

A Churchillian and Benthamite Defense of Democracy

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I. INTRODUCTION

In this Article, I am going to defend democracy against those Cassandras who are pessimistic, even in a comparative sense, about its capabilities and worth. I expect that many of those pessimists about democracy will think me something of a Pollyanna, all too inclined to see the world through rose-colored spectacles that transmogrify what the Cassandras perceive as the three-quarters empty glass into what I claim is a three-quarters full one. So, let me be blunt right from the start. Mine will be a least-bad or

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Churchillian¹ defense of democracy, one that readily concedes that democratic decision-making has its flaws and faults—and a good deal more in some jurisdictions than in others—but that still insists that it beats any and all alternatives. In other words, my theme will be that democracy beats any alternative these Cassandras can suggest. It beats rule by unelected judges. It beats rule by a bureaucratic elite. It beats theocracies and military juntas. It beats rule by a far too unaccountable supranational body like the European Union.² It beats rule by the smartest university academics, even if they all happen to be legal academics. It beats, as Mr. Churchill put it, any other alternative so far tried.³ Hence, I am in no way claiming that democratic decision-making is perfect, or close to perfect. It is just better than anything its critics can suggest. At least that is my position and the standard against which my argument aims to be weighed or evaluated. Note, too, that my stance is wholly compatible with holding nontrivial worries about the future prospects for least-bad democratic decision-making. I am here simply defending comparatively best, or upper echelon, practice in today’s democratic world against all the pessimists out there, not making predictions about its future resilience.

Now whether that be a Pollyannaesque position or not, before I can set about trying to defend it I need to provide a clarification, make a distinction, and then suggest why we might, *prima facie*, expect democracy to be a least-bad decision-making system. I will turn to these preliminaries now, and then later consider and reject possible lines of rebuttal, thereby doing what space permits to make my Pollyanna case against the Cassandras.

II. PRELIMINARIES

First off, I want to clarify that I am here defending a thin conception of democracy rather than some morally pregnant or morally laden account. As I have defended just such a thin or morally Spartan account of democracy in the past, at some length in the pages of a *Law & Philosophy* Article,⁴ I will for present purposes be brief in setting out this clarification. If one imagines a spectrum ranging from accounts of democracy that are infused with moral substance all the way over to accounts that are almost wholly procedural and in terms of substance quite desiccated, then my defense will

1. Winston Churchill’s exact words were “that democracy is the worst form of Government except all those other forms that have been tried from time to time.” 444 Parl Deb HC (5th ser.) (1947) col. 207 (UK) (remarks of Mr. Churchill).

2. See generally James Allan, *Democracy, Liberalism, and Brexit*, 39 CARDOZO L. REV. 879 (2018).

3. See 444 Parl Deb HC (5th ser.), *supra* note 1, at cols. 206–07

4. See generally James Allan, *Thin Beats Fat Yet Again—Conceptions of Democracy*, 25 LAW & PHIL. 533 (2006).

be of understandings of democracy that reside towards the latter part of that spectrum, the procedural end. What I want to rule out are accounts of democracy that assert something along the lines of: a jurisdiction *X*, in addition to anything else, only counts as a democratic one if it upholds the right to this, that, and the other thing and in some moral sense or other must be a good, or at least an acceptable, jurisdiction. Or put differently, I want to adopt a thin, morally enervated account of democracy—basically a procedural one. This account looks to how a government was selected and overwhelmingly shuns adding on disqualifying conditions focused on substantive evaluations of whether what the government happens to be doing once in office, or promised to do during an election, passes some set of moral and political thresholds. I want to have room to say country *Y* is democratic but is doing morally bad things, even plenty of bad things. I want any country to count as a democracy that chooses its government by counting each citizen or resident equally in terms of allowing almost all of them over a set age⁵ a free and secret vote and then, actually letting the numbers count in terms of picking that government—whether or not the result then be filtered through an electoral college, or subject to the vagaries of a proportional voting system, or bicameralism, or limited by strong federalism. I want there to be plenty of room to say that a nation is a democracy, but its government is doing some morally egregious things. I do not want the largely procedural question of how a government has been selected to be irredeemably tangled up with substantive moral and political judgments regarding the choices it is making, such that these substantive choices allow, or force, one to say country *X* does not count as a democracy since it is doing bad things or is denying all sorts of rights we judge essential to good government. I do not want, in other words, the concept of democracy to have stuffed into it nearly every virtue the user of the term can imagine.

I think that on balance there are all sorts of good consequences in keeping separate the “is this a democracy?” and the “is it a morally good

5. We can put to one side such peripheries as whether convicted murderers or rapists ought, or ought not, to have a vote. In my view, this falls into the Waldronian realm of reasonable disagreement, and I side-step it—and variants of the prisoner voting debate—completely for the purposes of this Article. See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999), for a discussion about Waldron’s notion of reasonable disagreement. I also should make explicit what is probably evident to everyone—that this Article is necessarily a brief one and, hence, focuses on replying to certain important claims against democracy, leaving numerous empirical, historical, and other issues untouched.

or at least tolerable government?” questions.⁶ Now as I said, I have argued that case in full elsewhere⁷ and so, as a clarification of the sort of understanding of democracy that I am defending in this Article, will just assert it here⁸—that democracy is best understood in largely procedural terms only.

If that is the clarification I needed to provide, the distinction I will make can be stated quite briefly. I want readers to keep distinct in their minds the difference between, roughly speaking, two sorts of claims: (1) democracy is not up to the job in today’s world,⁹ is becoming ever less up to the job, or would be outperformed by a system with a much bigger role for unelected experts¹⁰ and (2) democracy and democratic decision-making is today under

6. Relatedly, and perhaps not at all surprisingly, I am with H.L.A. Hart and against Ronald Dworkin in thinking that good results flow from keeping separate “law as it is” and “law as it ought to be.” See H.L.A. HART, *THE CONCEPT OF LAW* 200–12 (3d ed. 2012); see also James Allan, *Fantastic Mr. Fox*, 23 KING’S L.J. 329, 333 & n.9 (2012) (reviewing A.W. BRIAN SIMPSON, *REFLECTIONS ON THE CONCEPT OF LAW* (2011)); James Allan, *Is You Is or Is You Ain’t Hart’s Baby? Epstein’s Minimum Content of Natural Law*, 20 RATIO JURIS 213, 213 (2007).

7. See generally Allan, *supra* note 4.

8. Having recently read Fred Schauer’s *Rights, Constitutions and the Perils of Panglossianism*, I think today I could add to the reasons I gave back in 2006 for adopting a thin understanding of democracy. See generally Frederick Schauer, *Rights, Constitutions and the Perils of Panglossianism*, 38 OXFORD J. LEGAL STUD. 635 (2018). In Schauer’s piece, he points to the frequently observed, however understandable, tendency many people—meaning also many academics—have of wanting to define away hard choices or zero-sum conflicts of interest rather than having to choose between them in a way that requires tough choices and debatable evaluations. *Id.* at 635–36. Schauer describes this unwillingness as the tendency to be “Panglossian” and hence to want to paint a “best of all possible worlds” where hard choices—be they between inconsistent factual presuppositions or competing value judgements—are simply assumed away. *Id.* at 639–41, 644. Those who insist on a morally laden, morally pregnant, or morally fat understanding of democracy can be characterized in precisely similar terms, as Panglossians. They are, in effect, removing any possible conflict between democracy—and the democratic method for choosing a government—and a lack of tolerable rights-respectingness once an elected government is in office. To have the former, they say, you must avoid the latter, by definitional fiat as it were. And that means, for them, that all such conflicts between a good procedural way of picking governments, all things considered and the possibility of bad, maybe really bad, choices being made by governments chosen thusly simply cannot happen. *Id.* at 641. The latter possibility is foreclosed under their more morally substantive definition of the former. In Schauerian terms, they are too Panglossian to allow the possibility of such conflicts and hence the resulting hard choices and debatable value judgements that would ensue. They overfill the concept of democracy with moral substance. They too readily define away Waldronian disagreement, if I can put it in terms Schauer himself did not.

9. I deliberately put to one side all questions of whether democracy works better in the developed world. For present purposes, I am focused on the established democratic world, or even just on the main long-standing Anglosphere democracies.

10. Leaving it open how one wishes to give content to the notion of experts in this context, some of the options including: top judges; those with an in-depth knowledge of international law; those who inhabit the upper echelons of the governmental bureaucracy, administrative state, or university sector; those who occupy the top jobs in some supranational

attack from various unelected decision-makers. The two claims are quite distinct, and in this Article I am taking issue with the first, not with the second. So yes, I am defending democracy's credentials and track record against all comers. But no, I am not in any way whatsoever denying the second. Indeed, quite to the contrary, I have recently argued at book length that the second is correct and that democracy and democratic decision-making are under attack.¹¹

That brings me to my third preliminary point. Here, I want to set out why, without knowing more or considering the issue at the dawn of the democratic age, one might nevertheless expect democracy and democratic decision-making to be the least-bad option on the table. Start with Jeremy Bentham, who in fact was writing at the dawn of the democratic age, and his vigorous support for democracy.¹² Readers will be aware that Bentham was one of the founders of utilitarian thinking.¹³ And of course it is true that the early Bentham, not least in his *An Introduction to the Principles of Morals and Legislation* (IPML) and while focused on giving advice to the legislature,¹⁴ was naïve about power and how it might need to be controlled.¹⁵ In IPML, Bentham asks us to think in terms of sticks and

organization such as the European Union; or something else again. I say all are worse than democratic decision-making.

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

12. See generally PHILIP SCHOFIELD, *UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* (2006) (discussing Bentham's view on a representative democracy).

13. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Batoche Books 2000) (1781). Although published in 1789, Bentham's book was in fact written a fair bit earlier, having been first printed in 1780. *Id.* at 5. The gist of utilitarianism can certainly be found in pre-Bentham writers, including in David Hume's work, but Bentham was the first great systematiser of the utilitarian doctrine. See GEOFFREY SCARRE, *UTILITARIANISM* 57–60, 72 (1996).

14. This alone—Bentham's writing for and implicitly from the vantage of the legislator rather than today's much, much more common tendency when it comes to legal academic writing of adopting, implicitly or explicitly, the vantage of a top judge—puts Bentham in a rather smallish club. O.W. Holmes, in his famous *The Path of the Law*, takes a not unrelated stance in bemoaning how legal education overwhelmingly—or at least far too frequently—implicitly adopts the judge's vantage rather than the lawyer's. See generally JAMES ALLAN, *THE VANTAGE OF LAW: ITS ROLE IN THINKING ABOUT LAW, JUDGING AND BILLS OF RIGHTS* (2011), for a discussion on this question of vantage.

15. See George H. Smith, *Thomas Hodgskin Versus Jeremy Bentham*, *LIBERTARIANISM* (July 3, 2012), <https://www.libertarianism.org/publications/essays/excursions/thomas-hodgskin-versus-jeremy-bentham> [<https://perma.cc/7JEU-AXBZ>].

carrots, of pain and pleasure,¹⁶ as the only tools at hand for a legislature to change people's behavior.¹⁷ Sure, in any society there will be your Mother Therasas, who if left all alone will act from their own inclinations so as to increase overall social happiness—"the greatest happiness of the greatest number"¹⁸ in Bentham's formulation. Conversely, there will be your potential or wannabe robbers, rapists, and murderers whose natural inclinations have to be redirected by the legislature either by the prospect of reward—such as pleasure, which for Bentham is a good-in-itself—or failing that, then with the threat and possibly the quite severe application of pain—for Bentham, a bad-in-itself.¹⁹ Most of us will lie somewhere between these two poles.

But the early Bentham just took it for granted that if he pointed out to the legislature how to make laws that would be likely to increase social

16. See generally BENTHAM, *supra* note 13, at ch. V. This is "pleasure" in the eighteenth century sense of the word that meant not just sensual and sexual pleasure but anything that gave one happiness. It is a very broad sense indeed. See *id.* at ch. V, paras. I–IV.

17. James E. Crimmins, *Jeremy Bentham*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/bentham/#PaiPle> [<https://perma.cc/TM7Q-XMW5>] (last updated Jan. 28, 2019).

18. See J.H. Burns, *Happiness and Utility: Jeremy Bentham's Equation*, 17 UTILITAS 46, 46 (2005); see also BENTHAM, *supra* note 13, ch. 1, paras. II–III, VI–VII. Note that over his lifetime, Bentham changed his mind on this, equivocating between "greatest happiness of the greatest number" and "greatest average happiness"—the latter building in a sort of strength of feeling component. See Burns, *supra*, at 46. But in the end, Bentham went back to the "greatest happiness of the greatest number" measure as the other is too easy to game. See generally *id.*

19. See *id.* And it was just this worldview that spurred Bentham to become, in practice, one of the world's all-time great reformers. He pushed for prison reform and sentences that imposed only as much pain as would be likely to deter. See JANET SEMPLE, BENTHAM'S PRISON: A STUDY OF THE PANOPTICON PENITENTIARY 1 (1993). Hence, he was a driving force for the John Howard Society, which advocated for prison reform, newer, more humane prisons, and the rewriting of Britain's bloody penal law. *Id.* at 62; see *Our History*, JOHN HOWARD SOC'Y CAN., <http://johnhoward.ca/about-us/history/> [<https://perma.cc/UW33-BS2N>]. Bentham was a founding force for the Royal Society for the Prevention of Cruelty to Animals (RSPCA) because they, too, could feel pain—a bad in itself, recall. See David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. C.L. REV. 1, 3–4. He later pushed for a much wider franchise, the 1832 First Reform Bill being in part due to his actions and thinking. See Dean Alfange, Jr., *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 76 (1969) ("Law reform was Bentham's aim, and the success of Bentham and his followers in bringing about reform is nothing short of remarkable."); J. Salwyn Schapiro, *Utilitarianism and the Foundation of English Liberalism*, 4 J. SOC. PHIL. 121, 124, 129–31 (1939). He was not against women having the vote, and this was in the early 1800s, recall. See JEREMY BENTHAM, PLAN OF PARLIAMENTARY REFORM, IN THE FORM OF A CATECHISM, WITH REASONS FOR EACH ARTICLE: WITH AN INTRODUCTION, SHEWING THE NECESSITY OF RADICAL, AND THE INADEQUACY OF MODERATE, REFORM 35–36 (Lawbook Exch. 2004) (1818). The list goes on and all of his reforming activities stemmed from this utilitarian worldview. On the other hand, the same worldview made Bentham an outspoken critic of natural law thinking and of Bills of Rights, most famously of France's *Declaration of the Rights of Man*, an older Bill of Rights than America's. See Schapiro, *supra*, at 125.

happiness—by their sticks and carrots application of incentives—the legislators would be inclined to travel down that path.²⁰ The later Bentham saw his early self as naïve. If, as Bentham thought, all of us want pleasure—broadly understood but in ways that vary from person to person—and do not want pain—also broadly understood—then he later realized that this must be true of legislators, too, and of those with power.²¹ In other words, if all of us, wherever our instinctive or inculcated proclivities may place us on the spectrum, want happiness and the avoidance of pain, then this must be true of those with power, too. Hence, the obvious question that follows from that is what sort of incentives—what sort of application of the possibility of future pleasure and pain—might realign the behavior of legislators so that they do a better job of increasing overall social happiness in how they govern and enact laws.

It is in answering that question, given his sticks and carrots view of human nature, that Bentham became one of the great supporters of democracy and indeed was pushed from being an opponent of the new country of the United States to being one of its biggest supporters.²² For Bentham, it was all about incentives to change behavior, just now with the focus on legislators rather than regular citizens. Sure, such a nineteenth century sticks and carrots view of human psychology is undoubtedly overly reductionist. But all the same, there is clearly a good deal to it. And so that is what Bentham did; he applied this sticks and carrots incentives worldview to those with lawmaking power. And what eventuated was a strong endorsement of democracy along the lines of the following sort of thinking.

To start, you give most everyone—over a certain age and who looks moderately sane—a vote on who gets to wield this power. Why? Because the goal is to increase the greatest happiness of the greatest number. And no one knows what will make the adult you happy better than you, at least so thinks the great antipaternalist Bentham.²³ Notice again that this is no

20. See Smith, *supra* note 15.

21. See BENTHAM, *supra* note 13, at ch. VII.

22. See H.L.A. Hart, *Bentham and the United States of America*, 19 J.L. & ECON. 547, 548 (1976).

23. Bentham was nothing if not an antipaternalist. This contrasts quite noticeably with one of his acolytes, also a utilitarian, the even more famous John Stuart Mill, who in comparison was a paternalist. Robin West, Comment, *Rationality, Hedonism, and the Case for Paternalistic Intervention*, 3 LEGAL THEORY 125, 125 (1997). That said, one might be an antipaternalist, broadly speaking, for two distinct reasons. Hence, to the sort of “I’m afraid that if left to pursue their own pleasure, many people would end up being beer-drinking, TV-watching couch potatoes” type retort, one might reply (1) “If that is what they enjoy,

narrowly understood view of happiness. Some might get happiness from a higher income, some less so, a few Mother Therasas not at all. Some things might matter much more to you than having more money in your pocket and a lower tax rate. Bentham does not prejudge. It is up to you to give an indication of what will increase your happiness—because you know this better than anyone else—by telling us with your vote, however blunt a tool that may be.

On the other side of the equation, those with power need to win an awful lot of votes to stay in power.²⁴ If we assume that those running for office want to win²⁵—that in some broad sense winning the election for this office will increase the candidate’s happiness, or rather at the time of running the candidate thinks that it will—then letting-the-numbers-count democratic systems for choosing who will govern go some significant way towards realigning the interests of (1) all of us voters and (2) those who end up with power. It is by no means a perfect alignment of interests, but it is far better than what you have without asking people via voting. It creates a very real sort of accountability—certainly a more tangible sort than when some unelected judges or nineteenth century aristocrats tell us that they have looked inside themselves and are truly doing what they think is of most benefit to others, that their decision has nothing much to do with what *they* want, believe, or prefer but rather is solely to do with what they believe *you* want—or should want. Bentham was scathingly dismissive of all such de

that is what they should do” or (2) “That might happen; it would be unfortunate to be sure; but letting an elite decide what lives would be good for people is unlikely to produce any better results and would be extremely dangerous given the power such elites would have to have.” This second reply might, or might not, be buttressed by challenging just how philosopher king-like today’s elites actually are. Thank you to Steven Smith for this distinction between these differing foundations for anti-paternalism. Interview with Steven Smith, Professor of Law, Univ. of San Diego Sch. of Law, in San Diego, Cal. (May 20, 2019).

24. Just how many can vary with voting systems. But it will be a large percentage of the voting population’s votes they will need to stay in office. To be sure of electoral victory, they will need to aim to win noticeably more than half the votes of the electorate.

25. Notice that on this Benthamite understanding, it is no coherent criticism at all to say of some politicians that they only want to get reelected. That, for Benthamites, is what underlies the incentives in the system and what makes politicians accountable, not to everyone in society, but to as many as it is likely to take for them to have a good chance of being reelected. Take away the desire to be reelected and you remove the core incentive in the system until the next election when they are voted out. From now till then, politicians become much, much more of free agents and far less responsive to the views of the voting public.

haut en bas claims supposedly driven by altruism.²⁶ He wanted a tangible sort of accountability for those with power.²⁷

I might therefore sum up this third preliminary point of mine in this way. Those who downgrade, undersell, pooh-pooh, or attack the value or worth of democracy seem to be too insouciant about accountability concerns, too willing to ignore one of the core virtues of democracy and of democratic decision-making—understood as a procedural good. This core virtue is a function of how democracy lets us throw the bums out while, in a Benthamite way, going some worthwhile distance towards aligning the interests of the elected politicians—who, to keep their jobs and whatever attendant perks there may be, need to aim for the votes of more than half of those who go to the polls—with those of the voters.²⁸ So back at the dawn of the democratic age, having made accountability to as many citizens as possible a key goal, it seems highly plausible to me that one would have had strong, *prima facie* grounds for expecting democracy and democratic decision-making to be the least-bad option on the table, to outperform all those other forms of governing and decision-making that Churchill lumps together as “hav[ing] been tried from time to time.”²⁹

III. CONSIDERING AND REJECTING POSSIBLE LINES OF REBUTTAL: POLLYANNA PREVAILS OVER CASSANDRA

That is a *prima facie* type case for thinking democracy is as good as it gets. Let me now consider some plausible rebuttals. I will lump these together in what some might consider to be an idiosyncratic way and one that has a bit of overlap between each heading or mooted rebuttal. But that is probably unavoidable. Notice, as well, that these rebuttals will encompass the bulk of the first part of this symposium issue’s potential travails for democracy.

26. Compare Bentham’s brutal, yet immensely entertaining, description of what he thinks really lies behind moral claims that affect others but in fact do not look likely to increase overall social happiness—so are moral claims that do not align with what utility arguably dictates. *See BENTHAM, supra* note 13, at ch. 2, para. XIV nn.1–9. Bentham says these are nothing more than “I like it” or “I don’t like it” claims, but that to have any chance of swaying others they will be presented as keeping with such altruistic-sounding abstractions as the fitness of things, the moral law, God’s will, the right reason, or in today’s language, with fundamental human rights. *See id.* at ch. 2, paras. II, XVIII.

27. *See id.* at ch. 2, para. XVIII n.1.

28. An imperfect alignment, no doubt, but perhaps a least-bad one and better than just trusting judges—or anyone else—who cannot be removed from office anywhere nearly as easily and certainly not by the voters.

29. 444 Parl Deb HC (5th ser.), *supra* note 1, at col. 207.

I will touch on the second part of the mooted travails in my concluding remarks.

A. Embrace Paternalism and Prefer Aristocracy

The above Benthamite-type defense of democracy is premised in part on an antipaternalist view that the adult you is better placed than anyone else to indicate what is best for you; hence, on average, over time, voters will beat experts—in a least-bad sense only, remember—when it comes to increasing social welfare. One sort of rebuttal is to reject that antipaternalist premise. There are various bases for doing so.

I.

Here we focus on the voters' ignorance of facts. Many or most voters, goes this sort of rebuttal, are not well-informed on the facts. In that sense, they are on the whole pretty ignorant. Combine that with an implicit or explicit belief that political disagreements turn overwhelmingly on getting the facts right, not on individuals' differing sentiments or value judgements, and you have a potent attack on democracy—a further, often unspoken premise of which is that a coterie of experts who do happen to know the facts, be they top judges or bureaucrats or the like, would do better than majoritarian democracy. And that is precisely the book-length argument that several years ago Ilya Somin made³⁰ and that I then critiqued in a review in *Constitutional Commentary*.³¹ As I said in that review, the picture Somin 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.”³² Yet, there are huge difficulties with that characterization, especially for Humeans, who follow the great Scottish philosopher David Hume in believing that reason is inert and, hence, that sentiments and feelings drive action, not reason.³³ Further, they note that the naturalistic fallacy makes the move from “is” to “ought” fraught, that moral evaluations do not possess a mind independent status, and so on.³⁴ At the risk of a lengthy excerpt from my own previous work, here is how I put it in replying to Somin:

30. ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2d ed. 2016).

31. James Allan, *Do Judges Know Best?*, 32 *CONST. COMMENT.* 479 (2017) (book review). The next few paragraphs follow the critique of Somin-type arguments that I made there.

32. *Id.* at 488.

33. *Id.* at 489.

34. *Id.* Note that the argument that follows still works for those with more deontological and Kantian meta-ethical and normative core principles. Why? Because as

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 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), or the United Kingdom before it entered the European Union.³⁵

2.

And, of course, it is worse than that for Somin-style arguments, which assert that the voters are ignorant of facts so we can dispense with, or diminish the input from, democracy.³⁶ After all, if each voter's sentiments and values and feelings do matter in achieving the optimal social policy position, then there is this further or related danger with expert driven decision-making processes, namely that:

Jeremy Waldron made clear in replying to Michael Moore, there is no universally accepted epistemic method for discerning what those "true" moral principles are. See WALDRON, *supra* note 5, at 164–65. Hence, moral realist versus moral realist is in no different position from noncognitivist versus noncognitivist. See *id.* Accordingly, there is no reason to believe judges, administrators, or anyone else will have superior insight about moral reality or rights than legislators, put to the side Somin's "know more facts" thesis.

35. Allan, *supra* note 31, at 489–90 (footnote omitted).

36. See generally SOMIN, *supra* note 30.

[S]ay, a lawyerly caste from which the top judges are chosen [might] tend[], on average, to hold different political and social druthers than the majority of voters, [meaning that] on my [Humean] 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.³⁷

So, this is the danger of a nonmajoritarian decision-making elite having values and preferences and druthers noticeably out of step with the majority's, and when afforded the power to do so will favor their own side of the ledger. In today's world of an expert imposed euro currency, common agricultural policy, and mass immigration preference—to focus just on the European Union, and to choose from amongst a host of examples where the expert preference in no way at all seems self-evidently better than the voters'—this hardly seems to be an insignificant worry or danger.

3.

Nor are those the only two weaknesses in the rebuttal to my least-bad defense of democracy that is premised on voters being ignorant. Another problem with Somin-type arguments that focus on voters' ignorance of facts is that proponents of that view are likely to frame hotly debated political issues in vague and amorphous terms, such as crime reduction, environmental protection, and security concerns,³⁸ so that they can then, as I said in my review of his book:

[F]ollow Somin and assert that “differences . . . turn primarily on disagreements over how to achieve widely agreed-upon goals” However, that seems to me to be because [they] have finessed disagreement by moving [their] focus up to the Olympian heights of “widely agreed-upon-goals.” Make things sufficiently general, sweeping and generic and of course [they] are far more likely to find overwhelmingly shared human sentiments that then only require knowledge of likely facts to point [them] 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 me³⁹

37. Allan, *supra* note 31, at 490.

38. SOMIN, *supra* note 30, at 11.

39. Allan, *supra* note 31, at 490 (citations omitted) (quoting SOMIN, *supra* note 30, at 11).

4.

The various permutations of the voters are ignorant of the facts attempted rebuttal of my defense of democracy do not exhaust the options. Another possibility is far blunter. Given that paternalism amounts to the claim that I know better than you what is good for you, this next possible rebuttal basically forswears paternalism—because at heart it does not much care about a big chunk of the voting population and those voters’ happiness, welfare, or preferences—in favor of a vigorous sort of aristocracy. Here, you just characterize a big proportion of the voters as “deplorable” or in some other way unworthy of consideration.⁴⁰ Of course, virtually any competent politician operating in one of today’s long-established democracies would be adept enough not to admit to such views openly, publicly, and on the record. Well, perhaps every once in a while, such sentiments might slip out, by mistake, even from the mouth of a veteran politician. Meanwhile, I suspect that there are plenty of grounds for believing, not least as a result of my own personal experiences chatting with a good many others over drinks, that more than a few people do harbor such aristocratic sentiments—and here I am certainly not excluding from the ranks of such sentiment-harborers those who happen to be top judges, law professors, law students, senior bureaucrats, people working for international agencies in top capacities, including United Nations personnel who pay no income tax,⁴¹ and the list goes on. Sure, they may be careful not to reveal these views frequently or outside of a well-vetted coterie of friends. But something along the lines of this outlook that some of my fellow citizens are deplorable gives them grounds for thinking democratic decision-making can be improved upon. It is suboptimal.

My brief response to this sort of deplorables rebuttal, of what amounts to demanding an aristocratic element in one’s constitutional arrangements, is that such calls always look better, or so say I, when people are themselves part of that aristocracy. Worse, you could never sell it to people upfront and openly. If you tried, the deplorables—and indeed others not as aristocratically inclined—would be likely to revolt. Hence, any such undisguised pleas

40. See Aaron Blake, *Did Hillary Clinton Just Make Her Own ‘47 Percent’ Gaffe?*, WASH. POST (Sept. 10, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/10/republicans-think-hillary-clinton-just-made-her-own-47-percent-gaffe-did-she> [https://perma.cc/P6BP-NFGL].

41. See Loan T. Le, *For Americans Working at the U.N., a Wonderland of Taxes*, N.Y. TIMES (Sept. 28, 2003), <https://www.nytimes.com/2003/09/28/world/for-americans-working-at-the-un-a-wonderland-of-taxes.html> [https://perma.cc/8J4Y-8F6V].

for more aristocracy in any of today's long established democracies would have bad net consequences, as well as quite possibly subverting the legitimacy of established democratic institutions even where those pleas were ultimately rejected. Of course, I concede that, in theory, best consequences can diverge from the path of honesty, openness, and any realistic ability to sell the proposal to one's fellow citizens. But having conceded that, I also think most of us would be more than a little skeptical of the worth of preferred constitutional arrangements that can never honestly be revealed to one's countrymen. Accordingly, let me simply say that, in my opinion, there is just too much whiff of elitism piled on aristocracy about any arrangements that attempt to enervate democracy due to the deplorable critique—that it would smack too obviously of the arrangements of the European Union, and would be likely to unleash the sort of voter backlash we can see there that flows from the paucity of the European Union's democratic credentials. And all of that is without stating the obvious, namely that if you put such a call for more aristocracy to all of us voters in a referendum or at some sort of constitutional convention it would be defeated, and be defeated badly. So, it has to be pursued in secret or heavily disguised.

That is a taste of one cluster of plausible lines of rebuttal to my least-bad defense of democracy; it encompasses all the variants that in one way or another embrace paternalism and prefer aristocracy. I reject the core lines of attack of all such rebuttals. I do so for the reasons sketched above. Hence, in providing a Churchillian-style defense of democracy, I think that Pollyanna has thus far warded off Cassandra.

B. Reject Procedural Democracy on Wholly Moral Grounds

Another line of rebuttal focuses almost overwhelmingly on the moral realm and argues that in some way or another democratic decision-making—for proceduralists like me recall that that means decision-making rules that put majoritarianism and letting-the-numbers-count concerns front and center—is less morally good than some proffered alternative. In other words, the claim here boils down to asserting that democracy fails on moral grounds, consequences be damned.

Alon Harel's *Why Law Matters* is one of the most uncompromising versions of this sort of argument, and all I will respond to here.⁴² Harel opts to make preeminent the “right to a hearing,”⁴³ though I can see no reason why

42. ALON HAREL, *WHY LAW MATTERS* (2014). I have also offered my thoughts on this book. See James Allan, *Why Politics Matters: A Review of Why Law Matters*, 9 *JURISPRUDENCE* 132, 132–33 (2018) (book review). My criticisms here, albeit in much shortened form, mirror those in that review.

43. See HAREL, *supra* note 42, at 193.

one might not choose any sort of right to be what is claimed to trump democratic decision-making. What you end up with by book's end is a wholly noninstrumentalist, morality trumps consequences case for strong judicial review—to the extent that Harel himself concedes that the track record of unelected judges looks no better to him than that of the elected branches.⁴⁴ That said, my view is that this sort of Harelian argument requires one to prefer Kant to Hume—on a host of fronts, including their respective accounts of human reason—moral realism to noncognitivism, and deontology to consequentialism. One would also have to be quite sanguine about the legitimacy of international law, of unelected judges using a Bill of Rights to make veto-proof calls on a host of social policy issues, and of goods-in-themselves “rights to a hearing” not being open to being gamed⁴⁵—not to mention having to overlook the Waldronian response to Michael Moore outlined in footnote thirty-four above.⁴⁶

Worse for this sort of rebuttal is the fact that even from within a wholly deontological moral framework, one largely to Harel's liking, there is plenty of room to make a case in favor of democracy. After all, that is precisely what Jeremy Waldron has done. Waldron does something along those lines—he makes a strong rights, deontological argument on behalf of democracy—by starting with nonconsequentialist equality concerns to get to his argument that people do not treat others as autonomous agents worthy of respect unless they have an equal say in decision-making, even over rights-related issues.⁴⁷

44. *Id.* at 186.

45. I happen to be on the other side of all of those required premises, as I make clear in my review. *See* Allan, *supra* note 42, at 132–33. As for the potential of gaming a right to a hearing, I there pointed out that:

Were one a consequentialist one might, as I would, point out the various potential flaws in how hearings are conducted by top courts in the common-law world. Test cases are carefully selected by special interest groups to give them the best chance of winning; government (the Executive) is sometimes not committed to winning in court, and thereby runs dead; tactical concessions are sometimes made by counsel that may help the client in the case at hand but that assuredly disadvantage groups not before the courts; one particular trial judge who happens to hear some case may be a long-time supporter of social change; there is an asymmetry when it comes to *stare decisis* such that interpretively conservative judges will follow precedent with which they disagree while non-conservatives will follow their sense of justice; and the list goes on. Any right to a hearing before real life courts carry all these risks, and more.

Id. at 136 n.4.

46. *See supra* text accompanying note 34.

47. *See* WALDRON, *supra* note 5, at 213; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1348, 1353 (2006). For my take on Waldron,

This, recall, is how Waldron grounds his “right to participate,” his “right of rights,” which lies at the heart of his deontological defense of democracy.⁴⁸

All in all then, the Section III.B sort of rebuttal—or attack on a least-bad defense of democracy—will not convince anyone whose underlying starting positions are in the same solar system, or perhaps galaxy, as mine. And even in the Harelian part of the moral and metaphysical universe, there remains plenty of room to doubt such rebuttals. Hence, I think Pollyanna has warded off Cassandra again. Of course, Harel’s argument is not the only sort that prefers the unelected judges to the elected legislators and so we turn next in that broader direction.

*C. Assert That Strong Judicial Review of the sort that Cannot Plausibly
Be Characterized as a Form of Constitutionalism Still
Beats Democracy*

Strong judicial review, the sort that empowers judges to strike down or invalidate statutes enacted by the democratically elected legislature, can be supported on a host of grounds.⁴⁹ Some of those grounds do not seem to me to involve anywhere near as direct challenges to democracy and democratic decision-making as others of those grounds. For present purposes only, I am therefore going to generalize and make a sweeping stipulation that divides the world of strong judicial review—at least in the common law world—into two camps. The first, I am going to dub strong judicial review that takes place as a form of constitutionalism and the second, as strong judicial review outside the bounds of constitutionalism. Defenses of the former sort, judicial review as a form of constitutionalism, I am going to ignore. I am going to do so because in my view all such conceptions of strong judicial review are much easier to reconcile with democracy, and I will sketch why in a moment.⁵⁰ It is the latter sort only, strong judicial review that is defended on grounds outside the aegis of a constitutionalism worldview, which I will consider here as a potential rebuttal to my least-bad Churchillian defense of democracy.

Let me therefore skip over all sorts of highly debatable value judgments as to whether any particular writer’s defense of strong judicial review belongs in the first or second category, as well as what precisely might be needed

see generally James Allan, *The Travails of Justice Waldron*, in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 161 (Grant Huscroft ed., 2008).

48. See WALDRON, *supra* note 34, at 213.

49. Judicial review in this sense can be distinguished from judicial review of administrative action—the weaker kind that does not involve a direct challenge to the elected legislature.

50. Which is not to say that I prefer such strong judicial review as a form of constitutionalism to New Zealand-style parliamentary sovereignty. I do not. See James Allan, *Against Written Constitutionalism*, 14 OTAGO L. REV. 191, 192–93 (2015).

to qualify for membership of one or the other. For present purposes, it will suffice if I speak in rough-and-ready terms and contend that the first occurs where a jurisdiction's top judges are upholding the locked-in meaning some authoritative and legitimate⁵¹ lawmaker in the past laid down in a constitutional text. Put bluntly, the judges are not just making it up according to their own moral and political druthers; they are honestly seeking a mind-independent answer, however difficult to find that answer may be for limited biological creatures. I happen to believe, with Larry Alexander, Richard Kay, Richard Ekins, and others, that that requires some sort of intentionalist originalism, some search by judges for what the legitimate lawmakers intended.⁵² Yet whether you agree with me on that, or not, is not at issue here. Include within the first category any theory that plausibly asserts the judges are doing something other than legislating from the bench and there is then a sense that the answers they give can be understood as having been in

51. Of course, questions of legitimacy are themselves debatable and subject to reasonable disagreement. Plausible legitimacy-giving options might include: (1) the result of a referendum where at least half the voters have to give it the nod—this basically being the Australian method of constitutional amendment; (2) the result of a democratically enacted statute—this being how the statutory bills of rights in New Zealand and the United Kingdom came into being; or (3) the result of the best form of widespread citizen input that was available at the time—this arguably being the case in the United States for its written constitution. See Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7–8 (2006); Vicki C. Jackson, *The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT'L J. CONST. L. 575, 575–76 (2015); *Referendums Overview*, AUSTRALIAN ELECTORAL COMMISSION, https://www.aec.gov.au/elections/referendums/Referendums_Overview.htm [<https://perma.cc/LUQ9-ULWP>] (last updated June 6, 2011). The 1982 Canadian method of entrenching a Charter of Rights was, in my view, a far less legitimate option compared to any of those given that in Canada, there was never any referendum on the issue nor any election either, be it a federal or provincial one. See F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms*, 20 CAN. J. POL. SCI. 31, 31–32 (1987). A small coterie of the political class simply brought it in over the heads of the voters—which is not to say that the Charter of Rights is not popular today, because it is. See Peter H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 30, 31 (1983). But the legitimacy of how something came to be can be distinguished from its present day popularity. Perhaps even less legitimate, if that is possible in a modern day democracy, is how Australia, the last major democratic country with no national bill of rights, came to have a limited implied freedom of political communication. See Diana Sedgwick, *The Implied Freedom of Political Communication: An Empty Promise?*, 7 U.W. SYDNEY L. REV. 35, 35 (2003). In my view, the top judges outright made it up, for some because the voting population kept rejecting a bill of rights. See generally James Allan, *The Three 'Rs' of Recent Australian Judicial Activism: Roach, Rowe and (No) 'Riginalism*, 36 MELB. U. L. REV. 743 (2012).

52. See, e.g., James Allan, *In Honor of a Simple-Minded Originalist*, 34 CONST. COMMENT. 401–07 (2019).

some way or other locked-in—meaning, given our legitimacy stipulation, that earlier voters agreed to take certain things off the parliamentary sovereignty table. It will not have been an agreement to give the judges a blank check though. The list will not be ever-changing at the point-of-application and malleable in the hands of the judges. And as for issues not on that earlier agreed to “these are off the table” list? Well, they will remain with the voters. Hence, strong judicial review as a form of constitutionalism seems to be a good deal more compatible with democracy.

But what happens if the world we live in does not happen to look much like one where our top judges are in fact doing what constitutionalism demands they do—perhaps they are treating the document as a living Constitution⁵³ or are affording it a moral reading or a Dworkinian best fit one?⁵⁴ What then? Because this is precisely what Richard Kay happens to believe is the case, as a matter of empirical fact, as regards today’s United States—and indeed Canada and elsewhere. “[A] fair examination of actual constitutional judgements is unlikely to convince many observers that those decisions closely match up with the rules in the constitutional text.”⁵⁵ And I agree with Kay, as I suspect do plenty of others.⁵⁶ Gaze around the common law world and, as he says, top judges look largely, nay, overwhelmingly, to be doing something that is very hard to categorize as strong judicial review as a form of constitutionalism.

And that gives us another type of rebuttal to my least-bad defense of democracy. Here, you just say something along the lines that what such judges are doing under the second category above can be endorsed or reconceptualized as a sort of super senate, tricameralism-type check and balance; the top judiciary are often or largely discretionary decision-makers, true, but this is all to the good. Or such is claim.

Alas, this type of rebuttal suffers all of the weaknesses of the sort set out in Section III.A above—it overemphasizes voter ignorance; implicitly requires an overblown trust in experts; betrays an insouciance about

53. Ilya Somin, *Originalism, Living Constitutionalism, and Outrageous Outcomes*, WASH. POST (Feb. 4, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/originalism-living-constitutionalism-and-outrageous-outcomes/> [<https://perma.cc/CA83-AHUT>].

54. Ronald Dworkin, *The Moral Reading of the Constitution*, N.Y. REV. (Mar. 21, 1996), <https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/> [<https://perma.cc/FT25-33SX>].

55. Richard Kay, *Democracy, Mixed Government, and Judicial Review*, in *LAW UNDER A DEMOCRATIC CONSTITUTION: ESSAYS IN HONOUR OF JEFFREY GOLDSWORTHY* 199, 212, 223–24 (Lisa Burton Crawford, Patrick Emerton & Dale Smith eds., 2019).

56. See, e.g., ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 1–2 (1989); ROBERT F. NAGEL, *UNRESTRAINED: JUDICIAL EXCESS AND THE MIND OF THE AMERICAN LAWYER* 1–2 (2008).

accountability concerns of the sort that deeply worried Bentham; and, here too, could never be sold to people upfront and openly.⁵⁷

Cassandra has still not driven Pollyanna from the field. This rebuttal fails as well.

D. Fret About Centralization and Growing Bureaucratic Power

I will be extremely brief with this mooted rebuttal to my least-bad defense of democracy. It will be the last rebuttal I consider. Yes, there may well be a problem with growing administrative and bureaucratic power at the expense of democracy and democratic decision-making.⁵⁸ And yes, too great creeping centralization may also be a legitimate worry.⁵⁹ In neither case, though, is less democracy an answer. It will not be a bureaucratic supranational European Union-like body that quite significantly deregulates and removes numerous regulations for every new one adopted. It will be an elected administration. And no nonelected body is likely to fight growing centralization either, including university administrations.⁶⁰ Nor do the top judges in the common law federalist world have all that great a record—I put this kindly, you understand—in defending federalism and decentralization against the center, especially not in Australia.⁶¹ Only the elected politicians, state or federal, have any plausible hope of combatting this deleterious trend. Or so say I. Put differently, Pollyanna has little difficulty swatting away Cassandra’s doubts about democracy on this score.

57. As Richard Kay, a proponent of this sort of rebuttal to my least-bad defense of democracy, himself concedes. See Kay, *supra* note 55, at 221, 226.

58. See Robert J. Samuelson, Opinion, *The Administrative State Is Huge, and It’s Only Getting Bigger*, WASH. POST (Mar. 5, 2017), https://www.washingtonpost.com/opinions/the-administrative-state-is-huge-and-its-only-getting-bigger/2017/03/05/bb388e28-003a-11e7-99b4-9e613afeb09f_story.html?utm_term=.9ace6330a452 [<https://perma.cc/CYE9-4ZXX>].

59. See John B. Judis, Opinion, *Federal Government Is More Powerful than State Government*, N.Y. TIMES (July 16, 2013), <https://www.nytimes.com/roomfordebate/2013/07/16/state-politics-vs-the-federal-government/federal-government-is-more-powerful-than-state-government> [<https://perma.cc/W36D-EKXX>].

60. This is a point I have made at more length in critiquing Australian universities. See generally James Allan, *The Administration of Australian Universities: A National Scandal? Or Amiss in Funderland?*, in *CAMPUS MELTDOWN: THE DEEPENING CRISIS IN AUSTRALIAN UNIVERSITIES* 23 (William O. Coleman ed., 2019); James Allan, *Why Our Universities Are Failing*, QUADRANT (Apr. 8, 2014), <https://quadrant.org.au/magazine/2014/03/australian-universities-just-good-enough/> [<https://perma.cc/UYB2-CUMJ>].

61. See James Allan & Nicholas Aroney, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, 30 SYDNEY L. REV. 245, 246–47 (2008).

IV. CONCLUDING REMARKS

That is my least-bad defense of democracy against all those Cassandras who are pessimistic about its comparative capabilities and worth. I am a full-blooded Pollyanna when it comes to providing a Churchillian and Benthamite defense of democratic decision-making. That said, and as I made clear in the distinction I offered in Part II above, there is a difference between attacks that assert: (1) democracy is not up to the job in today's world and would be outperformed by a more elitist, more aristocratic, more expert driven system and (2) democracy today is under attack from various unelected decision-makers. As I there noted, I agree with type (2) claims. In fact, I even believe that elected politicians can themselves be part of such attacks—with the current British Tory Party response to the Brexit vote being an extremely plausible example of that.⁶² So category (2) can be expanded to include even the political class in a representative democracy.⁶³

I also made plain at the very start of this Article that my least-bad defense of democracy is wholly compatible with my holding nontrivial worries about its future prospects. One significant cause for future worry might emanate from what could be bluntly described as tribal voting. This is perhaps particularly so under Bentham's sticks and carrots, put incentives on those with power, inject some real accountability into the system, conception of democracy.⁶⁴ Think about it. If people vote simply based on group or tribal identity—because she is a woman like me; because he is gay like me; because she is black like me; the list goes on—and if this trumps most all other considerations, then political parties and candidates are no longer disciplined by the Benthamite need to offer policies that they think will make you happy. Any policies will do, so long as they offer candidates that are in your tribe. And the tribe with the most people in it will then be likely to win, or maybe the ones best able to form stable coalitions. Put differently, if most voters' biggest source of satisfaction, happiness, and pleasure comes from seeing their own group, however defined, prevail, then the Benthamite defense of democracy looks a lot less persuasive. Or at least I think that most readers can sketch out for themselves the sort of possible future danger I

62. See, e.g., Opinion, *Remainer Tories' Desire to Stop Brexit Has Overridden Party Loyalty and Their Duty to Honour the Referendum*, TELEGRAPH (Sept. 2, 2019, 7:33 AM), <https://www.telegraph.co.uk/opinion/2019/09/02/remainer-tories-desire-stop-brexit-has-overridden-party-loyalty/> [<https://perma.cc/GYZ5-8LMK>].

63. This inclusion extends to covering situations where politicians amend the rules of the game so as to help, or to try to help, entrench their position. Likewise, it might extend to situations where the vast preponderance of the media, universities, and bureaucracy aligns with and supports one of the two main parties. See the article in this special issue by Maimon Schwarzschild. See generally Maimon Schwarzschild, *Points of Crisis or, Is It All Over?*, 56 SAN DIEGO L. REV. 1069 (2019).

64. See H.L.A. Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799, 801–02 (1972).

mention here. I have called it tribal voting. Those more polite and urbane than I might describe this cause for future worry about democracy in terms of the challenges associated with pluralism. It is the topic of the second part of this symposium issue's potential travails for democracy. I still happen to believe that even here, Pollyanna is winning the race against this future challenge to democracy. But Cassandra is closing ground.

