# THE IRONY OF POPULISM: THE REPUBLICAN SHIFT AND THE INEVITABILITY OF AMERICAN ARISTOCRACY

*Zvi S. Rosen*[*]

## I. INTRODUCTION

> Clause 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.[1]

On April 8, 1913, the populist dream of true mass democracy came to pass with the ratification of the Seventeenth Amendment.[2] The undemocratic Senate, relic of the attempt to produce a republican system of mixed government, had faded into the realm of historical trivia, to be replaced with the modern elected senate. From this point forward, all three forms of government contained within our mixed government would be popularly elected,[3] and America had undergone its transformation from a democratic republic to a democracy with scattered bits of republicanism.

However, this is not what actually happened. The republican system around which the Constitution is built withstood the modification of the Seventeenth Amendment, and the system of mixed government endures to this day. Rather, what the Seventeenth Amendment achieved was merely the diminution of the Senate.[4] The aristocratic component of the government, which the Framers thought so important, found a new home in the federal judiciary, where it resides to this day. As the courts

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[*] Mr. Rosen is currently pursuing his LL.M. in Intellectual Property Law at the George Washington University. Prior to this the author completed his J.D. at the Northwestern University School of Law, and recently worked on the nominations of Justice Samuel A. Alito and Chief Justice John G. Roberts as a clerk in the Office of Legal Policy at the United States Department of Justice. The author would like to thank Professor Stephen Presser for his invaluable assistance and encouragement as advisor on this project, as well as Professor Robert Bennett for acting as second reader. Several friends are also owed thanks for reading over sections or all of this paper and providing comments.

[1] U.S. CONST. amend. XVII, cl. 1.

[2] Jay S. Bybee, *Substantive Due Process and Free Exercise Of Religion:* Meyer*,* Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U.L. REV. 887, 892-93 (1996).

[3] Although the events of the election of 2000 have suggested that election of the President may not be truly popular, the electoral college has effectively been under popular sway for almost two centuries. *See infra* Part II.D.1.

[4] Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985).

slowly explored their new role in the federal government, they gradually began to utilize the power which befitted their new stature, leading to a Supreme Court which has been an important force on the legislative scene of the nation for the last century. While the Court has been bitterly criticized for its "activist" role, the Court is in fact merely doing its part in the republican shift in government created by the Seventeenth Amendment.

Part II of this paper gives an extremely condensed account of the relevant history of the aristocratic part of mixed government in ancient and Renaissance times, as well as elucidating what is meant by a republic. Part II then examines American Republicanism in theory and practice in the making of the Constitution, with particular attention to the role of mixed government. Part III of this paper offers a condensed history of the Seventeenth Amendment and earlier similar proposals, with particular focus on the changing attitudes towards aristocracy and mixed government. Part IV examines the republican shift at length, namely how the Supreme Court came to replace the Senate as the aristocratic component of government. Finally, Part V offers a summation and final analysis.

## II. REPUBLICAN CONSTITUTIONALISM AND MIXED GOVERNMENT

When the Constitution was drafted, the Framers strongly believed that America should be a democratic republic. To determine the composition of the republic, the Framers turned their attention to the philosophers of antiquity, whose conceptions of the Roman Republic the Framers then modified to rectify its weaknesses and to compensate for the passage of time and history. In order to understand the debates and the ideologies of those participating, some background development in republican history and theory is necessary.

### *A. Republic Defined*

In its simplest form, 'republic' simply means "the people"—as in the rule by the people for the people.[5] However, this paper will use a more specific definition similar to the English word 'commonwealth,' which more closely approximates what the founders meant by 'republic.'[6] In this definition, a republic is a government constituted not necessarily by the people, but for the people. The institutions of the government are thus arrayed for the sole purpose of advancing the public good. Integral to this understanding is a structure of mixed government, similar to the

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5 M.N.S. SELLERS, REPUBLICAN LEGAL THEORY 6-7 (2003).

6 *Id*.

ancient Roman Republic, one that draws a balance between stability, representation, effectiveness, and relative freedom from corruption.[7]

### *B. Republicanism in the Ancients and Renaissance*

Although the Greek philosophers had written about mixed government in various theoretical forms, mixed government would find its truest expression in antiquity among the Romans.[8] The first major writer on the structure of Roman mixed government was Polybius, who briefly set forth the structure of mixed government found in Rome at that time (the height of the Republic at 150 B.C). He argued that it was the system of mixed government which gave Rome its unique strength.[9] The three constituent parts of Polybius's mixed government are democracy (the people), aristocracy (the nobility), and monarchy (the king), each of which possesses its own unique strengths.[10]

A century later, in *On the Commonwealth*, Cicero set forth in greater detail his view of mixed government and its benefits.[11] Cicero shared Plato's fear of the people[12] and found monarchy to be the best of the three forms of government.[13] Cicero argued, however, that all these forms are inferior to a mixed government which integrates the three forms into one system of government.[14] According to Cicero, by integrating the three systems into a system where they check each other, their individual weaknesses are diminished, while their individual strengths are all brought out, and in a highly stable fashion.[15] Without mixed government, each individual form of government inevitably degenerates as a result of its inherent attributes into its corrupted equivalent, be it monarchy to despotism, aristocracy to oligarchy, and democracy to ochlocracy (mob rule).[16] However, in a properly mixed government, the degeneration of each branch is checked by the other branches, as the weaknesses of that branch are the strengths of the other branches. To Cicero's mind, the unchecked intemperance of the Greek democratic institutions was to blame for the fall of the Greeks.[17]

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7 *Id.*

8 *Id.* at 7.

9 3 POLYBIUS, THE HISTORIES 271-73 (E.H. Warmington ed., W.R. Paton trans., Harvard Univ. Press 1972) (1923).

10 *Id.* at 273.

11 1 CICERO, ON THE COMMONWEALTH 35 (C.D. Yonge trans., Harper & Bros. 1877), *available at* http://www.gutenberg.org/dirs/1/4/9/8/14988/14988-h/14988-h.htm.

12 *Id.* at 43.

13 *Id.* at 45.

14 *Id.*

15 *Id.*

16 POLYBIUS, *supra* note 9, at 275.

17 SELLERS, *supra* note 5, at 11.

He preferred the system of the Roman Republic, in which the formulation of laws was left to the wise, with the proviso that no law could be passed without the assent of the people.[18]

Unfortunately, as Cicero was writing about the glories of the Republic, it was collapsing before his eyes.[19] As the Empire rose and the Republic faded into rose-tinted recollection, many Romans tried to explain how the Republic had failed.[20] Thinkers including Sallust, Plutarch, and Tacitus all further built a notion of a republican tradition, but the notion mostly lay dormant for a millennium following the fall of Rome.[21] One and a half millennia later, on that same peninsula, republicanism would rise from the ashes of distant memory.

Early Renaissance political philosophers debated whether republics only existed at certain times or could exist at any time.[22] Without answering this question, the Florentine republic and others of the Italian Renaissance gave hope for the vitality of republicanism in modern times. As the ancient ideas on government and other areas returned to the intellectual milieu at the time of the Renaissance, attempts to put these ideas into practice would follow.[23] Following the spectacular collapse of rule of the House of Medici in 1494, the government of Florence alternated between republican and Medicean governance for over forty years until the Medici were re-established as hereditary rulers of Florence.[24] Well before this, though, one of the first to note the movement of Florence towards a mixed state was Leonardo Bruni, who proposed that this movement was a result of the masses no longer fighting, and the increased influence thus given to the wealthy who could hire mercenaries.[25] Although mixed government was a good thing from a narrow classical view, in practice the mixed government in Florence led to oligarchy.[26] The aristocracy was too powerful, and it lacked control from the top (i.e., the monarchical part of the republic).[27] Bruni made these observations during the first major period of Medicean dominance, but the overly-powerful aristocracy was a problem that would dog the Florentine republic for its entire history.[28]

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18 *Id.*

19 *Id.* at 6-7.

20 *Id*.

21 *Id.*

22 J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 84 (1975).

23 *Id.* at 85.

24 *Id.* at 86.

25 *Id.* at 89-90.

26 *Id.*

27 *Id.*

28 Technically it had long been a republic, but in name only, as it was closer in form to an aristocracy.

When the French Army removed the Medici from power in 1494, a new constitution was written for Florence following the example set by the Venetian Constitution of the same time.[29] This new constitution set up a system of mixed government much closer to the Roman ideal than the system Bruni observed half a century earlier.[30] Although it has been observed in modern times that the government was less mixed and much closer in structure to the aristocracy that was causing problems before, in the minds of many, the "Venetian Constitution"[31] of 1494 would signal the rebirth of mixed government in the modern world. And even though that government would fall in 1512, many would continue to advocate republicanism for Florence.[32]

One of the most important of these advocates was Donato Gianotti.[33] The writings of Polybius were being rediscovered at that time, and Gianotti would become "a contributor of originality, if not of direct influence, to the theory of mixed government."[34] The first major Italian writer to reference Polybius,[35] Giannotti's theory of government similarly called for a mixed structure.[36] Furthermore, Giannotti repudiated Polybius's assertion that Rome was the ideal model for mixed government.[37] Under Giannotti's reading of Polybius, in Rome, the three branches were of equal power. However, in his mind, the power of the parts needed to be distinct, not equal.[38] Giannotti's thoughts on mixed government would be "strikingly anticipatory"[39] of the thoughts of James Harrington a century later, and indeed of Americans two centuries later, who would give the people a uniquely important role while recognizing the necessity of aristocracy and monarchy.[40]

Slowly, republicanism would find its way to England. Of course, in some sense, England had possessed a system of mixed government since time immemorial (composed of the House of Commons, House of Lords, and the King). This balanced view, however, was neither acknowledged nor accurate, considering that most power lay with the King.[41] Nonetheless, in 1642, just before the English Civil War broke out, King

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29 POCOCK, *supra* note 22, at 103.
30 *Id*.
31 *Id.* at 117.
32 *Id*.
33 *Id.* at 272.
34 *Id.* at 273.
35 *Id.* at 296.
36 *Id.* at 300.
37 *Id.* at 308.
38 *Id*.
39 *Id*. at 300.
40 *Id*.
41 *Id.* at 354-55.

Charles I declared England a mixed government, rather than a pure monarchy, in *His Majesty's Answer to the Nineteen Propositions of Both Houses of Parliament*.[42] In this document, the balance between the Commons, Lords, and Kings was not only recognized, but declared as an instrumental aspect of the English Constitution.[43] While this document was issued under duress and suffered from subsequent attempts to reinstate pure monarchy, the document was quickly and widely accepted.[44] This document did not purport to set forth a new doctrine. Rather, the *Answer* recognized that the English Constitution was already one of mixed government as a result of centuries of progress by the parliament.[45] Though the Civil War and subsequent divestment of the king from power somewhat mooted this point, the acceptance of mixed government in America was vital to American thinkers, both in their conception of the English Constitution, and of how it should be reformed and applied to America.

James Harrington, author of *Oceana*, was, like Giannotti before him, "a poor prophet but a successful enricher of the conceptual vocabulary."[46] While *Oceana* was in many ways a seminal work, its unique feature from the standpoint of mixed government was the way it regarded aristocracy as not merely something to be transmitted by hereditary title.[47] Rather, the aristocracy was a natural one to be filled by the elites of society.[48] And although being born into property would enhance one's chances of joining the aristocracy due to superior chances for education and reflection borne from leisure, it was not an automatic qualification for joining the aristocracy.[49]

### *C. American Republicanism to 1800*

With *Oceana*, the stage was set for American constitutionalism. Every aspect of British government accepted mixed government as integral to the English Constitution, a fact of which few interested parties were unaware.[50] The notion of a natural aristocracy made even

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42 *Id.* at 361.

43 *Id*.

44 *Id*.

45 *Id.* at 362.

46 *Id.* at 302.

47 *Id.* at 395.

48 *Id.*

49 *Id*.

50 Suri Ratnapala, *John Locke's Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 190 (1993).

more sense in the relatively unstratified society of America than it did in the much older society of England.[51]

### 1. Natural Aristocracy Defined

Given the background above, a workable definition of natural aristocracy (henceforth referred to simply as "aristocracy" in an American context) is both possible and necessary for the proceeding analysis. The natural aristocracy in the minds of the framers of the American Constitution consisted of men much like themselves – men of education, talent, and wealth.[52] It would thus be men capable of looking beyond the shifting immediate interests of the people, and towards the frequently unpopular but necessary objectives of true statesmanship. Wealth was considered important not merely because it freed these men from the more mundane concerns, which may have impacted their decision-making, but also because it was considered a reasonable index of talent and education.[53]

### 2. American Republican Theory

In the years following the Glorious Revolution in England, Parliament, having already declared its ultimate power in England, gradually shifted in form to the Parliament we would recognize today. In this environment the Tories and the Whigs, the two schools of thought regarding the English Constitution, were in conflict. The radical Whigs argued that the English Constitution was that of a true mixed government, and that it had merely been corrupted.[54] American observers to this conflict adopted this viewpoint, and believed it to be the proper normative viewpoint of English Constitutionalism. This led many in the American Colonies to believe that they were merely reforming the English Constitution.[55] While this was not the prevailing reading of the English Constitution in England, it was nonetheless widely accepted in America, and was used to temper the impression of radicalism regarding the revolution.[56]

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[51] POCOCK, *supra* note 22, at 514. ("[T]hough [some areas like] the Hudson Valley might offer grounds for disputing this.").

[52] CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS 131 (1994).

[53] *Id.* ("Americans had decided that . . . education and talent often accompanied wealth . . . ."); Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 441 ("A 'natural aristocracy' was soon identified with men of property who could adequately represent the public interest.").

[54] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 200 (1969).

[55] Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?,* 69 N.C. L. REV. 421, 436-37 (1991).

[56] WOOD, *supra* note 54, at 200-01.

Colonial government was frequently chaotic, and many observing the colonies believed this was due to the lack of an aristocratic component to the government.[57] While some gave thought to the creation of a hereditary aristocracy as an exception to the democratic system, most agreed that this would be ill-advised; a general consensus emerged that another method of finding the natural aristocracy in America would be needed.[58] Additionally, a small number questioned the need for an aristocracy at all and proposed a pure democracy.[59] The number favoring pure democracy would swell over time, and indeed ultimately lead to the Seventeenth Amendment.

Despite some views that a pure democracy was more desirable, the leading theoreticians believed that a mixed government was vital to the success of the Constitution, and explored the nature of the senatorial body. Many of the prominent American thinkers of the time were involved in this debate. For instance, in *Federalist No. 39*, James Madison asserted that only a republican government would be suitable for the "genius of the people of America," and set upon showing the republican character of the Constitution.[60] Madison first looked to the republics of the more recent memory and dismissed them as false republics, usually oligarchies in masquerade.[61] Madison believed that, in a republic "[i]t is *essential* . . . that [the government] be derived from the great body of the society"[62]—anything else is bound to not be for the common good. However, it is not essential that the government be appointed directly by the people. As long as certain elements of the government are appointed by the representatives of the people, there is no concern regarding the republic's true standing.[63]

Interestingly, Madison did not view the appointment of Senators by the states to be particularly important; he described this provision as having been chosen due to being the "most congenial with the public opinion."[64] To be sure, Madison thought state representation in the national government was important.[65] However, Madison also found important "favoring a select appointment," that is, ensuring that the Senators are the natural aristocracy of the republic.[66] In Madison's view,

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57 POCOCK, *supra* note 22, at 513-14.

58 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 278 (1969); WOOD, *supra* note 54, at 208.

59 BAILYN, *supra* note 58, at 279-80.

60 THE FEDERALIST No. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961).

61 *Id.* He specifically singled out Venice for this. *Id.*

62 *Id.* at 241.

63 *Id*.

64 THE FEDERALIST No. 62, at 377 (James Madison) (Clinton Rossiter ed., 1961).

65 *Id*.

66 *Id*.

having the state legislatures appoint the Senators was an effective way to kill two proverbial birds with one stone.[67]

While other political figures such as Alexander Hamilton would also write on mixed government,[68] the most important thinker on mixed government and American Republicanism was John Adams. Adams' *Thoughts on Government*, written as a response to Thomas Paine's *Common Sense* and published in 1776, was not only the most important pamphlet on mixed government, it was the most influential pamphlet in general for the early stages of constitutionalism.[69]

In *Thoughts on Government*, Adams first addressed the anarchism he saw in Paine and other pamphleteers of the time, asserting the importance of a well-formed government.[70] Adams shared the opinion of both the ancient and modern republicans that the only good government is a republican government, which would make it the only appropriate government for the new nation.[71] Given Adams' argument for a bicameral legislature, the need for an upper house to moderate the lower house and exercise wisdom was clear.[72] This body would act as "a mediator between the two extreme branches . . . that which represents the people, and that which is vested with the executive power."[73] Also, in Adams' *Thoughts on Government*, he introduced the notion of executive appointment with the advice and consent of the council regarding nominees.[74] Adams admitted that this conservative republican notion was not suitable for true popular government, and yet it found its way directly into the Constitution.[75]

In Adams' mind, "there never was a good government in the world, that did not consist of the three simple species of monarchy, aristocracy, and democracy . . . ."[76] Adams understood that every government has its unique strengths and advocates, and they all make a valid point, even those who advocate monarchy alone.[77] However, each form of

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[67] *Id*.

[68] *See*, *e.g.*, ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *available at* http://www.founding.com/library/lbody.cfm?id=148&parent=56.

[69] WOOD, *supra* note 54, at 203.

[70] JOHN ADAMS, *Thoughts on Government*, *in* THE PORTABLE JOHN ADAMS 234 (John Patrick Diggins ed., 2004).

[71] *Id.* at 235.

[72] *Id.* at 236-37.

[73] *Id.* at 237.

[74] *Id.* at 239.

[75] *Id.*; U.S. CONST. art. II, § 2, cl. 2.

[76] 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 149 (Da Capo Press 1971) (1787-88).

[77] *Id.* at 151.

government will succumb to corruption if left alone, and no republic of the past had ever survived in a republican form.

Adams' analysis and application of these lessons is unique.[78] Regarding Machiavelli's assertion that "those are much mistaken, who think any republican government can continue long united," Adams responded, speaking clearly to those who favored pure democracy, that "[r]epublics that trust the content of one assembly or two assemblies are as credulous, ignorant, and servile, as nations that trust the moderation of a single man."[79] He believed that a mixed government is the key to stability and justice, not a government which can lead to the tyranny of the multitude.

In response to Machiavelli's assertion that differences and divisions were hurtful to republics, leading to factionalization, Adams noted that all forms of government produce factions, and that not all factionalization is harmful. Furthermore, when government is properly mixed and balanced, "[f]actions may be infinitely better managed."[80] This is because, in a simple government dominated by any one of the three forms, the government itself is a faction.[81] In a mixed government, however, factions take on a much smaller role, since they are checked not only by other factions, but by the other aspects of government. A faction that controls a portion of the democratic branch of government must still contend not only with other factions in the democratic branch, but also the checks of the aristocratic and monarchical parts. Admittedly, this can be overwhelmed by political parties with control over all branches; however, the difficulty of that, both in terms of attaining it and retaining party discipline, is significant, and far more difficult than doing so in a single democratic legislature with all powers. While even at that time many equated a republic with a pure democracy, Adams viewed this equation is simply incorrect.[82]

Advocates of mixed government were hardly limited to these few thinkers though. From the revolutionary period on, many believed that a senatorial part was needed to house the social and intellectual elite.[83] It was thought that these elites would give American legislatures all the virtues of the House of Lords in even greater measure than a hereditary

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[78] Much of Adams' *Defence* is comprised of an examination of the republics of earlier times, from Rome to the Italian Renaissance to England, which have been discussed above. See *supra* p. 9.

[79] 2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 128 (Da Capo Press 1971) (1787-88).

[80] *Id.* at 129.

[81] *Id.* at 130.

[82] JOHN ADAMS, 3 A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 159-160 (Da Capo Press 1971) (1787-88).

[83] WOOD, *supra* note 54, at 209.

aristocracy could offer, while relieving the government from the substantial burdens of a hereditary aristocracy.[84]

Tellingly, in all the debate about the judiciary,[85] and about the ratio of mixed government in the colonies, not much was written about the place of the courts in the regime of mixed government. While the courts might seem to be a natural place for the intellectual aristocracy at first glance, this was not discussed. The best explanation is simply that the courts were not considered to be aristocracy or any other part of government—they were simply an adjunct to the three forms of government. While it was important that courts had power for purposes of separation of powers, they were not direct parts of a mixed government at the time of the Constitution.

The federalists who advocated mixed government had their chance to implement it in many state constitutions, including the Massachusetts Constitution of 1780, which bore Adams' unique stamp and shares many important features with the federal Constitution.[86] And yet the federal Constitution offered both new challenges and opportunities for Constitution-making. In doing so, the advocates of mixed government were able to give the aristocratic part of society a permanent home in the government, a home that would be uniquely appropriate for their talents.

### 3. Republicanism and the Constitution

When it became increasingly apparent that the Articles of Confederation were simply inadequate to lead what was much more than a loose alliance, the stage was set for a convention to write the Constitution for America. With many states suffering from the vices of unrestrained democracy, those who were not Federalists, such as James Madison, were more amenable to mixed government than they otherwise would have been.[87] This period embodied the high mark of the intellectual popularity of mixed government, ensuring that mixed government principles were bound to be integral to the new Constitution.

One difficulty to implementing these principles was the distillation of the aristocracy from the masses.[88] The direct election of Senators was one such option which met with some support, although mostly from those who did not generally favor mixed government. As William Smith noted though, a legislature in which both houses are elected carries no

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84 *Id*.

85 *See*, *e.g.*, THE FEDERALIST No. 78 (Alexander Hamilton).

86 MASS. CONST. OF 1780.

87 *Cf.* THE FEDERALIST No. 10 (James Madison).

88 WOOD, *supra* note 54, at 210.

benefit beyond a legislature with only one house—"[t]hey are only two Houses of Assemblymen."[89] Additionally, as Thomas Jefferson noted, "a choice by the people themselves is not generally distinguished for its wisdom."[90] An aristocracy which is directly accountable to the people is no aristocracy at all, both in content and abilities. The aristocracy would be unable to pursue the balancing function that was so necessary in a republic—keeping the excesses of the people themselves suitably restrained.

Others, including many federalists like Alexander Hamilton, supported life tenure for Senators; however, this was dismissed by those with more democratic tendencies.[91] It also seemed inordinately dangerous to give life terms to the aristocracy; the risk was that they would become the dominant branch, even with the limitations of the purse that were placed on them. Aristocrats with life terms would have had free rein to pursue whatever they desired, accountable to no one.

Another notion that came to be seen as inimical to republican government was having Senators elected by a limited franchise.[92] Although this was a popular idea in the early days of constitutionalism, as time went on, many saw the idea of a limited franchise as an attempt to impose fixed class differences on the new society, and it was not viewed as a serious option by the time of the Constitution.

Thus, the idea that would be adopted for the Constitution came to prominence—having the representatives of the people elect the Senators. The Constitution was drafted so that the Senate not only constituted the aristocracy in the mixed government of the American Constitution, but also so that the states were represented in the federal government. The state legislatures would appoint Senators to the Congress—a system that persisted until the ratification of the Seventeenth Amendment.[93]

Although "the Federalists may have concocted less elitist rationalizations for the upper house, . . . in their hearts they knew that at least to a degree that body would also embody the vestiges of mixed government."[94] Adams and others made mixed government integral to the new Constitution, making sure that "the Constitution as drafted and ratified preserved much of its essence."[95]

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[89] *Id.* at 215.

[90] *Id.* at 213; *see generally* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (Frank Shuffelton ed., Penguin Books 1999) (1787).

[91] WOOD, *supra* note 54, at 503-04.

[92] *Id*.

[93] U.S. CONST. amend. XVII.

[94] John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 285 (1999).

[95] *Id*.

#### 4. Mixed Government vs. Balanced Government

Before going further, it is worthwhile to mention the distinction between mixed and balanced government. While both are methods of controlling power in the government, they look to different sources of power in considering the proper arrangement. Balanced government is a way of ensuring that the three branches of government remain balanced relative to each other, and that one branch, be it the legislature, executive, or judiciary, keeps the power to carry out its responsibilities and does not gain power to exercise the responsibilities of another branch to the detriment of that other branch.[96] Mixed government is more of a way to harness the unique qualities of various types of government, and notably did not concern the judiciary in the constitutional debates of the time. Balanced government is a doctrine which the Constitution enforces, while mixed government is a philosophical notion which the Constitution embodies.

### *D. American Republicanism to 1913*

Mixed government had always been an unpopular theory among the people.[97] With the democratic part of the government in a uniquely important role, both the language and structure of mixed government came under assault by those in favor of pure democracy. As the institutions of aristocracy came under attack, the first stirrings of the shift of aristocracy from the Senate to the Supreme Court can be seen.

From the founding of the American republic to the Civil War, the language used to describe the republic shifted markedly toward a democratic point of view. Giants of American legislation, such as Webster, Calhoun, Clay, and others, found a home in the Senate of the time.[98] Observers such as Alexis de Toqueville were struck by the Senate's "eloquent advocates . . . and statesmen of note, whose arguments would do honor to the most remarkable parliamentary debates of Europe."[99] At the same time, the House of Representatives seemed to many to be a house comprised of 'village lawyers' and 'obscure individuals.'[100] The constitutional system seemed to be working exactly as it was supposed to, with the House representing the general public, and the Senate representing the loftier ideals and practices for which the common people might have less sympathy. And yet even by this point,

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96 *See, e.g.*, WOOD, *supra* note 54, at 584.

97 *See generally id.*

98 C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 53 (1995).

99 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 259 (Francis Bowen ed., Henry Reeve trans., 4th ed. 1864).

100 HOEBEKE, *supra* note 98, at 54 (quoting Alexis de Tocqueville).

dating back almost to the Constitution itself, ideological and political movements were moving to shift this balance towards the mass democracy the Framers of the Constitution abhorred.[101]

While many of the luminaries of the constitutional convention were uncomfortable with direct and unrestrained democracy, others were much less concerned by it and would endeavor to effectively dismantle the Constitution's original structure of mixed government. While de Tocqueville was praising indirect elections as resulting in the uniquely excellent mixture of American Republicanism, in fact what was intended to be one of the vital components of aristocracy in the American mixed government (the Electoral College) had already fallen to mass democracy, leaving the Senate as the remaining bastion of aristocracy in the American Republic.[102]

The Electoral College had been incorporated into the Constitution with the goal of controlling presidential choices.[103] Although there was reasonable confidence that a voting body as large as the entire country would make a reasonable choice, the tyrants who sullied the pages of republican history suggested that absolute confidence in the general population in this regard would be misplaced. As such, a college of electors was constituted, so the people would indirectly elect the President. The Constitution gave no particular guidance on the selection of electors, and originally the majority of states chose their electors, defined as "citizens of 'superior discernment, virtue and information,' who elected the president 'according to their own will.'"[104] This view, however well-considered it seemed in the theoretical framework of mixed government, was "an affront . . . to the democratic sensibilities of the [later] age."[105] By 1832, electors in all states but South Carolina were bound to the decision their party had made in the primary. Since then, the Electoral College has been little more than a rubber stamp with the occasional effect of producing democratically elected presidents who fail to triumph in terms of pure plebiscite. The aristocratic part of the government was thus limited to the Senate. And yet, the Senate seemed to have undergone a similarly ill transformation only shortly thereafter.

Selection of Senators by state legislatures grew increasingly problematic after the Civil War, as problems with both legislative deadlocks and bribery of state legislators sullied the process.[106] As the office of Senator shifted more towards democracy and away from

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[101] *See generally id.*

[102] *Id.* at 84-85.

[103] *Id.* at 84.

[104] *Id.* (quoting Senator Thomas Hart Benton).

[105] *Id.* at 85 (quoting Senator Thomas Hart Benton).

[106] *Id.* at 91.

aristocracy, it came to be viewed with a certain lesser degree of respect, and more as another political job of influence.[107] Respect for the Senate diminished further as many former captains of industry became Senators, leading to popular assumptions of bribery and corruption, even though such assumptions were rarely grounded in reality.[108] This loss of respect was due largely to a shift in the way fortune was viewed, away from the original perspective that Senators were expected to come from the wealthy.[109] Only a century after the founding, the public largely disapproved of the fact that it was "as difficult for a poor man to enter the Senate of the United States as for a rich man to enter the kingdom of heaven."[110] By the time of the Seventeenth Amendment, the United States Senate was viewed in an unequivocally negative way by many Americans. It was seen as corrupt, enraptured by and captive to big business, undemocratic, and an anachronism. And yet the Senate of the time was already far more democratic than most would assume.[111]

## III. THE RISE OF THE POPULARLY ELECTED SENATE

The notion that Senators should be popularly elected dates back to the framing of the Constitution, where extensive thought was given to the way a natural aristocracy would be properly distilled. This notion would achieve absolute fruition with the Seventeenth Amendment to the Constitution, but would begin earlier—even before the Civil War.

### *A. The Long Road to Amendment*

The first proposal that Senators be directly elected by the people of their constituent state was introduced in the United States House of Representatives in 1826.[112] The proposal was tabled without discussion, much like a similar proposal in 1835, and five more in the early 1850s.[113] Andrew Johnson, Tennessee Congressman and future president, sponsored two of these bills in the early 1850s and would become one of the most notable early proponents for the direct election of Senators.[114] In 1868, while addressing a Congress deeply preoccupied with the constitutional and practical challenges of reconstruction and deeply mistrustful of him, President Johnson advocated a constitutional amendment which would institute the direct election of Senators.[115]

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[107] *See id.* at 91-106.
[108] *Id.* at 99.
[109] *See generally* WOOD, *supra* note 54.
[110] HOEBEKE, *supra* note 98, at 99.
[111] *See id.* at 91-106.
[112] *Id.* at 85.
[113] *Id.*
[114] *Id.* at 85-86.
[115] *Id.* at 86.

While the Constitution would not be amended in this manner for some time yet, a practical shift in the direction of popular election had already occurred.

Popular campaigning for Senate seats (called "canvassing") had a pedigree that stretched back to 1834.[116] This was taken to a new height in the Lincoln-Douglas race of 1858, in which the race for a Senate seat filled by appointment took on national attention. While some editorialized that "[t]he Senator . . . is the representative of the state, as an independent policy, and not . . . of its individual citizens," the majority of the citizenry was hardly alarmed at this surge of democracy.[117] Meanwhile, as new states began to pop up with great frequency in the West following the Civil War, they would often choose their Senators through senatorial primaries rather than the concerned judgment of the legislatures.[118] The state legislatures theoretically had the right to make their own choice; however, much like federal presidential electors, they had practically been reduced to the level of rubber stamp, with harsh consequences for disobedience.

The proposals for direct election of Senators continued unabated, and in increasingly large numbers.[119] In the 1890s, the issue received national prominence for the first time as it became a central issue of the National People's (or Populist) Party.[120] At this point, resolutions began to pass the House advocating the direct election of Senators, and after short time, these resolutions began receiving unanimous votes.[121] While these resolutions did not make it past the Senate, the path of the future Senate was clear.

### *B. The Ratification of a Progressive Amendment*

In 1908, after six years of a quiet surface and unquiet depths on the issue, Congress passed a resolution for an amendment which would mandate direct election for United States Senators.[122] In the Senate, the amendment was stymied because northern Senators attempted to include in the amendment federal control over the voting to ensure that all races could vote equally.[123] Naturally, these additions received little support from southern Senators. Additionally, many of those from the older and more populous states felt that direct elections of Senators

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[116] *Id.* at 87.

[117] *Id*. (citing William H. Riker, The Development of American Federalism 148 (1987)).

[118] *Id.* at 88.

[119] *Id.* at 136.

[120] *Id.* at 136-37.

[121] *Id.* at 141.

[122] *Id.* at 157.

[123] *Id.* at 162-63.

would be far more complicated and troublesome because of their large populations.[124] In the larger states, it would be simply impossible for voters to be acquainted with the senatorial candidates the same way they could be in the newer and less populated states. The Senators who led the charge for the Seventeenth Amendment, most notably William E. Borah of Idaho, were in large part Senators from newer and more sparsely populated states that had introduced primary systems for choosing Senators.[125]

Senator Elihu Root gave perhaps the last great defense of counter-majoritarianism on the Senate floor, arguing that the purpose of the Senate was "occasionally to rebuke, never to flatter, the sovereign people."[126] The problems with the Senate did not lie with the nondemocratic method of choosing Senators, but rather that the people had abandoned the model, which in its prime had brought the best and brightest, the natural aristocracy, to the halls of government.[127] And yet the die had already been cast. The resolution would fail to carry, but, a new Congress would come in a week later, and the new Senate would approve a slightly different version than the one approved by the House.[128] After a long period of battle between the House and Senate, the House gave in and accepted the Senate's version on May 13, 1912. Within a year, the amendment had the necessary number of states to pass, with only two states rejecting the amendment, and many accepting it unanimously.[129] On May 31, 1913, the Seventeenth Amendment was formally entered into the United States Constitution by William Jennings Bryan, acting in his capacity as the Secretary of State.[130] Mass democracy was now not only a fact on the ground—it was a part of the Constitution, one unlikely to ever be removed, or even seriously questioned.

## IV. THE REPUBLICAN SHIFT

Despite popular sentiments that the aristocratic element should be purged from government, mixed government survived, with the Supreme Court taking upon itself the role of legislative aristocracy. While this shift started slowly, the Seventeenth Amendment was a shock which dramatically accelerated this process, leading to the modern activist court as the aristocratic part of government.

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124 *Id*.

125 *Id.* at 158-64.

126 *Id.* at 176.

127 *Id*.

128 *Id.* at 189.

129 *Id.* at 189-90. Connecticut, the last state needed, ratified on April 8, 1913. *See id*.

130 *Id.* at 190.

### *A. The Resilience of Mixed Government*

Some have argued that, by 1913, an argument that the Senate was the vital aristocratic part of a mixed government was so far removed from contemporary discourse "as to be incomprehensible to nearly anyone but constitutional pedants."[131] Yet this is to overstate the level to which contemporary discourse had fallen. Certainly in the popular imagination of the time, America was a democracy, and any nondemocratic institutions were an affront to this viewpoint. Even at the time of the framing, mixed government was unpopular, but viewed as a necessity by those entrusted with framing a government that would stand the test no other republic had successfully stood—the test of time.[132]

Although the use of mixed government as a philosophical notion was at low ebb at the time of the Seventeenth Amendment, it had not fallen off the map. Foreign observers such as Lord Bryce noted that the Senate continued to check "on the one hand the 'democratic recklessness of the House,' on the other, the 'monarchical ambition' of the President."[133] American political figures were much more muted in their recognition of this constitutional fact, preferring to offer false rhetoric about the Constitution's commitment to democracy. However, some were willing to publicly admit that the Constitution was "against the spirit of [pure] democracy."[134]

In fact, the lack of modern support for the Seventeenth Amendment is quite striking. Numerous movements and politicians support the repeal of the Seventeenth Amendment, including former House Majority Leader Tom Delay, former Senator Zell Miller, and former presidential and senatorial candidate Alan Keyes.[135] Senator Zell Miller, shortly before his previously announced retirement, introduced an amendment to repeal the Seventeenth Amendment.[136] Other commentators, including John W. Dean, have also noted the negative effects of the

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[131] *Id*. at 136.

[132] Ely, *supra* note 94.

[133] HOEBEKE, *supra* note 98, at 127.

[134] *Id.* at 177 (quoting Senator Jonathan Bourne).

[135] Lewis Gould, *Alan Keyes's Daffy Idea to Repeal the 17th Amendment*, HISTORY NEWS NETWORK, Aug. 23, 2004, http://hnn.us/articles/6822.html (last visited May 14, 2005). Despite the title, the article does not give theoretical support for the Seventeenth Amendment—it only repeats that some Senators at the time were corrupt. *Id.*

[136] 150 CONG. REC. S4494-01, S4503 (2004) (statement of Sen. Miller introducing S.J. Res. 35) ("The Senate has become just one big, bad, ongoing joke, held hostage by special interests, and so impotent an 18-wheeler truck loaded with Viagra would do no good.").

Seventeenth Amendment.[137] Belying the claim that mixed government is dead as a basis of government, it has returned to the intellectual and political consciousness of interested parties, to the point that Senator Robert Byrd can refer to it as "the principal basis for the U.S. Constitution."[138]

The insight that the Supreme Court is acting as the aristocratic part of a modern mixed government is not a new one.[139] "[D]espite the substantial assimilation of the character of the Senate to that of the House of Representatives, mixed government survives" with the Supreme Court as aristocracy.[140] Although the amount of scholarship regarding the interaction of contemporary government and mixed government is still small, it is growing.[141] In any case, while the academy has been debating the true nature of republicanism for some time, the structure of mixed government in modern government has slowly begun to become apparent to laypeople as well.[142]

### 1. Modern Liberal Republicanism

It should be noted that the classical republicanism at issue here is substantially different from the liberal "civic" republicanism which has only recently been in vogue.[143] Although liberal republicanism was an interesting attempt to remake constitutional order in a way more congruent with a certain set of political and social beliefs, it bore little

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[137] John W. Dean, *The Seventeenth Amendment: Should it be Repealed?*, FINDLAW, Sept. 13, 2002, http://writ.corporate.findlaw.com/dean/20020913.html.

[138] 146 CONG. REC. S2910-02, S2916 (2000) (statement of Sen. Byrd).

[139] *See generally* Ely, *supra* note 94.

[140] *Id.* at 289.

[141] *See, e.g., id.*; Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 721 (2001).

[142] *Judges, Suicide, and the Resurgence of the States*, THE ECONOMIST, July 5, 1997, at 25.

> America is, by common consent, the world's most energetic democracy. But it is also pretty good at aristocracy: the system, as Aristotle defined it, in which an unaccountable but virtuous elite decides things for the common folk. America's democratic politicians wear check shirts, and speak in simple sound-bites. Its aristocrats wear black robes, and communicate through densely argued documents. America's democratic politicians stand or fall by their poll numbers. America's aristocrats are unelected, irremovable; their standing depends not on popular approbation, but on the power of their thought.
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> The aristocrats, of course, are the nine Supreme Court justices . . . .

*Id*.

[143] G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994) (summarizing scholarship up to that point).

resemblance to classical republicanism.[144] To Adams or Madison, the socialized ideals of civic republicans would remind them most of the diggers[145] who were the antithesis of the order of mixed government.[146] While to advocates of civic republicanism the term republicanism can refer to the New Deal or the Warren Court "republicanism," the republicanism of the Constitution is that of mixed government.[147]

#### 2. The Necessity of Aristocracy

The resilience of republicanism stems in part from the inevitable need for an aristocratic branch to balance out the inevitable democratic tendencies of American Government. There is no particular reason to accept the assumption of the supremacy of democracy in the current American system. This assumption owes little more to its genesis than ill-defined popular wisdom and the political philosophy of the nineteenth century.[148] Rather, an element of aristocratic moderation has always been a necessity to the American political system. Despite the allure of mass democracy, the choices of the people in mass democracy are uneven, and frequently poor.[149] When the newly formed states embraced mass democracy during and following the revolution, the results were frequently chaotic. Since the adoption of the Constitution, however, aristocracy has remained an essential part of the American body politic in various guises—and has contributed to the stability of American government.

### *B. The Real and Theoretical Senate*

#### 1. Progressive Myths

It is often stated that the Senate of the late nineteenth and early twentieth century was little more than a servant to big business with little to commend it. While this is a popular view, its accuracy as a description of the Senate at the time is somewhat questionable.

To attack the Senate for being a rich man's club and thus a perversion of the original purpose of the Senate is to misunderstand the

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[144] *See*, *e.g.*, Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 97 (1987); *see also supra* Part II.B.

[145] The diggers were a group of English Radicals at the time of the Civil War who advocated "digging" the well-off down so as to enforce economic equality. *Digger*, *in* 4 ENCYCLOPEDIA BRITANNICA 92 (15th ed. 1998).

[146] THE FEDERALIST No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961) ("A rage for . . . an abolition of debts, for an equal division of property, or for any other improper or wicked project . . . .").

[147] Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

[148] *See generally* HOEBEKE, *supra* note 98.

[149] *See*, *e.g.*, WOOD, *supra* note 54, at 213.

original purpose and intended composition of the Senate. Many proposals for senatorial selection actually placed a fairly high property qualification on proposed Senators. The popular bodies in the immediate aftermath of the revolution sought to take advantage of their power, to the detriment of the property of the few. Indeed, many of the purely democratic state legislatures had conducted land grabs against wealthy Tories and others.[150] To the Framers, theft against the rich was no less heinous than theft against the poor.[151] Having wealth was not viewed in the negative light it was viewed with in the populist era.[152] At the time of the framing, wealth was seen as a sign of talent, something to be valued.[153]

Generally speaking, although the progressives felt they were faulting the Senate for failing its duties, they were actually criticizing it for not being a second House of Representatives. This misunderstanding is reasonable given that the unpopularity of the notion of aristocracy led the defenders of the Senate, even in the times of the Constitution itself, to use bicameralism and not mixed government to defend the institution of the Senate.

And yet the merit of the Senate would not be reduced to bicameralism proper until the passage of the Seventeenth Amendment. As seen above, the Senate retained some of its aristocracy right up to 1913.[154]

### 2. Actual Diminution

While the Senate would retain some of its aristocracy up to 1913, much of it had been diminished before then.[155] Much of the Senate was indeed composed of party hacks and others who did not do credit to the institution. However, blame for this seems more reasonably placed at the feet of prior democratic reform than the deterioration of the Senate from natural causes. In a statement running contrary to popular opinion, Jefferson noted that the choices of the people are not known for their wisdom.[156] The people had already arranged to choose their own Senators in many states by democratic means; now they were agitating that the Senators were insufficiently democratic. The democratic reforms to the Senate had produced much of the late-nineteenth and early-twentieth century senatorial muddle in the first place. Thus, the people

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[150] *See*, *e.g.*, 1 LAW PRACTICE OF ALEXANDER HAMILTON 197-223 (Julius Goebel, Jr. ed., 1964) (dealing with the New York legislature's attempts to do this).

[151] *Id*.

[152] RICHARD, *supra* note 52, at 131.

[153] *Id*.

[154] *See supra* Part III.B.

[155] *See supra* Part III.A.

[156] WOOD, *supra* note 54, at 213 (quoting Thomas Jefferson).

saw more democratic reform as the answer, perhaps because the people insufficiently appreciated the need for aristocracy to check their rash passions.

### 3. The Fall to Democracy

Even prior to the Seventeenth Amendment, "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."[157] With the Seventeenth Amendment, this process only accelerated.[158] Today, the Senate acts in concert with the House of Representatives, occasionally checking it, but more often simply acting in a similar manner since both bodies are subject to similar democratic pressures. It is frequently noted that although there are differences between the two bodies, these differences are minor.[159] Although there are still some wise men in the Senate, Senators are now shackled to the fickle constraints of mediocrity known as popular opinion and special interests.[160] Aristocracy has left the Senate, and shows no signs of returning to it under the current configuration of mixed government.

## *C. The Rise of Legal Education*

Another factor vital to the rise of the Supreme Court was the firming of the association between legal education and intellectual achievement. While at the time of the founding many of the intellectual giants were lawyers, the training process for lawyers was much more uneven, and the intellectual prowess of Hamilton and Adams was a result of factors other than their legal training.[161] It is perhaps no coincidence that legal education began to assume its modern form just as the republican shift began to occur.[162]

The judges, who serve as aristocrats, are generally considered the cream of the modern legal crop. Of course, the notion of lawyers as America's aristocrats is nothing new, going back even before de

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[157] Ely, *supra* note 94, at 289.

[158] Craig S. Lerner, *Review: Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2099 n.156 (2002) ("The Seventeenth Amendment, by requiring the direct election of Senators, has made the body more political . . . .").

[159] *See*, *e.g.*, *id.*; Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 246 (2002).

[160] 150 CONG. REC. S4494-01, S4503 (2004).

[161] *See generally* Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped our System of Legal Education*, 39 NEW ENG. L. REV. 251 (2005).

[162] *Id.*

Tocqueville's famous assertion to that effect.[163] Additionally, it seems reasonable to believe that the Founders expected a significant portion of the aristocratic part of the government to be comprised of lawyers. However, they certainly did not expect the function of aristocracy to be delegated solely to lawyers. While lawyers have more knowledge of the functionality of the law, that is not necessarily an asset to a body that is meant to be deliberative. While the lawyers in the Supreme Court may be of the highest intellectual caliber, they lack the wealth of knowledge and experience a more diverse body would contain.

Even as the lawyer class was the intellectual elite in de Tocqeville's eyes, lawyers of that time period bear little resemblance to the lawyers of today. While some lawyers were steeped in the classical traditions, this was more a consequence of the system of education at the time, than their legal training, which more closely resembled a medieval apprenticeship than modern legal education.[164] However, this apprenticeship system also resulted in many lawyers, especially in the outlying regions, who were little more than technicians.[165] Legal education developed slowly in America, as the first law school, Harvard Law, was not founded until 1817.[166] Even after this, legal education would not take off until after the Civil War, when various pressures conspired to dramatically reform American legal education into a modern professional discipline.[167] By 1921, many top schools required a college degree for admission, in stark contrast to previous standards.[168] Indeed,

> [l]aw's move from collegiate to professional was not merely a simple change of status, but was perceived as a much needed elevation of the field itself.
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> By gradually becoming a professional school, law upgraded the value of its degree. No longer just a collegiate school of lectures, law was now a laboratory of legal research, conducted by specialized researchers for professionals. Law school's elevation to a graduate profession provided further proof to the bar that lawyers were . . . the nation's moral arbiters and leadership elite.[169]

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[163] DE TOCQUEVILLE, *supra* note 99.

[164] *See* Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 918 (1994).

[165] *Id*.

[166] Harvard Law School: Facts, http://www.law.harvard.edu/about/faq.php #facts (last visited March 25, 2006).

[167] *See generally* Appleman, *supra* note 161.

[168] RICHARD L. ABEL, AMERICAN LAWYERS 48 (1989).

[169] Appleman, *supra* note 161, at 298.

### *D. The Rise of the Supreme Court*

Aside from the possible exception of *Marbury v. Madison* and *Dred Scott*, the Supreme Court rarely, if ever, engaged in activist judicature prior to the Civil War.[170] In the years following, such practices would slowly increase in both prominence and frequency as the court found its way to the aristocracy it is today.

#### 1. Judicial Activism

Although "judicial activism" is a term thrown around frequently, finding a workable definition of it is somewhat difficult.[171] The definition used here, one used many times by the Supreme Court, is the court acting in a legislative rather than judicial role.[172] Put another way, this definition can be expressed simply as the Supreme Court acting as an aristocratic legislature instead of in an adjudicatory role.

An additional step is reasonable from this definition. If judicial activism is simply acting as an aristocratic legislature, then judicial activism is in fact an assertion by the court of its aristocratic status. As can be seem from the brief history of judicial activism below, the prevalence of these assertions rises in proportion to what would be expected from the Republican Shift.

#### 2. Activism and Aristocracy

It would be a mistake to view activist judges as an aberration on the face of American Government. Put in its simplest form, judicial activism is merely the aristocratic part of government acting as the aristocratic part of government.

Alexander Bickel's seminal work *The Least Dangerous Branch* is striking in its recognition of the aristocracy of the twentieth century Supreme Court.[173] Bickel argues that the Supreme Court should serve to protect "certain enduring values"[174] which could not be reliably protected by the elected branches. Judges "have the leisure, the training, and the

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[170] Marbury v. Madison, 5 U.S. 137 (1803). A careful observer of *Marbury* and its attendant circumstances will note that, despite being a case that struck down a federal statute, *Marbury* was not activist. Notably, the court's opinion demonstrates submission to the Jefferson administration.

[171] Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401 (2002). For a history of the usage of the term, see Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004).

[172] Kmiec, *supra* note 171, at 1471.

[173] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 24 (2d ed. 1986).

[174] *Id*.

insulation"[175] necessary to properly decide these questions – a clearer definition of aristocracy can scarcely be imagined. The Senate was originally designed to be comprised similarly – with men of leisure, training, and insulation from the whims of the masses.[176]

Many see judicial activism as a tool for liberal meddling. However, more astute observers note that judicial activism can be used by both sides of the political equation.[177] The distinguishing factor is that activist decisions embody the values of the intellectual elite – the natural aristocracy of America.[178] This has been a frequent theme in the dissents of United States Supreme Court Justice Antonin Scalia in decisions he regarded as activist.[179]

Although the first recorded use of the term "judicial activism" was only in 1947,[180] judicial activism had been occurring long before. Following the Civil War, the Court was willing to embrace "a more aggressive review posture."[181] In the 1883 Civil Rights cases, the Supreme Court found that the 1875 Civil Rights act banning various forms of racial discrimination went beyond Congress' power and struck it down.[182] Meanwhile, in several other cases of the era, the Court made a strong activist stand in presuming unduly narrow and restrictive definitions of the reconstruction amendments.[183]

Twentieth century judicial activism began in a manner somewhat different than previous cases. In one of the century's earliest cases, *Lochner v. New York*,[184] the Court applied substantive due process to a

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[175] *Id.* at 25.

[176] Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1351-52 (1996) ("This function explains the Senate's six-year term, its staggered turnover, its age and residency requirements, as well as the original Constitution's provision for indirect Senate election."). For reasons why it sits less easily, see *infra* Part V.C.

[177] *See*, *e.g.*, Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 188-89 (1998).

[178] *Id.* at 189. "To observe that judicially-enforceable constitutionalism is a politically double-edged sword is not to deny that the practice has any systematic bias; it is only to suggest that the bias operates along an axis other than partisan politics." *Id.*

[179] *See* Romer v. Evans 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains - and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."); United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

[180] Kmiec, *supra* note 171, at 1446.

[181] G. Edward White, *The Constitutional Journey of* Marbury v. Madison, 89 VA. L. REV. 1463, 1521 (2003).

[182] The Civil Rights Cases, 109 U.S. 3 (1883).

[183] Plessy v. Ferguson, 163 U.S. 537 (1896); The Slaughter-House Cases, 83 U.S. 36 (1872).

[184] Lochner v. New York, 198 U.S. 45 (1905).

maximum hours law for bakers, and found it to be unconstitutional.[185] As subsequent commentators have noted, "[t]he *Lochner* decision remains the foremost reproach to the activist impulse in federal judges."[186] In a series of decisions that would follow, the activist Court would invalidate numerous laws that were designed to protect workers from various predations on the basis of freedom of contract.[187] This activist Court would be finally undone by its own attitudes. After several strongly activist decisions striking down New Deal programs, pressure from the President threatening court-packing led to a retreat from activist decisions regarding freedom of contract and the Commerce Clause.[188] Following World War II, the Court handed down a second series of activist decisions, including *Brown v. Board of Education*, *Miranda v. Arizona*, and *Roe v. Wade*.[189]

In recent years, judicial activism has not been constrained by political alignment, and thus can be viewed as aristocracy in its purest form. The Court has issued liberal substantive Due Process decisions, such as *Lawrence v. Texas*,[190] and conservative Commerce Clause decisions, such as *U.S. v. Morrison*.[191] In its purest sense now, the Supreme Court is a vessel for the values of the elite—the values of the aristocracy.

### *E. Why Only the Supreme Court?*

A reasonable question upon all this is why did the Supreme Court in particular become the aristocracy of the United States, and not the federal courts as a whole? The lower courts are staffed by judges of estimable intelligence, with the same protections and rights as justices on the United States Supreme Court. This said, although important decisions are sometimes made by the lower courts, developments listed below that were contemporaneous with the fall of the Senate keep the lower federal courts in the shadow of that of the Supreme Court in terms of acting as legislators.

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185 *Id.* at 45.

186 Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 890 (4th Cir. 1999) (Wilkinson, C.J., concurring) (giving a fairly short but more robust history of judicial activism).

187 *Id.* at 890.

188 *Id*. at 890-91.

189 *Id.* at 891-92; Roe v. Wade, 410 U.S. 113 (1973); Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

190 Lawrence v. Texas, 539 U.S. 558 (2003).

191 United States v. Morrison. 529 U.S. 598 (2000).

### 1. The Judiciary Act of 1891

It is difficult to underestimate the impact of these twin innovations of certiorari and the circuit courts of appeal to the Supreme Court of the United States, which were both effected by the Judiciary Act of 1891.[192] As the nation's economy became truly national, the Supreme Court was freed from being the court of appeal for all federal cases, and was given a robust set of courts of appeal which would develop into intellectually formidable courts all their own, which would take on the responsibility of deciding most federal law, and the Supreme Court was freed to focus on cases that interested it.[193] Being freed from the responsibilities of riding circuit was another benefit to judges from this act that freed them from many of their former irksome responsibilities, and led to their assuming their position more or less permanently in the marble walls of One First Street.[194]

### 2. The Highest Court Effect

As the highest court in the land, there is simply no-one to correct the Supreme Court, while the lower courts can be corrected by the Supreme Court. Thus, even the most radical and important circuit decision can be overturned by the Supreme Court, limiting the influence of the lower courts essentially to when the Supreme Court decides they are right or does not consider the matter worth dealing with. When this effect (which obviously existed since the beginnings of the federal courts) was coupled with the Judiciary Act of 1891, the Supreme Court was finally freed of many of the mundane aspects of being a court of law.

## *F. Advice and Consent*

In recent years, the confirmation battles in the Senate surrounding the President's nominations to various positions have become more and more fierce.[195] Although Republican nominations that have been filibustered, rejected, or otherwise forestalled have made more headlines, Democrats are quick to say that the reverse also occurred, just with less fanfare.[196] While there had been issues of political objections to appointments prior to the Seventeenth Amendment, the

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[192] 26 Stat. 826.

[193] *Id*.

[194] *Id*.

[195] Independence of the Judiciary: Judicial Vacancies and the Nomination and Confirmation Process, A.B.A. (2005), http://www.abanet.org/poladv/priorities/judicial_vacancies.html (last visited Oct. 2, 2005).

[196] Herman Schwartz, *Nuclear Whiner*, THE AMERICAN PROSPECT, March 24, 2005, http://www.prospect.org/web/printfriendly-view.ww?id=9384.

amendment paved the way for the naked politicization of the procedure of advice and consent.[197]

Perhaps no role is more important for the aristocracy to play in a republic than that of advice and consent. Since the Senate is supposed to be comprised of the natural aristocracy of the republic, its unique level of talent and freedom from politicization is best brought to bear in matters of advising the president on and consenting to the President's appointments to various positions, such as the federal courts.[198] Should an unfit candidate be sent to the Senate, the Senate would reject the candidate, without concern for political alignment in the positive or the negative.

With the shift of the Senate away from aristocracy, learned deliberation became something of an odd role to delegate merely to the Senate. When the Senate is not the natural aristocracy, the reasons to allow it advice and consent slip away. Some would argue that advice and consent should be viewed instead as a democratic power, but if so, why not allow all the democratically elected representatives that power? Obviously, making the new aristocracy of the Supreme Court the arbiter of appointments via advice and consent is impossible due to conflicts of interest. As such, true aristocratic deliberation on nominees is not reasonably foreseeable.

With the delegation of advice and consent to a democratic body, politicization of the process must inevitably follow.[199] As can be seen in the past twenty years, and especially in late 2005, this is exactly what has happened.

## V. CONCLUSION: THE TRIUMPH OF THE REPUBLICAN SHIFT

While the Supreme Court still must wait for issues to come before it, this is not much of a concern anymore, as most issues of constitutional import are legislated fairly rapidly nowadays. Furthermore, while the Court can abstain from deciding cases due to issues such as standing and political question, that is a power that is squarely within the Court's

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[197] 150 CONG. REC. S4494-01, S4503 (2004).

[198] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 120 (Max Farrand ed. 1966).

[199] Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 489 (1998).

> One obvious effect of the Seventeenth Amendment was to make the Senate's constitutionally imposed duties, such as the confirmation of presidential nominees, subject to popular review, comment, and reprisal. Although there is no hard evidence establishing precisely how much the Seventeenth Amendment has influenced the kinds of people elected to the Senate or the nature of the Senate's proceedings or activities, this change has surely had at least some effect.

*Id*.

control. With the Supreme Court justices free to not adjudicate cases they did not consider significant,[200] the Court was prepared to take over the role the Senate had been forcibly removed from in the political sphere—that of the aristocratic part of government. But why would it? The answer is that republicanism and mixed government are far too integral to the Constitution to be displaced by an amendment that dealt at most a glancing blow to the core philosophy of the republican document. In order to undo mixed government, the destruction of the Constitution, not just the amendment, would be necessary. The Seventeenth Amendment changed some of the structure of mixed government. Instead of the development of a mass democracy in the place of the former republic, the republic merely shifted its aristocracy in a way it had already been doing in response to democratic attacks on aristocracy—it shifted the aristocracy to the judiciary. The process had anomalous and unwelcome effects on two bodies that were neither designed nor ideally suited for their new roles, but they adapted fairly quickly into the once and future order of democracy, aristocracy, and monarchy.

[200] Due to the advent of Certiorari process. *See supra* part 4.e.1.