

## THE APPARENT INEVITABILITY OF MIXED GOVERNMENT

*John Hart Ely\**

There are few positions more demonstrable than that there should be, in every republic, some permanent body to correct the prejudices, check the intemperate passions, and regulate the fluctuations, of a popular assembly.

— Alexander Hamilton at New York Ratifying Convention<sup>1</sup>

The “dominant political theory” in England from the mid-seventeenth century well into the nineteenth was “the age-old theory of mixed government.”<sup>2</sup> As such it was the object of serious consideration by the founders of our country.<sup>3</sup> Its original formulation held that the ideal government should comprise elements of monarchy, aristocracy, and democracy.<sup>4</sup> Given the circumstances of our separation from England, of course, monarchy was expeditiously expelled from the American version. However, “the abolition of monarchy had not altered the basic postulates of the science of politics,”<sup>5</sup> and the general idea here became that there should be an executive (elected somehow, probably indirectly) to provide energetic action when that was needed, a popular legislature generally empowered to make policy and provide the rules by which we are governed—and an aristocratic branch to moderate between the other two and in particular to check their respective tendencies toward despotism on the one hand and anarchy on the other.<sup>6</sup>

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1. J. Elliot, ed., 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 301 (William S. Hein & Co., Inc., 1863).

2. M.J.C. Vile, *Constitutionalism and the Separation of Powers* 36-37, 41, 60-62, 75, 117-18 (Liberty Fund, 2d ed. 1998) (“Vile”).

3. See generally Gordon Wood, *The Creation of the American Republic, 1776-1787* (W.W. Norton, 1969) (“Wood I”). Cf. Vile at 91-92 (quoting Montesquieu) (cited in note 2).

4. Vile at 37-41 (cited in note 2); Wood I at 19 (cited in note 3).

5. Wood I at 202 (cited in note 3).

6. *Id.* at 19, 198, 208.

Generally this aristocratic element was envisioned as residing in the upper house of the legislature.<sup>7</sup> (Some suggested that these “senators” be installed for life, others that they be chosen by an electoral college.<sup>8</sup>) For a time there was bruited the notion that lineage and property might serve as suitable surrogates for wisdom and a deliberative character.<sup>9</sup> However, these equations drew sufficient fire from such committed democrats as Thomas Paine<sup>10</sup> to send them (at least officially) into hasty retreat and induce a return to a more direct (though still impure) “wisdom and deliberation” rationalization of the Senate.<sup>11</sup>

The pattern of the old system of thought was followed, therefore, to this extent: the three qualities requisite to an effective system of government were enumerated—a concern for the interest of the whole, wisdom, and dispatch—and these were related to the need to combine democratic and aristocratic elements in the legislature with an efficient executive power. In Massachusetts at this time the aristocracy was defined as “the gentlemen of education, fortune and leisure,” and although, therefore, class divisions were acknowledged, indeed welcomed, they were not the hereditary class divisions of the rejected European theories of government.<sup>12</sup>

Even such faint nods to aristocracy were too much for some of the founding generation, and further “new explanation[s] of the position of the senate” were created—that the lower house would represent the people, the upper house the states as entities, or, more intelligibly, that the two houses would not so much represent different interests as they would check one another and thus contribute to the more general desires for deliberation and protection from tyranny.<sup>13</sup>

Madison in *The Federalist* was still trying to find a way of distinguishing the two houses of the legislature from each other “by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government,” for the advantage of bicameralism still seemed to be “in proportion to the dissimilarity in the genius of the two bodies.” Yet the genuine principles of republicanism were necessarily leading others to disavow any suggestion of a different social basis

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7. *Id.* at 217, 163.

8. *Id.* at 213, 216.

9. *Id.* at 217-22. Obviously the protection of property against a majoritarian “levelling spirit” was at least an unspoken part of the point here too. *Id.* at 209, 557.

10. *Id.* at 221, 223-24, 237; Vile at 121-22 (cited in note 2).

11. E.g., note 1; Wood I at 556 (quoting Oliver Ellsworth) (cited in note 3).

12. Vile at 165-66 (cited in note 2); see also Wood I at 556, 557-58 (quoting Alexander Hamilton) (cited in note 3).

13. Wood I at 237, 244-54, 558 (cited in note 3).

for the upper houses, and were in fact turning them into another kind of representation of the people, often of course differently recruited, and with their organization and tenure emphasizing stability and continuity, but with their existence justified publicly if not always privately almost solely in terms of a functional Whiggish division of mistrusted legislative power.<sup>14</sup>

But whatever the shifts in rationalization, the Senate continued to be envisioned as fewer in number than the House of Representatives, older, wiser, and "refined through a filtration process" of election not directly by the people but rather by the state legislatures. "The resemblance to the aristocratic House of Lords and the patrician Senate of ancient Rome was never lost, and men continued to invoke the rapidly disintegrating theory of mixed government to explain the character of the Senate."<sup>15</sup>

Thus the Federalists may have concocted less elitist rationalizations for the upper house, but in their hearts they knew that at least to a degree that body would also embody the vestiges of mixed government. The term had all but disappeared from public debate, apparently forever.<sup>16</sup> However, the wiser heads among the Federalists, John Adams most conspicuously,<sup>17</sup> understood that the Constitution as drafted and ratified preserved much of its essence.

Whereas the members of the House of Representatives were to be at least 25 years old, serve two-year terms, and be chosen "by the People," the members of the Senate were to be at least 30 years of age, serve six-year terms, and, most importantly, be chosen "by the Legislature[s]" of their home states. As for the President, he was to be chosen by a college comprising "Electors" sent from each state in a number totalling the state's Representatives and Senators combined. The document further provided that the Electors were to be "appoint[ed] in such manner as the Legislature [of the state] shall direct" and (there being no requirement that the Electors be popularly elected) they were under no obligation in voting for President to

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14. *Id.* at 254-55.

15. *Id.* at 553-54.

16. Thus, to take an example that prefigures my conclusion, it does not appear in contemporary debates over judicial review.

17. "However much Adams may have leaned towards mixed government in 1776 or 1780, there was, of course, no chance of such views being accepted, otherwise than in the watered-down form of a bicameral legislature and a veto power for an elected governor." Vile at 163 (cited in note 2). See also Gordon S. Wood, *The Radicalism of the American Revolution* 267 (Alfred A. Knopf, 1991) ("*Wood II*"). Adams' relative candor on this issue helped account for his (also relative) isolation. Wood I at 569, 575, 586 (cited in note 3). See also *id.* at 554 (quoting Dickenson, Hamilton, and Morris).

follow the wishes of the people of the state. (Note the *double* “filtration” here: the state legislature could choose the Electors any way it saw fit, and the Electors could vote for President any way *they* saw fit.<sup>18</sup>) Thus Adams was right: significant elements of “mixed government” survived into the original document.

Of course much has changed since then. Since the nineteenth century it has been the practice in every state for the people generally to choose the presidential Electors—prior to that some states had the legislature make the selection—and it is by now the universal understanding that the Electors are to vote for the presidential and vice-presidential candidates a majority of the state’s people have selected.<sup>19</sup> It is true that the Constitution has not been officially amended in either of these respects, but it has become clear nonetheless that a dispositive deviation from either practice would not be tolerated.<sup>20</sup> As the Supreme Court noted in 1952, the Electors “are not the independent body and superior characters which they were intended to be” and thus “are not left to the exercise of their own judgment.”<sup>21</sup> *Both* filters are therefore gone: the Electors are elected by the people, and they vote for the presidential ticket the people tell them to vote for. In other words, the people elect the President.<sup>22</sup>

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18. “The electoral college was designed by men who did not want the election of the President to be left to the people.” *Gray v. Sanders*, 372 U.S. 368, 376 n.8 (1963).

19. In 1872 electors pledged to Democratic presidential candidate Horace Greeley felt obliged to vote for him despite the fact that he had died between the general election and the Electoral College’s vote. Edward S. Corwin, *The President: Office and Powers 1787-1984* at 385-86 (Randall W. Bland, Theodore T. Hindson and Jack W. Peltason eds., New York U. Press, 1984).

20. See, e.g., Ronald D. Rotunda, *The Aftermath of Thornton*, 13 Const. Comm. 201, 203-06 (1996).

21. *Ray v. Blair*, 343 U.S. 214, 228 n.15 (1952) (quoting S. Rep. No. 22, 19th Cong., 1st Sess. 4 (1826)).

22. It is true that since the early nineteenth century almost all states have employed a statewide unit rule giving all of the state’s electoral votes to the candidate who wins the popular vote statewide. The unit rule was obviously adopted and is retained by most states, often defensively, as a way of increasing their clout. The federal Constitution does not have anything to say either way about this, although the Twelfth Amendment provides that when no candidate receives a majority of the electoral vote and the presidential election is consequently thrown into the House of Representatives, “the votes shall be taken by states” and, surprisingly (to me at any rate) each state is to get one vote. At least as of 1996 only Maine and Nebraska employed something other than the unit rule, electing some Electors by statewide vote and others by congressional district. William Josephson and Beverly J. Ross, *Repairing the Electoral College*, 22 J. Legis. 145, 161 (1996).

Certainly the merits of the statewide unit rule are debatable. For obvious reasons—A wins a few states by a landslide, B a few others by a nose—the unit rule renders real the possibility that the candidate with the highest nationwide popular vote will lose. The last time this actually happened was in 1876, when Rutherford B. Hayes was elected President despite the fact that his opponent, Samuel J. Tilden, had garnered more popu-

As regards the Senate, the amendment was more official. The Seventeenth Amendment, ratified in 1913,<sup>23</sup> provides that the Senate is to be elected in the same manner as the House, that is, "by the people" rather than the state legislatures.<sup>24</sup> Of course some differences between the two houses remain, and while a couple of them seem faintly relevant, it is difficult to see any as making a significant difference to the subject under discussion. A member of the House generally is elected by the people of only one section of the state,<sup>25</sup> a Senator by the people of the entire state. No reason comes readily to mind for supposing that this renders the Senate more "aristocratic" or deliberative, though it must to some degree tend to make the Senators less parochial (or, at least, parochial in the service of a somewhat larger entity). The difference between the minimum ages for the two offices obviously remains, but seems unimportant. With longer life expectancies, 25 and 30 must seem even less different than they did in the eighteenth century, and in any event the overwhelming majority of Representatives are over 30. As for the difference between six-year and two-year terms, it is too glib simply to respond that most Representatives are repeatedly reelected. They are indeed, but at the cost of spending something like half their time in office raising money and campaigning. Assuming that Senators have to spend roughly the same amount of time per election cycle engaged in such activities,<sup>26</sup> one year constitutes only *one-sixth* of their terms, leaving the Senators more time for deliberation and putting them in somewhat lesser bondage to shifting popular passions.

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lar votes nationwide. However, it seems impossible to predict *ex ante* what blocs of voters or sorts of candidates are likely to be thus advantaged, rendering the unit rule difficult, if not impossible, to regard as reinserting an aristocratic element into the system—questionable though it may be for other reasons.

23. In fact, "by 1912, Senators were already picked by direct election in 29 of the 48 states, notwithstanding the language of Article I." Rotunda, 13 Const. Comm. at 207 (cited in note 20). The story of the devices used prior to the adoption of the Seventeenth Amendment thus to circumvent Article I is succinctly told in *id.* at 206-09.

24. But cf. Legal Times 13 (June 8, 1998) (Judge Douglas Ginsburg addressing graduates of George Mason Law School):

The path from the original Constitution to our present situation, and why we took it, is too long, and too sad, a story for this occasion. In my view, the greatest mistake (*sic*) was the 17th Amendment to the Constitution, which in 1913 provided for the direct election of United States senators.

25. Seven of the fifty states have only one Representative, whose district is obviously coextensive with that of the state's two Senators.

26. To the extent this is inaccurate, one should alter the analysis accordingly. In any event the percentage of their members' terms that must be devoted to campaigning for reelection differs significantly between the two houses.

Finally, and most would probably say this is most important, there is the Senate's traditional self-image as a more mature and responsible body than the House. We heard much of this—mainly from the Senators themselves but to a degree from the media as well—during the recent impeachment imbroglio. And yes, I am aware that the House voted two articles of impeachment and the Senate failed to convict on either of them, which I join most Americans in thinking the right result.<sup>27</sup>

However, the difference between the votes seems quite clearly the result not of any comparative maturity of judgment on the Senate's part but rather of two other factors. The first is the fact that the House was the charging body, the grand jury if you will, the Senate the body whose vote would actually evict the President from office—a difference the members of both houses simply cannot have avoided taking into account. The second is more obvious, that while it takes a simple majority of the House to accuse, it takes two-thirds of the Senate to convict. (I am aware that the Senate votes were 45-55 and 50-50, each short of a majority, albeit one by the skin of its teeth. I am also aware that legislators faced with clearly losing causes often vote with the winners.)

Nonetheless, 45% of the Senators voted to convict on what had become Article I, whereas 53% of the members of the House had voted to send it over. Particularly in light of the fact that the House vote was only an indictment, this is not a terribly large difference: fifty-three percent does not even flirt with two-thirds. What had become Article II makes the point even more dramatically: true, only 50% of the Senators voted to convict on it, but only 51% of the House had voted to refer it! This barely amounts to a difference of any sort, let alone one that suggests an observable difference between the maturity and deliberateness of the two bodies.<sup>28</sup> (Recall as well that the House *rejected*

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27. The ambiguity respecting the breadth of my endorsement—it seems pretty clear most Americans would not go along with me here—is intentional. Am I the only one who thinks impeachment without conviction may have been about right? I do not regard self-serving one-sided “sex” between the most powerful man on earth and a physically unremarkable and understandably starstruck 22-year-old subordinate as a simple case of sex “between consenting adults.” Beyond that, perjury and obstruction of justice are felonies, even when in context they are not, as I said early and publicly, the sort of “high crimes and misdemeanors” that warrant removing the President from office. (“Low” is the adjective that comes more readily to mind.)

28. A number of Senators suggested another way in which the House had behaved with inadequate maturity and deliberation: by voting almost entirely along straight party lines. See, e.g., *New York Times* A22 (Feb. 12, 1999) (remarks of Sen. Tim Johnson, Democrat of South Dakota):

I think [our votes send] a very loud message to the House of Representatives.

the other two articles of impeachment its judiciary committee had recommended, one of them by essentially a two to one vote.) If it's maturity you seek, and like me you regard a disposition not to evict President Clinton as a sign thereof, try the *American people*, only 31% of whom favored conviction.<sup>29</sup> It's enough to tempt one to identify the people generally as the true aristocracy, were that not to drain the term of all meaning.

I don't know about you, but when Chief Justice Rehnquist entered the Senate Chamber, I felt much as I did at the end of William Golding's *Lord of the Flies*: Thank God, everything's going to be all right. A grownup has arrived.

I suppose that vignette gives my thesis away: that despite the substantial assimilation of the character of the Senate to that of the House of Representatives, mixed government survives. For all the while the role of the Senate as a comparatively sober, well-educated, and only indirectly elected elite was on the wane, the comparable role of the Supreme Court was symmetrically waxing.<sup>30</sup> The Court, indeed the entire federal judiciary, is a comparatively old, well-educated, isolated, thoughtful, and wise institution whose input into the laws that govern us is significant.

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Don't ever, ever, send to the Senate again articles of impeachment that are this weak and partisan.

Weak maybe, though we've seen that just about the same percentage of Senators voted for them as Congressmen. Partisan? The truth is that *both* houses behaved in disturbingly partisan ways. In the House the Republicans voted 98% and 95% for the two articles that were adopted, the Democrats 98% and 98% against them. On the two articles that didn't make it out of the House, however, there were Republican "defection" rates of 12% and 36%. In the Senate the Republicans voted in 82% and 91% blocks in favor of the charges, thereby lending some substance to Mr. Johnson's implied claim of lesser Senate partisanship. *However, neither party in the House (nor the Senate Republicans) matched Mr. Johnson's very own team, the Senate Democrats, who voted 100% (45-0) against both articles!*

29. New York Times A16 (Feb. 3, 1999).

30. In the early days American judges were often "aristocrats," including some who were not even lawyers, and their decisions were expected to, and undoubtedly did, reflect their socially elevated status. Wood II at 71-72, 323-34 (cited in note 17). However, prior to *Marbury* judicial jurisdiction was necessarily, and even thereafter it was in fact almost exclusively, a common law jurisdiction, not involving the constitutional invalidation of statutes or other work of the political branches. *Dred Scott v. Sandford*, 60 U.S. 393, decided in 1856 and notoriously invalidating the Missouri Compromise, was only the second Supreme Court decision striking down an act of Congress (*Marbury* itself being the first).

*Dred Scott* was also the first Supreme Court decision to invoke the documentally unprovided, for that matter oxymoronic, doctrine of "substantive due process," essentially authorizing a judicial second-guess of the wisdom of legislation pursuant to no particular constitutional command but rather to some undefined amalgam of the Court's estimations of American tradition and right reason—obviously the very sort of jurisdiction an advocate of judicial participation as the aristocratic element in a "mixed government" would think appropriate.

*Marbury v. Madison*, written by his appointee John Marshall and mining from the Constitution the institution of judicial review, must have made John Adams dance a—well, crack a smile anyway. Six years, horsefeathers: try a life term.

If I had my way, the Supreme Court would not function as an engine of mixed government. *Democracy and Distrust*<sup>31</sup> is an extended argument for the proposition that the Court should not act as an elite impediment to what it takes to be the substantive excesses of the politically responsible branches but, on the contrary, as a perfecter of the democratic process. You will not be surprised to learn, however, that I do not always have my way: *Democracy and Distrust* is characteristically the object of ritual compliment and rapid dismissal.<sup>32</sup>

Instead, the currently dominant academic theory of judicial review is one that would importantly involve the judges in assessing the wisdom of the democratic branches' choices.<sup>33</sup> Whether it is Laurence Tribe telling the justices it is their job to make "difficult substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions,"<sup>34</sup> or Ronald Dworkin assuring them that it "is too late for the old, cowardly, story about judges not being responsible for making" such choices, "or that it is undemocratic for them to try,"<sup>35</sup> the message is clear: government by the people may be an ennobling myth, but sometimes the people get it wrong, and as the reflective elite element in our law-making system, the justices must keep them within the bounds of what is acceptable to the reasoning class.

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31. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U. Press, 1980).

32. Or worse. See, e.g., Laura Kalman, *The Strange Career of Legal Liberalism* 90 (Yale U. Press, 1996) ("Although Ely's effort on Warren's behalf proved herculean, academic lawyers of all ideologies responded with groans . . ."); *Watkins v. U.S. Army*, 847 F.2d 1329, 1356 n.7 (9th Cir. 1988) (Reinhardt, J., dissenting) (entire footnote) ("That Dean John Hart Ely has 'severely criticized' *Roe v. Wade*, maj. op. at 1341 n.21, makes the majority's position no more persuasive and *Roe v. Wade* no less binding or important a constitutional decision"). In light of the results of Professor Kalman's survey, I would have thought my critique of *Roe* had probably *strengthened* its authoritativeness.

33. Fortunately, the justices are only intermittently convinced, with the result that our system can quite justifiably be labeled democratic, most of the time.

34. Laurence H. Tribe, *American Constitutional Law* 584 (Foundation Press, 2d ed. 1988).

35. Ronald M. Dworkin, *Freedom's Law* 38 (Harvard U. Press, 1996). (I confess I find elusive the sense in which it is "cowardly" to trust the judgment of the citizenry at large, rather than preserving a veto for people like ourselves.)

Such recommendations turn my stomach, but I'm a democrat:<sup>36</sup> except where the majority is subjecting some despised or negatively stereotyped minority to inferior treatment or effectively barring its members from the process of governing,<sup>37</sup> I simply cannot understand by what right the educated elite can lay claim to any sort of veto on the collective judgment of its (okay, our) fellow citizens.<sup>38</sup> But though I don't buy it, I can un-

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36. In my more paranoid moments I begin to feel as if, at least among constitutional theorists, I'm the only one. See, e.g., Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 Const. Comm. 271, 274 (1997) (footnotes omitted):

Conservative constitutional commentators insist that principled justices would sustain bans on abortion and strike down affirmative action policies; their liberal peers insist that principled justices would strike down bans on abortion and sustain affirmative action policies. Libertarians would have justices strike down bans on abortion and affirmative action policies; democrats would have justices sustain both measures.

Two or three commentators are cited for each school, save "democrats," where I am the only one. (Parenthetically, I am also an unacknowledged counterexample to what Graber thinks all this proves, that "Controversial cases in leading studies consistently come out 'right,' as 'right' is defined by the theorist's political commitments." Id. I've always been opposed to laws of the sort struck down in *Roe*, and said so in my criticism of that case. For the most part, though, I expect he is right.) And of course—the paranoia's lifting—I'm not the only democratic constitutional theorist: Why, there's Jürgen Habermas, and Henry Monaghan, and Mike Klarman, and . . . let me get back to you on this.

37. See also Martin Luther King, Jr., "Letter from the Birmingham Jail," in Martin Luther King, Jr., *Why We Can't Wait* 85-86 (Harper & Row, 1964):

Let us consider a more concrete example of just and unjust laws. An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is *difference* made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is *sameness* made legal.

Let me give another explanation. A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law.

Actually, given the proclivities of legislatures, these two exceptions generate a quite energetic theory of judicial review and justify most of the modern Court's "activism." See Ely, *Democracy and Distrust* chs. 5 & 6 (cited in note 31).

38. It is true that from time to time there have been inserted in the Constitution provisions (surprisingly few, actually) that cannot without some questionable pulling and hauling be made to conform to either of these accounts—provisions that, candidly considered, protect against legislative interference with some nonparticipational, nonegalitarian value their supporters thought unusually important. True, at the time the provision was inserted its supporters commanded the substantial (elected) supermajority required to enact a constitutional provision: two-thirds of each house of Congress *plus* a majority in at least three-quarters of the state legislatures. Nonetheless, enforcing the substantive value judgments of people no longer alive, no matter how overwhelming their majority, may seem only marginally less "undemocratic" than having appointed judges impose *their* substantive values. *Democracy and Distrust* at 8-12 (cited in note 31).

However, values that are neither participational nor egalitarian do not belong in a constitutive document, at least not in ours. Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. Leg. Educ. 457, 463-64 (1954). It is therefore no surprise to find that whenever such constitutionally sheltered substantive values have posed a real threat to contemporarily popular policy, they have been quite expeditiously expelled from the Constitution, by either official (Article V) or judicial amendment. Ely, *Democracy and*

derstand the contrary position, that intelligent, reflective people are likely to be, well, more intelligent and reflective than the masses and “therefore” their views on how the nation should govern itself should be entitled to special weight, an ultimate veto when necessary. The idea obviously did not originate with John Adams or his contemporaries: it dates back at least as far as Plato<sup>39</sup> and Aristotle.<sup>40</sup>

Thus although mixed government is not the theory that best fits our constitutional charter, especially as it has evolved through amendment,<sup>41</sup> it possesses an ancient alternative pedigree. And given that the educated and well-born will inevitably exercise disproportionate influence in determining our form of government, I suppose it is virtually inevitable. But *please*, gang, admit that what you’re advocating is a mixture of government by the people generally and government by an unelected elite comprising people like yourselves. Stop calling it democracy.

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*Distrust* at 99-100 (cited in note 31).

39. B. Jowett, ed., *Laws*, III, *The Dialogues of Plato*, V, 72-75 (Oxford, 3d. ed. 1892).

40. *Politics*, II, 6, pp. 60-61; IV, 9, pp. 177-84; V, 9, p. 232. See generally Kurt von Fritz, *The Theory of the Mixed Constitution in Antiquity* (Columbia U. Press, 1954).

41. *Democracy and Distrust* at 88-101 (cited in note 31).