin tells us at the end of chapter seven, the final chapter before his conclusion, that "the painful reality is that we cannot count on any major increase in political knowledge in the foreseeable future" (p. 223). No, this thesis about voter ignorance is basically part and parcel of a larger critique of majoritarianism. Think of it as the plaintiff's brief for judicially enforced constitutional rights of a broadly Richard Epsteinian sort.

Now I reject that desired end point or core position for reasons I will sketch out in a moment. Nevertheless, I am very glad that I read this book. It was stimulating. It was well-written. It did all the John Stuart Mill things about making one think again, and questioning one's own positions, that you would like a book to do. If you have an interest in constitutional law, and whether you classify yourself as a libertarian, a majoritarian, or something else again, put this book on your list to order.

In the rest of this article I will do two things. Firstly, I will give an overview of Somin's book. Then, secondly, I will say why I did not find its rejection of majoritarianism to be convincing. As for the overview, this is a seven-chapter book with an introduction and conclusion. The first chapter runs through a host of data, at times depressing, indicating the levels of political ignorance. Put more bluntly, Somin tells you just how little the preponderance of voters actually knows about issues and, well, facts. The second chapter considers whether, nevertheless, they know enough basic facts to pass the implicit hurdles of various theories of representative democracy. Somin concludes that the answer is "no." "Public knowledge levels fall well short of the requirements of normative theories of political participation" (p. 73). Then the author moves to arguing that this political ignorance is "rational"—not a sign of stupidity, but of rationality. "Political ignorance is rational because an individual voter has virtually no chance of influencing the outcome of an election—possibly less

than one in one hundred million in the case of a modern U.S. presidential election” (p. 75). Somin says this point applies as much to “highly altruistic and civic-minded citizens as to narrowly self-interested ones” (p. 78). There is a caveat however. “[I]t turns out that the decision to vote is rational so long as the voter perceives a significant difference between candidates and cares even slightly about the welfare of fellow citizens, as well as his or her own” (p. 80). Refinements on this get considered, such as possibly caring about the size of a mandate, and how “some other reason not clearly related to voting” (p. 97) will, in Somin’s view, be the most powerful determinant of one’s political knowledge.

That is the first half of the book, more or less, in which the author analyzes the nature and extent of the problem of political ignorance in a democracy like the United States. Lots of data; lots of social science; lots of asserted ignorance, albeit of a sort claimed also to be rational. Then the last four chapters shift to considering what Somin considers to be potential solutions. As noted above, Somin is pessimistic about voters becoming better informed any time soon. That is chapter seven, the last one. Nor does Somin think that various “shortcut” aids that might guide voters are sufficient to overcome his earlier critiques. Yes, there is “considerable merit” to the argument that “voters can infer candidates’ policy stances from their partisan affiliations rather than undertaking the much more difficult task of inquiring into the views of each individual aspirant to office” (p. 109). But there is not enough merit to this claim, says Somin. Nor is there enough from the idea that voters might follow the lead of “opinion leaders” (p. 115), or that voting based on past performance, “retrospective voting” (p. 117), might on balance do the trick. That is chapter four, which even looks at the Condorcet jury theorem (p. 133).

That leaves just chapters five and six. The former is about what Somin calls “foot voting,” or moving to jurisdictions with policies more palatable to the individual. In the United States that means moving between the various 50 States. This ties in to federalism and the decentralization of decision-making. Somin is a fan of this foot voting, despite recognising and detailing the admitted costs. With foot voting, the incentives, he says, are better than when it comes to ballot-box voting. Accordingly, for the author (and when it comes to seeing the upsides of foot voting I am more than a little sympathetic, and certainly agree with the

author's support of federalism), this counts as a real solution to the problem of political ignorance. The other claimed solution to the problem laid out in chapter six, an even more crucial solution for Somin on my reading of the book, is strong judicial review—unelected judges being given the power to invalidate or strike down the elected legislature's laws on the basis of their interpretation of a written constitution.<sup>8</sup> It is here where I strongly differ with the author and here that I will focus in what remains of this review. He rejects majoritarianism. I think it is the least-bad option going. Even more to the point, I think majoritarianism is the only option that has any chance at all of delivering anything like the first-order substantive policy positions Somin favors.

Why? Start by remembering that Somin's critique of majoritarianism is not intended as some sort of brief for Euro-leftism or for the democracy-enerivating—I would say democracy-emasculating—arrangements of the European Union. No, it is meant as a brief for judicially enforced constitutional rights that will deliver broadly libertarian outcomes. And yet Somin's dislike or distrust of majoritarianism is certainly extremely reminiscent of the attitudes of, say, Jean-Claude Juncker, the President of the European Commission, who talks as though there are a good number of things more important than letting-the-numbers-count democracy.<sup>9</sup> Not terribly dissimilarly, Somin's tone is of the “democracy is okay within limits, old chap, but let's keep a firm lid on things” variety. Here is how the author puts it:

Unlike Plato and the totalitarians, I do not argue for a *complete* rejection of democracy. I accept the evidence that democracy generally functions better than alternative systems of government... [including because democracies are] more likely to avoid major policy disasters and do not commit mass murder

---

8. Such is the relatively recent growth in the extent to which common law judges around the English-speaking world are prepared to second-guess and gainsay elected legislatures that one could argue that this is happening even in jurisdictions without a written constitution, meaning in the United Kingdom and New Zealand. I make just such an argument myself. See James Allan, *Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 108 (Tom Campbell et al. eds., Oxford Univ. Press 2011).

9. “Monetary policy is a serious issue. We should discuss this in secret, in the Eurogroup [...] I'm ready to be insulted as being insufficiently democratic, but I want to be serious [...] I am for secret, dark debates.” Jean-Claude Juncker, *quoted in* Valentina Pop, *Eurogroup Chief: I'm for secret, dark debates*, *EUOBSERVER* (Apr. 21, 2011, 10:01 AM), <https://euobserver.com/economic/32222>.

against their own people.... But the superiority of democracy over other forms of government leaves open the possibility that democracy might function better if its powers were more tightly limited” (p. 9, internal footnotes omitted and emphasis mine).

“Phew,” was my first reaction on reading that it was not to be a *complete* rejection.

More seriously, Somin builds up a case that focuses on facts. “Throughout this book, I focus primarily on political knowledge defined as awareness of factual matters related to politics and public policy” (p. 9). The explicit thesis he lays out is that the voters simply do not have enough knowledge of those facts. Of course, that alone is not enough to defeat my sort of “democracy is the worst form of Government except all those other forms that have been tried from time to time”<sup>10</sup> Churchillian defense of majoritarian democracy. Hence Somin also relies, implicitly, on an unspoken premise that some sort of caste of experts—be they unelected judges or bureaucrats or something else again—that does have this knowledge of facts, and (to make the argument work properly) has it to a noticeably higher degree than do the voters, will tend to make better decisions, all things considered (including taking account of the costs of this sort of paternalism, whose costs Somin ignores). I will be blunt here and say straight out that I am skeptical as regards this Sominian unspoken premise or faith in a caste of experts. I doubt very much that such experts would outperform majoritarian democracy—which I stress again is a comparative claim on my part, not a rose-tinted brief for majoritarianism as some sort of unsullied good.

Take the euro currency in the European Union. A more top-down, expert-imposed policy decision is hard to imagine. It is overwhelmingly likely that the German voting population would have rejected it out of hand, if ever they had been given the opportunity to have a say. With the benefit of hindsight, it seems pretty clear that it was a mistake for some countries to enter into this new supranational currency, and in the long term that probably includes Germany. The fact-filled experts misfired. Likewise with immigration in Europe, at least if you believe that Angela Merkel’s recent unilateral decision to welcome a million people claiming to be refugees counts as a decision that was taken

---

10. 444 Parl. Deb. H.C. (5th ser.) (1947) col. 203 (UK).

outside of majoritarian constraints — which looks very plausible in the light of the results for her political party since she announced that decision.

Other examples are hardly difficult to list. The EU's Common Agricultural Policy is another expert-driven policy. Its long-term effects may be amongst some of the most insidious and malign going for whole swathes of the Third World. Or take any of the various United Nations bodies. When the United Kingdom attempted to reform its welfare laws to link government housing supply more directly to the number of inhabitants via a "bedroom tax," which was a much less sweeping welfare reform than what Bill Clinton signed into law in the United States, the UN's Special Rapporteur on Adequate Housing, Raquel Rolnik — who surely must qualify on the face of things as an "expert" — called for the immediate suspension of this so-called bedroom tax.<sup>11</sup> Or, again, there is the UN Panel that found in favor of the claim made by Julian Assange, of WikiLeaks notoriety, that he has been subjected to "arbitrary detention." This Panel, by a 3-1 count, recommended Mr. Assange's immediate release and (for good measure) some monetary compensation.<sup>12</sup> Again still, at least if one is inclined to count the United Nations Human Rights Council as possessing expertise when it comes to human rights, then there is the fact that it — together with the United Nations General Assembly — has issued more resolutions alleging rights-infringing conduct against Israel than against all other countries on Earth, combined! And note that all of the examples in this paragraph are happily free of the taint of majoritarian decision-making.

---

11. U.N. Rep. of the Hum. Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, Dec. 30, 2013, U.N. Doc A/HRC/25/54/Add.2 (2013), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/191/93/PDF/G1319193.pdf?OpenElement>. See too the Special Rapporteur's interview in *The Guardian* newspaper, Amelia Gentleman, 'Shocking' Bedroom Tax Should Be Axed, Says UN Investigator, THE GUARDIAN, Sept. 10, 2013, <http://www.theguardian.com/society/2013/sep/11/bedroom-tax-should-be-axed-says-un-investigator>.

12. This conclusion seems patently absurd to me. But there is no denying that the people who made it would be classed as "experts." See U.N. Rep. of the Hum. Rights Council, *Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Fourth Session, 30 November–4 December 2015*, U.N. Doc. A/HRC/WGAD/2015 (2016). For what it is worth, the former director of public prosecutions in England, Ken Macdonald QC, characterised the reasoning of these "experts" as "beyond parody." I'm inclined to think Mr. Macdonald was being too kind.

However, and despite the fact I could go on and on in these types of realms with similar examples of supposed “experts” with great knowledge reaching extremely suboptimal results, perhaps all this is unfair to Somin. There is nothing in the book that indicates he has any fondness for the supposed expertise flowing from European Union officials or commissioners, or from any United Nations body. So let us take an example of the results of claimed expertise somewhat closer to home. Universities are packed full of smart people who have as much knowledge of facts as any people alive. How do such experts do when it comes to running universities themselves? Not well, by my way of thinking.<sup>13</sup> In fact I lean towards agreeing with William Buckley’s famous line that he would rather entrust the government of the United States to the first 400 names in the Boston phone book than to the faculty of Harvard University. Still unfair to Somin? Okay, so forget that too. How about the many experts who have designed and implemented the Affordable Care Act, admittedly a change passed by the elected legislature? Are these the sort of experts Somin has in mind as non-ignorant decision-makers, people he believes will deliver the sort of small government and free market outcomes he wants?

I suppose what I would have liked to have read in this book is why Somin believes that in the long-term experts (however he would end up defining that term) will have a better hit rate than voters in delivering the sort of first-order substantive outcomes he wants. Put differently, if you are going to pour the cynical acid of public-choice-type theory on voters, why not pour it on “experts” and on unelected judges too?

And that takes me to chapter six of the book, the one in which Somin makes his positive case for strong judicial review. After all, perhaps the only experts Somin really has any faith in at all to oversee, guide and gainsay the voters are the top judges in a common law jurisdiction, or, more narrowly still, maybe it is just the top judges in the United States. If so, it is here that he and I really part company. In effect, Somin rejects or significantly downplays (depending on your reading) the so-called countermajoritarian difficulty. He does not fully endorse what he calls “the radical interpretation of the impact of voter ignorance”

---

13. In the Australian context, see James Allan, *Why Australian Universities Are Not Good Enough*, QUADRANT, Mar. 2014, at 81.

(p. 185), which asserts that voter ignorance means that no legislation truly reflects the will of the majority, so that while judges cannot “simply overturn legislation anytime they wish ... they should not refuse to overturn it for fear of acting in a countermajoritarian fashion” (p. 186).

Instead, after noting that he believes “the radical view has some merit” (p. 186), Somin concedes that some legislation does in fact reflect majority will and where that is not clear there is still the chance it has “penetrated the barriers of political ignorance despite the odds against such an occurrence” (p. 186). So the author prefers a less radical, more moderate approach under which “the problem of political ignorance does not completely eliminate the countermajoritarian difficulty but does greatly reduce its significance” (p. 187). Basically this “moderate” approach boils down to asserting that “[s]ince most legislation has only limited majoritarian significance, if any, countermajoritarian concerns should be far more easily outweighed by other considerations than earlier theories suggest” (p. 188). What counts as falling within the ambit of “those other considerations” Somin does not tell us. Such a “complete theory of the range of values that should influence constitutional decision-making by the judiciary is outside the scope of this chapter” (p. 188), according to the author.

Put differently, Somin thinks that worries about the countermajoritarian difficulty—in my terms, the worry or difficulty that you will not achieve good long-term outcomes when a handful of unelected ex-lawyer judges are deciding a host of social policy issues over the heads of 300 million plus citizens, and doing so by themselves (as Jeremy Waldron<sup>14</sup> has shown), employing the strictly majoritarian procedure of 5 beats 4 counting of judicial votes—amount to very little indeed. For him, it is “the ‘correct’ theory of constitutional law” (p. 188) that overwhelmingly matters with majoritarian concerns being tangential, at best. Heck, Somin goes so far as to say (though, truth be told, I found this point hard to follow, if not smacking of *Alice in Wonderland*) that strong “judicial review sometimes actually *increases* the majoritarianism of the political system by reducing the anti-majoritarian impact of voter ignorance” (p. 189,

---

14. See, e.g., Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts*, 123 YALE L.J. 1626 (2014).

emphasis in the original). I think Somin's claim here is that unelected judges can help keep the size of government more limited, and indeed limit what government does more generally (p. 190), though why we should pre-suppose that a majority of voters in some actual jurisdiction will or ought always to prefer that is beyond me. Likewise, whether today's top common law judges are a force for smaller government and less bureaucratic activity is clearly an empirical issue—a question of fact as Somin would put it—and personally I am very skeptical on that front too. Indeed, Somin hedges his bets by later saying that this supposed representation-reinforcing effect “applies only to judicial actions that limit the powers of other branches of government over the private sector,” not to “[j]udicial decisions that replace the power of other branches with judicial control” (p. 191). But that seems like cherry-picking to me, as there will always be a few cases from a top court to fit just about any theory or worldview.

At any rate, I hope that suffices to give a sense of where Somin attempts to take the reader. Remembering that my support for majoritarianism is of the “least-bad option available” variety, I will finish this article by raising what I think are two significant problems for the author's distrust of, dislike for, and disappointment with majoritarian democracy vis-à-vis strong judicial review.

Firstly, I think there is more to the fact/value dichotomy than Somin appears to think. Somin tells the reader right at the start that he will focus on “awareness of factual matters related to politics and public policy” (p. 9); that “[d]isagreement over some issues, such as abortion, may largely be determined by conflicting fundamental values, with little role for factual information” (p. 11, internal footnote omitted); but that on “a vast range of major political issues ... differences ... turn primarily on disagreements over how to achieve widely agreed-upon goals, such as economic prosperity, crime reduction, environmental protection [and more]” (p. 11). So the picture he paints is one where social policy choices (outside of, perhaps, one's preferred abortion regime) would become largely self-evident provided all of the disputants knew (or agreed on) all of the facts.

Yet I doubt that very much. From way back in my doctorate days onwards I have been in David Hume's philosophical camp,

and certainly preferred him to Immanuel Kant.<sup>15</sup> I think Hume is correct that reason is inert and that it is the sentiments that move action, so the Humean conception of reason strikes me as more plausible than the Kantian one; I think Hume's right too about the naturalistic fallacy—his point that there is an error involved in attempts to derive an “ought” from an “is” (though, as with Utilitarians, you can dissolve away all “oughts” and make them functions of the “is,” of what happens to make the greatest number of humans happy, and doing that will not breach Hume's Law); and I think Hume's position against moral realism and in favor of moral scepticism or non-cognitivism—that moral evaluations do *not* possess a mind-independent status—is also correct. Put differently, and leaving aside the philosophy, it is not just facts about the external, causal world that determine people's preferred social policy positions. We all bring different sentiments and preferences to the table. So we can know (or agree) all the costs of climate change and of a carbon tax and yet some will want to forego “5 units” of current consumption, some “20 units,” and some will want to put money into coping with a changed world rather than foregoing any current consumption by cutting emissions. Or take the purely economic realm. Is it irrational or against reason to prefer to reduce relative inequality, even if (let us assume) such inequality-reducing-steps would lower a society's overall wealth levels, and indeed would even make the bottom quintile of the population poorer? I don't think so. Some people might simply prefer or value more relative equality to preferring more overall wealth in society, or even to preferring more absolute wealth for the bottom quintile than what they would have if inequality were not being reduced. Now that favoring of more equality over more absolute wealth (or more absolute wealth for those at the bottom) would not be my preference, nor would it be Somin's. But neither is the holding of that preference irrational, at least not on the Humean understanding of reason.

Somin seems to me to skate over these deep philosophical matters and just assume that most of the time “the facts” will do the work (or enough of the work) needed to resolve disagreement so that all that stands in the way of knowing what to do is political ignorance. Hence, for Somin, we just need to inject a bit of

---

15. See JAMES ALLAN, *A SCEPTICAL THEORY OF MORALITY AND LAW* (1998). Or better yet, see J. L. MACKIE, *HUME'S MORAL THEORY* (rev. ed. 1980) and J. L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1991).

aristocracy (of the modern judicial variety rather than the older land-holding sort) into the political system and by doing that we will outperform the calls that would be made under a majoritarian set-up driven by the voters, such as you see most clearly in New Zealand (which, by the way, ranks higher in terms of economic freedom than does the United States, with its strong judicial review<sup>16</sup>), or the United Kingdom before it entered the European Union. Of course if, say, a lawyerly caste from which the top judges are chosen tends, on average, to hold different political and social druthers than the majority of voters, then on my premises factual knowledge (or voters' ignorance of facts) would not be the only variable. The values being brought to the table by the ultimate decision-makers would matter too. Relatedly, if you frame issues and goals in vague and amorphous enough terms ("crime reduction," "environmental protection," "security against the threat of attack" (p. 11)), then you can follow Somin and assert that "differences ... turn primarily on disagreements over how to achieve widely agreed-upon goals" (p. 11). However, that seems to me to be because you have finessed disagreement by moving your focus up to the Olympian heights of "widely agreed-upon-goals." Make things sufficiently general, sweeping and generic and of course you are far more likely to find overwhelmingly shared human sentiments that then only require knowledge of likely facts to point you towards what to do. But descend down from those heights towards the quagmire of day-to-day detail and all those shared sentiments across the population start to dissipate. And then "knowing the facts" is not enough to make the decisions with the best long-term consequences. You need also to know what people's differing sentiments or preferences or values are, and no one knows those better than you do, the voter, and certainly not a committee of unelected ex-lawyers. Or so it seems to me, which is why on reading this book I was not convinced by the author's division of labor between facts and values.

---

16. In fact, in the 2016 rankings New Zealand ranked 3<sup>rd</sup>, the United Kingdom (another jurisdiction without strong judicial review as it too lacks a written constitution) and Australia (which has a very American-style Madisonian written constitution but of the initial Madisonian sort, without any bill of rights, and so the strong judicial review is overwhelmingly restricted to federalism issues) both tied for 10<sup>th</sup> place in the rankings, and the United States was in the 16<sup>th</sup> spot. See FRASER INST., *ECONOMIC FREEDOM OF THE WORLD: 2016 ANNUAL REPORT* 18 (2016).

I mentioned above that I thought there were two significant problems with the book's attack on majoritarianism and support for judicially enforced constitutional rights of a broadly Richard Epsteinian sort. The second problem I note now is not philosophical at all, but rather wholly empirical. Put bluntly, I do not see why someone with Somin's (and, broadly, my) substantive preferences for small government outcomes thinks today's top judges are likely to deliver them. Sure, I can well understand why someone with broadly big government, left-leaning first-order druthers might think that today's top judges are more likely to satisfy his or her preferences than are the majority of voters through the institutions of elected representative government. What I am not sure about is why a libertarian-leaning small-government man thinks his best bet is the judges. Now I concede that perhaps my scepticism here has to do with the fact that I am not American. I know what the judges are doing in Canada and in the United Kingdom and in Australia and New Zealand. Give me the elected politicians any day, and not because they have a sterling track record but because—all things considered—they seem to me to have a better track record. Or rather, *given* my Hobbesian small government views and sentiments the elected legislature tends to do better.

Maybe, though, things are different in the U.S. Yet from my outsider's vantage it just does not appear that way. There are few Scalia-like originalists to be found amongst the upper echelons of the American judiciary. Even a Republican appointee to the Supreme Court votes to uphold the Affordable Care Act, and does so in the face of an attack founded in federalist constitutional considerations (of the sort Somin extols). Where, I wonder, are "the facts" that support the view that in the United States strong judicial review will deliver the sort of first-order substantive outcomes Somin wants to see prevail? I would have liked to see the book try to make that case more directly, that the gainsaying and overseeing judges now in office have the remotest likelihood in the near- to medium-term future—using the machinery of strong judicial review based on interpreting the United States Constitution (and, to be clear, I mean the sort of "living Constitution," non-originalist sort of approaches to constitutional interpretation that seem to me presently to be ascendant)—of enforcing constitutional outcomes of a broadly libertarian nature.

## CONCLUSION

Let me say it again: This is a thought-provoking book that repays the time spent reading it. Yes, ultimately, its main thesis left me unconvinced. I think that majoritarian democracy, which includes a Popperian capacity to “throw the bums out” that is lacking in all aristocratic or expert-driven decision-making setups, for all its flaws and all the political ignorance of the voters who are given such a big role, nevertheless still offers the least-bad way to govern tens and hundreds of millions of people. Ilya Somin thinks otherwise. After you have read his book you will be better placed to decide for yourself.