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THE CATHOLIC'S ROLE IN THE LEGAL PROFESSION IN REPUBLICAN GOVERNMENT

JOSEPH C. CASCARELLI*

This essay serves the single purpose of promoting discussion among Catholic lawyers on one question in light of the Holy Father's recent pronouncement that the Church has an obligation to make the Gospel relevant equally to the few as to the many, to the leaders as much as to the led.¹ Since American Catholic lawyers are constrained to act properly within bounds of the Federal Constitution as much as they are constrained to act properly within the bounds of the teachings and traditions of the Magisterium, the question would seem to be properly posed as: What is the role of the Catholic legal professional in republican government?²

* J.D. The Law School of St. Mary's University of San Antonio, Texas; B.A. (Politics) The University of Dallas, Irving, Texas.

¹ See Pope John Paul II, *Ecclesia in America* (visited February 2, 2000) <http://www.catholic-pages.com/documents/ecclesia_in_america.pdf>.

As I have already noted, love for the poor must be preferential, but not exclusive. The Synod Fathers observed that it was in part because of an approach to the pastoral care of the poor marked by a certain exclusiveness that the pastoral care for the leading sectors of society has been neglected and many people have thus been estranged from the Church. The damage done by the spread of secularism in these sectors "political or economic, union-related, military, social or cultural" shows how urgent it is that they be evangelized, with the encouragement and guidance of the Church's pastors, who are called by God to care for everyone.

Id. (citations omitted).

² Nowhere in the United States Constitution is it expressly stated that the federal government formed under this Constitution shall be a *republican* form of government. In other words, the Constitution does not use the word *republican* when describing the kind of government that will limit federal power that is distributed among the three branches. The only express mention of republican government appears in Article IV, Section 4, and it relates to the several states only. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a *Republican* Form of Government . . .") (emphasis added).

It would be a contradiction, however, for the federal government to guarantee a republican form of government in the states while guaranteeing some other form in

To start the discussion, I begin with the opinion of United States Supreme Court Associate Justice Antonin Scalia, a prominent member of the legal profession who is both Catholic and in service to the federal government. In his "Rome Address" to students at the Pontificia Universita' Gregoriana,³ Justice Scalia stated:

It just seems to me incompatible with democratic theory that it's good and right for the state to do something that the majority of the people do not want done. Once you adopt democratic theory, it seems to me, you accept that proposition. If the people, for example, want abortion, the state should permit abortion in a democracy. If the people do not want it, the state should be able to prohibit it as well.

It seems to me the crux of the matter for the Christian in a democracy is to use private institutions and his own voice to convert the democratic society, which will then have its effect upon the government. But I do not know how you can argue . . . that the government has a moral obligation to do something that is opposed by the people. That works fine in a monarchy, I suppose, but I do not know how you can reconcile it with democratic theory.⁴

Later, in the question-and-answer period following his address, Justice Scalia commented further:

Maybe my very stingy view, my very parsimonious view, of the role of natural law and Christianity in the governance of the state comes from the fact that I am a judge, and it is my duty to apply the law. And I do not feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign.

But the alternative is not to do what is good or apply the law. The alternatives are apply the law or resign because the law is what the people have decided. And if it is bad, the whole theory of a democratic system is you must persuade the people that it is bad. I cannot go around—with respect to the Nuremberg laws, I would have resigned. But I would certainly

the federal government. Therefore, we may say that by implication, the Constitution guarantees a republican form of government in the federal government, as well as to the several States. This inference is to be accepted as truth for purposes of this article.

³ Justice Scalia's "Rome Address" took place on May 2, 1996.

⁴ Antonin Scalia, *Of Democracy, Morality and the Majority*, Address at Gregorian University (May 2, 1996), in 26 ORIGINS 81, 87 (1996).

not have the power to invalidate them because they are contrary to the natural law. I have been appointed to apply the Constitution and positive law. God applies the natural law.⁵

Justice Scalia's central point, namely, that judges "apply the Constitution and positive law" whereas "God applies the natural law," seems to be founded upon the belief that judicial power in general, but particularly in the Supreme Court, must be exercised consistently with democratic theory in order to be legitimate.⁶ Certainly this is politically correct, but is it true based upon the constitutional design of the founders? Therefore, before we can begin discussing the role of the Catholic legal professional within the context of American republican government, I would like to examine the extent to which democratic theory is or may be the standard for measuring the legitimate exercise of judicial power in republican government as envisioned by the Framers of our Constitution.⁷

I. THE SUPREME COURT: DEMOCRATIC OR ARISTOCRATIC BRANCH OF REPUBLICAN GOVERNMENT?

Justice Scalia says that "[o]nce you adopt democratic theory . . . you accept that proposition."⁸ Specifically, once a judge accepts the proposition that democratic theory is at the foundation of the Constitution and its judiciary, there can be, according to Justice Scalia, only two choices for that judge: either

⁵ *Id.* at 89.

⁶ *See id.* at 89–90 (stating that while the Supreme Court has said that Christian concepts are embodied in the Constitution, "it is the Constitution that governs my actions . . . I'm a worldly judge. I just do what the Constitution tells me to do.").

⁷ It is not my intention to be unfair to Justice Scalia on the point that he is making in the context of his being a judge, as opposed to being a practicing lawyer. Justice Scalia might offer as a fair response that, while he believes he has no legitimate business applying natural law in his capacity as judge, his silence in regards to what lawyers may do leaves the door open for lawyers to argue natural law in the courtroom. This may be logically true; however, there is an important practical problem: If, as a rule of law, no judge may apply natural law principles, then why would a lawyer argue a point of natural law? Lawyers are, by nature, advocates for their clients. If a client cannot benefit practically from a natural law argument, no matter how persuasive and relevant, then it is not to be expected that a lawyer will advance such an argument to a judge whose hands are tied. The real issue, then, is whether judges can apply natural law principles in concrete cases when advanced by lawyers. This brings us right back to the issue whether democratic theory is the standard for measuring the legitimate exercise of judicial power in republican government.

⁸ Scalia, *supra* note 4, at 87.

faithfully apply the laws passed by the majority of the people, even “[i]f they are stupid laws,” or resign one’s appointment as judge.⁹ Even if Justice Scalia may not intend it to be so, his democratic theory leads to the conclusion that the whim of the People is supreme, even for the Supreme Court. But is this “democratic” conclusion consistent with the way that we appoint judges to the United States Supreme Court in accordance with the Framers’ design in the Constitution? Did the Framers intend the Supreme Court justices to be “democratic,” or did they have something else in mind when founding the republic? One important clue to the Framers’ intentions lays imbedded in the appointment process for justices to the Supreme Court. Let us therefore examine Justice Scalia’s basic assumptions about democratic theory within the limited context of his own appointment.

Justice Scalia is an associate justice of the United States Supreme Court. He ascended to his office after President Reagan nominated him and the Senate confirmed his nomination in 1986.¹⁰ Not only was Justice Scalia not voted into office by the People; he cannot be removed from his office by the People. His appointment as Supreme Court Justice is tenured for life, subject only to impeachment in the Senate for misbehavior on the Bench.¹¹ Therefore, as far as democratic theory is concerned, the appointment and life tenure of a Supreme Court Justice is about as far removed from the People as can be practically achieved in law and politics. In fact, a strong case might be made that the Framers of the Constitution

⁹ *Id.* at 89. Actually, Justice Scalia seems to consider a third option, namely, persuading the majority that the laws are bad, towards the objective of having the majority change such laws. Justice Scalia sees this option as being limited to his role as private citizen, however, rather than in his duty as judge. In response to the question whether it is possible that some common, fundamental ethics can give something to the positive law, Justice Scalia says: “Yes, of course, and it must. But that process is achieved not within the context of government, but outside the context of government, with free men and women persuading one another and then adopting a governmental system that embodies those Christian precepts.” *Id.*

¹⁰ See U.S. CONST. art. II, § 2 (“The President shall . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .”).

¹¹ See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”); U.S. CONST. art. I, § 3 (“The Senate shall have the sole Power to try all Impeachments.”).

deliberately intended the Supreme Court to be aristocratic, rather than democratic, in temperament.

To further elucidate this point, it would be useful to examine the composition of the Senate that appointed Supreme Court Justices within the context of the original Constitution of 1787, prior to the Seventeenth Amendment. In the Framers' original design, the Senate was not elected directly by the People. On the contrary, a senator was appointed by his respective state's legislature. Usually, that State's upper chamber, rather than the lower chamber, made the appointment of members to the Senate.¹² It was only with the passage of the Seventeenth Amendment, in 1913 during President Woodrow Wilson's administration, that senators were elected directly by popular vote.¹³ Thus, at the time of ratification of the Constitution in 1789, the People not only had no vote in the appointment of Supreme Court Justices; the People also had no vote in the appointment of their senators who, in turn, voted on the confirmation of Supreme Court Justices. Moreover, at the time the Constitution was ratified in 1789, most state legislatures were not elected by the general suffrage, but rather by a limited populace comprised of men having a substantial amount of wealth and property.¹⁴ This means that the various state legislatures were essentially oligarchic in composition, and therefore oligarchic in temperament.¹⁵ From the perspective of

¹² See U.S. CONST. art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislatures thereof . . .").

¹³ See U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .").

¹⁴ Each state maintained different ownership requirements for a man to qualify as a voter, a lower house candidate, or an upper house candidate. For example, Maryland required a man to own either 50 acres of land or 30£ in money to qualify as a voter in general elections, 500£ in real or personal property to qualify as a candidate for the lower house, and 1000£ in real or personal property to qualify as a candidate for the upper house. Massachusetts, New Hampshire, New Jersey, North Carolina, and South Carolina had similar property requirements. See PAUL EIDELBERG, *A DISCOURSE ON STATESMANSHIP: THE DESIGN AND TRANSFORMATION OF THE AMERICAN POLITY* 60 (1974) (citing BENJAMIN PERLEY POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* (1878)).

¹⁵ See BLACK'S LAW DICTIONARY 1085 (6th ed. 1990) (defining oligarchy as "[a] form of government wherein the administration of affairs is lodged in the hands of a few persons").

Aristotle writes:

[W]hen one is pursuing a philosophical method of inquiry in any branch of

formal mode of regime analysis,¹⁶ it is arguable that democratic theory played no role in the election of propertied men to the various state legislatures at the time of the Constitution's ratification. It is equally compelling that democratic theory played no role in the appointment by state legislatures of propertied men to the Senate. In short, prior to the passage of the Seventeenth Amendment, neither the Senators in Congress nor the Justices of the Supreme Court were elected by the People. For these reasons, political commentators on the American Regime have inferred, justifiably, that the Supreme Court constitutes the aristocratic element in our republic.¹⁷ This is precisely the observation made by Alexis de Tocqueville, astute student of democracy in America. He writes: "[I]f I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich . . . but that it occupies the judicial branch and the bar."¹⁸

It deserves our attention that Tocqueville insists the American aristocracy—the bench and the bar—is not composed of the rich. It is generally understood in political philosophical circles that “the rich” is equated mainly, if not exclusively, with

study, and not merely looking to practical considerations, the proper course is to set out the truth about every particular with no neglect or omission The course of the argument thus appears to show that the factor of number—the small number of the sovereign body in oligarchies, or the large number in democracies—is an accidental attribute, due to the simple fact that the wealthy are generally few and the poor are generally numerous. Therefore the causes originally mentioned [i.e., small and large numbers] are not in fact the real causes of the difference between oligarchies and democracies. The real ground of the difference between oligarchy and democracy is poverty and riches. It is inevitable that any constitution should be an oligarchy if the rulers under it are rulers in virtue of riches, whether they are few or many

ARISTOTLE, *THE POLITICS OF ARISTOTLE*, bk. III, ch. viii, §§ 1, 6–7, at 115–16 (Ernest Barker trans., 1948).

¹⁶ By *formal* mode of regime analysis, I mean the legal structure or institutional arrangements affecting the decision-making processes of government. In contrast, the *material* mode of regime analysis emphasizes the economic system of a country, the diverse occupations, habits, and moral dispositions of its citizens, and the factual distribution of power among the various groups composing the community as a whole.” EIDELBERG, *supra* note 14, at 18 (emphasis added).

¹⁷ See THOMAS R. DYE & L. HARMON ZEIGLER, *THE IRONY OF DEMOCRACY: AN UNCOMMON INTRODUCTION TO AMERICAN POLITICS* 258 (1970) (explaining that the founding fathers enacted such a system so as to be “sufficiently protected from the masses,” whom they distrusted).

¹⁸ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 328 (Schocken Books ed. 1961).

oligarchy.¹⁹ According to Tocqueville, even though the members of the bench and the bar may be wealthy (or at least wealthier relative to a majority of their fellow citizens), wealth is not the thing that distinguishes lawyers and judges from their fellow affluent citizens. There is something else. Specifically, there is a certain something in the character of the bench and the bar, formed by training and habits in the law, that makes them different from other citizens who might otherwise be as wealthy as judges and lawyers. In short, the practice of law spawns in most members of the legal profession a temperament that is more aristocratic than oligarchic.²⁰ Tocqueville describes this "certain something" as follows:

¹⁹ See ARISTOTLE, *supra* note 15, bk. III, ch. viii, § 7 at 116 ("[A]ny constitution should be an oligarchy if the rulers under it are rulers in virtue of riches, whether they are few or many . . ."); Alfarabi, *The Political Regime*, in MEDIEVAL POLITICAL PHILOSOPHY: A SOURCEBOOK 31, 43 (Ralph Lerner & Muhsin Mahdi eds. & Fauzi M. Majjar, trans., 1963). Alfarabi classifies the numerous regimes into six types according to the ends or chief objectives of their respective governments. Oligarchy is the *vile* regime, in which the ultimate aim of its citizens is wealth and prosperity:

The vile city or the association of the vile citizens is that whose members (a) cooperate to acquire wealth and prosperity, the excessive possession of indispensable things or their equivalent in coin and in money, and their accumulation beyond the need for them and for no other reason than the love and covetousness of wealth; and (b) avoid spending any of it except on what is necessary for bodily subsistence. This they do either by pursuing all the modes of acquisition or else such modes as are available in that country. They regard the best men to be the wealthiest and the most skillful in the acquisition of wealth. Their ruler is the man who is able to manage them well in what leads them to acquire wealth and always to remain wealthy.

Id.

²⁰ Thomas Jefferson's classic definition of true aristocracy is instructive on this point.

For I agree with you that there is a natural aristocracy among men. The grounds of this are virtue and talents . . . There is also artificial aristocracy, founded on wealth and birth, without either virtue or talents The natural aristocracy I consider as the most precious gift of nature, for the instruction, the trusts, and government of society.

Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THE PORTABLE THOMAS JEFFERSON 534 (Merrill D. Peterson ed., 1975) [hereinafter Jefferson Letter].

Similarly, Aristotle writes:

The only constitution which can with strict justice be called an aristocracy is one where the members are not merely 'good' in relation to some standard or other, but are absolutely 'the best' (*aristoi*) in point of moral quality. Only in such a constitution can the good man and the good citizen be absolutely identified; in all others goodness is only goodness relatively to the particular constitution and its particular standard.

Men who have more especially devoted themselves to legal pursuits, derive from those occupations certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.

The special information which lawyers derive from their studies, ensures them a separate station in society; and they constitute a sort of privileged body in the scale of intelligence. This notion of their superiority perpetually recurs to them in the practice of their profession; they are the masters of a science which is necessary, but which is not very generally known: they serve as arbiters between the citizens; and the habit of directing the blind passions of parties in litigation to their purpose, inspires them with a certain contempt for the judgment of the multitude. . . .

A portion of the tastes and of the habits of the aristocracy may consequently be discovered in the characters of men in the profession of the law.²¹

Thus, while the men who come to the Senate prior to the Seventeenth Amendment may, because of certain property requirements for holding office, be inclined towards oligarchic tendencies rather than aristocratic ones,²² the Justices who

ARISTOTLE, *supra* note 15, bk. IV, ch. vii, § 2, at 173.

In THE FEDERALIST NO. 76, Hamilton writes: "The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence. And experience justifies the theory." THE FEDERALIST NO. 76, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Further, Hamilton states: "There are men who, under any circumstances, will have the courage to do their duty at every hazard," and that such men "could neither be distressed nor won into a sacrifice of their duty," even if "this stern virtue is the growth of few soils," that is, found in the few rather than in the many. THE FEDERALIST NO. 73, at 445, 441 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See also THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I-II, Q. 105, art. 1 (Fathers of the English Dominican Province trans. 1947) (stating that "where the power of government is vested in one, and aristocracy, which signifies government by the best, where the power of government is vested in a few").

²¹ 1 TOCQUEVILLE, *supra* note 18, at 322.

²² It goes without saying that the Framers of the Constitution anticipated that lawyers would constitute a sizable membership in Congress, both in the House and the Senate. After all, many of the Framers were themselves lawyers. Given the fact, however, that the legislative branch is designed to give forum to the various factions in our country (today, we call them "interest groups" and "lobbies")—which is to say that the legislature's primary objective is to give vent to the will of the People; and, given the fact that the judicial branch is directed, in the words of Alexander Hamilton in THE FEDERALIST NO. 78, towards "judgment" rather than "force or will," a very strong case can be made that, as originally intended by the Framers,

ascend to the bench of the Supreme Court, by virtue of their tastes and habits of mind acquired through training and practice in the law, are expected, by the Framers of the Constitution, to transcend whatever oligarchic tendencies they might otherwise have as a result of their wealth.²³ It is with justification, therefore, that Tocqueville sees the bench in general, and the Supreme Court in particular, as the aristocratic element in our Republic.²⁴

the House of Representatives gives forum to the democratic tendencies, the Senate gives forum to the oligarchic tendencies, and the Supreme Court gives forum to aristocratic tendencies (just as the Presidency gives forum to the monarchic tendencies) in human nature. See EIDELBERG, *supra* note 14, at 169–74. Therefore, I understand the term republic to mean a “mixed” polity consisting of monarchic, oligarchic, and aristocratic elements, in addition to including democratic elements. Be that as it may, because the Justices of the Supreme Court are life-tenured and do not represent the interests of factions, I draw the inference that the Framers expected the effects of wealth to retreat into the background, and expected those virtues and habits of the profession of law that Tocqueville describes, including independence in judgment, to advance to the foreground in the Justices of the Supreme Court. It is for this reason, among others that will be explained elsewhere in this article, that the Framers designed the Supreme Court to be the repository of aristocratic, more so than the oligarchic, but in all events not the democratic, element in our republic.

²³ Tocqueville writes:

The Judge is a lawyer who, independently of the taste for regularity and order which he has contracted in the study of legislation, derives an additional love of stability from his own inalienable functions. His legal attainments have already raised him to a distinguished rank amongst his fellow citizens; his political power completes the distinction of his station, and gives him the inclinations natural to his privileged class.

1 TOCQUEVILLE, *supra* note 18, at 329. Those inclinations which Tocqueville ascribes as being natural to an aristocratic society include “a certain elevation of mind and scorn of worldly advantages, strong convictions and honorable devotedness, refined habits and embellished manners, the cultivation of the arts and of theoretical sciences, a love of poetry, beauty, and glory, the capacity of carrying on great enterprises of enduring worth.” Marvin Zetterbaum, *Alexis de Tocqueville*, in *HISTORY OF POLITICAL PHILOSOPHY* 761, 764 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987). Wealth in an aristocratic society is but a means to an end; in an oligarchic society, wealth is its own end. With these things in mind, we can begin to understand Tocqueville’s meaning when he says, “If I were asked where I place the American aristocracy, I should reply without hesitation, that it is not composed of the rich, who are united together by no common ties, but that it occupies the judicial bench and the bar.” 1 TOCQUEVILLE, *supra* note 18, at 328.

²⁴ Tocqueville writes:

This aristocratic character, which I hold to be common to the legal profession, is much more distinctly marked in the United States and in England than in any other country . . . [because the] English and the Americans have retained the law of precedents; that is to say, they continue to found their legal opinions and the decisions of their courts upon the opinions and decision of their forefathers. In the mind of an

II. LAWYERS: THE EPITOME OF AMERICAN REPUBLICANISM

The character of the bar (in contrast to the bench) in America is, according to Tocqueville, of unique quality: by birth and interest they are democrats, but by habit and taste they are aristocrats.²⁵ These qualities (humble birth, bourgeois interest, professional habits, and aristocratic taste) combine in the lawyer to produce in him or her a love for regular and lawful proceedings, and a reverence for what is old. Additionally, these same qualities instill an interest in taking on the causes of the People even if the lawyer does not share current and popular passions.²⁶ As a class, lawyers constitute the natural bond between the People and their government. The effect of this natural bond is reciprocal: The People mimic the likes, mannerisms, and language of lawyers. Tocqueville notes that “[a]s most public men are, or have been legal practitioners, they introduce the customs and technicalities of their profession into the affairs of the country.”²⁷ Tocqueville further emphasizes:

English or American lawyer, a taste and reverence for what is old is almost always united to a love of regular and lawful proceedings In America there are no nobles or literary men, and the people is apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated circle of society. They have nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply without hesitation, that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar.

1 TOCQUEVILLE, *supra* note 18, at 326, 328.

²⁵ Tocqueville writes: “Lawyers belong to the people by birth and interest, to the aristocracy by habit and by taste, and they may be looked upon as the natural bond and connecting link of the two great classes of society [i.e., oligarchy and democracy].” *Id.* at 325.

²⁶ For example, I have read about Jewish ACLU lawyers representing anti-Semitic defendants in free speech cases, just as I have in my own practice seen pro-choice ACLU attorneys represent pro-life picketers in similar constitutional cases. These examples would confirm Tocqueville’s point:

The people in democratic states does not mistrust the members of the legal profession, because it is well known that they [the legal profession] are interested in serving the popular cause; and it listens to them without irritation, because it does not attribute to them any sinister designs. The object of lawyers is not, indeed, to overthrow the institutions of democracy, but they constantly endeavor to give it [i.e., democracy] an impulse which diverts them from its real tendency, by means which are foreign to its nature.

Id. at 325.

²⁷ *Id.* at 330.

The hit television program *L.A. Law* was a success among the viewing public in

The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of [American] society, where it descends to the lowest classes, so that the people contracts the habits and tastes of the magistrate.²⁸

In so doing, the bar gives American democracy an impulse that diverts democracy from its severest tendencies and serves the vital cause of protecting the republic against the excesses of democracy without doing violence to that special virtue of democracy—love of liberty and equality—which the Framers intended to protect in the Constitution. “Lawyer-like sobriety” is how Tocqueville describes this aristocratic quality that the legal profession brings to bear on American democracy, thus benefiting American democracy.²⁹ He concludes:

[W]e perceive that the authority that [the Americans] have entrusted to members of the legal profession, and the influence which these individuals exercise in the Government, is the most powerful security against the excesses of democracy The profession of the law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy . . . [the profession of law] as a body, form the most powerful, if not the only counterpoise to the democratic element.”³⁰

In his discussion of a type of regime which he calls a polity and which subsequent political philosophers have called a republic,³¹ Aristotle demonstrates that, in terms of form (legal or

the 1980s and early 1990s, and has spawned an ongoing parade of lawyer and law firm programs, movies, and live shows, such as *Law & Order*, *The Firm*, and *The People's Court*. However low the legal profession has fallen on the current, unofficial list of trustworthy professions, lawyers paradoxically remain the professionals most imitated in popular American culture when it comes to mimicking language, likes, and mannerisms.

²⁸ *Id.*

²⁹ Tocqueville writes:

[W]ithout this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained; and I cannot believe that a republic could subsist at the present time, if the influence of lawyers in public business did not increase in proportion to the power of the people.

Id. at 325–26.

³⁰ *Id.* at 321, 325, 328.

³¹ See PAUL EIDELBERG, *THE PHILOSOPHY OF THE AMERICAN CONSTITUTION* 112 (1968). Eidelberg states:

It is common to regard a mixed regime as being composed of monarchy,

institutional structure),³² a polity or republic is a mixed regime that synthesizes democratic and oligarchic attributes.³³ Specifically, Aristotle writes:

[I]t is a good criterion of a proper mixture of democracy and oligarchy that a mixed constitution [i.e., a polity] should be . . . described indifferently as either. When this can be said, it must obviously be due to the excellence of the mixture. It is a thing which can generally be said of the mean between two extremes: both of the extremes can be traced in the mean A properly mixed 'polity' should look as if it contained both democratic and oligarchical elements—and as if it contained neither.³⁴

Aristotle's insight about the constitutional nature of a mixed regime—a polity or republican government—corresponds directly to Tocqueville's insight that members of the bar in America are democrats by birth and interest, but aristocrats by habit and taste: "Lawyers . . . may be looked upon as the natural bond and connecting link of the two great classes of society," i.e., oligarchy and democracy.³⁵ Precisely because they constitute this "natural bond and connecting link," lawyers constitute the mean between oligarchy and democracy in a mixed or republican regime, and especially so within the context of the American Constitution. As Aristotle has pointed out, a regime is "excellently mixed" when you may discern a regime's distinct

aristocracy, and democracy. While this conforms to the ideas of Cicero and Montesquieu, Aristotle regarded a mixed regime as consisting of democracy and oligarchy. Now without wishing to minimize the differences between these philosophers . . . according to these philosophers, mixed regime (which, bear in mind, is a republic) requires a division of political power between different bodies of men.

Id.

³² Under Aristotle's formal mode of regime analysis, there are three good forms and three bad forms of government based upon the principle of rule by one, few, and many. Monarchy and tyranny correspond to rule by one person. Aristocracy and oligarchy correspond to rule by the few. Polity and democracy correspond to rule by the many. Monarchy, aristocracy, and polity are just or good regimes, whereas tyranny, oligarchy, and democracy are considered bad or unjust regimes. Incorporation of study of the moral character of citizens and leaders constitutes the material mode of regime analysis. This notwithstanding, the study of a particular regime's form remains important because a regime's formal structure, in large measure, influences the character of its people. See EIDELBERG, *supra* note 14, at 18.

³³ See generally ARISTOTLE, *supra* note 15, bk. IV, ch. ix, §§ 1–10, at 177–78.

³⁴ *Id.* § 6, 10 at 177–78.

³⁵ 1 TOCQUEVILLE, *supra* note 18, at 325.

democratic and oligarchic elements, but are precluded from definitively stating that the regime is of a particular type. So too is the case with lawyers. Although democratic by birth and interest, and aristocratic in character and temperament owing to their habits acquired through their legal training,³⁶ lawyers do not, as a class, form any identifiable party that can be defined as either the "democratic party," the "oligarchic party," or the "aristocratic party" in the American regime.³⁷ As an aristocratic mean between the two extremes of democracy and oligarchy, lawyers constitute the epitome of American Republicanism or government that is "excellently mixed."³⁸ It is for precisely this reason that members of the legal profession constitute, according to Tocqueville, "the most powerful existing security against the excesses of democracy"³⁹ without doing violence to democracy.⁴⁰ The relevant question, therefore, is: How does the legal profession effectively do this?

³⁶ Tocqueville writes:

Men who have more especially devoted themselves to legal pursuits, derive from those occupations certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude A portion of the tastes and of the habits of the aristocracy may consequently be discovered in the characters of men in the profession of the law. They participate in the same instinctive love of order and of formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people.

Id. at 322.

³⁷ Tocqueville writes:

The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time, and accommodates itself to all the movements of the social body: but this party extends over the whole community, and it penetrates into all classes of society; it acts upon the country imperceptibly, but finally fashions it to suit its purposes.

Id. at 330-31.

³⁸ Aristotle notes: "In reality there are three elements which may claim an equal share in the mixed form of constitution—free birth, wealth, and merit." ARISTOTLE, *supra* note 15, bk. IV, ch. viii, § 9, at 176.

³⁹ 1 TOCQUEVILLE, *supra* note 18, at 321.

⁴⁰ "The profession of the law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy, and which can be advantageously and permanently combined with them." *Id.* at 325.

III. THE LAWYER AS GUARDIAN AND ADVOCATE OF NATURAL LAW

It can be said that the business of lawyers is justice. It is true that, no matter what his calling or job may be, every good citizen does justice when he gives to another his due.⁴¹ Still, when a dispute arises between two citizens who feel that each has given his neighbor his due, while at the same time feel that each has been wronged by his neighbor, resolution of this dispute is invariably laid at the doorstep of a lawyer. Each citizen wants justice, and it is generally agreed that justice is a subject about which a lawyer has special knowledge. In the course of resolving mundane interests between conflicting parties, whether by settling the case out of court or by putting the case to a jury, appeal is made by lawyers to some principle that stands higher in honor or respect to the commonplace interests of these litigating parties. Although frequently forgotten, this "appeal to something higher" is the foundation of natural law.⁴²

The first law of nature, or the first principle of natural law, is *seek Good, avoid Evil*.⁴³ No lawyer in his right mind would argue that his client, an accused murderer, should be freed from threat of jail or the death penalty solely because it is not an

⁴¹ See, e.g., *Bowman v. McLaughlin*, 45 Miss. 461, 495-96 (1871) (allowing an amendment to lost papers to prevent the defeat of justice); see also *Borden v. State*, 11 Ark. 528 (1851); *Collier v. Lindley*, 266 P. 526 (Cal. 1928).

⁴² See generally JACQUES ELLUL, *THE THEOLOGICAL FOUNDATION OF LAW* (1960).

⁴³ Aquinas writes:

[T]he first principle in the practical reason is one founded on the notion of good, namely, that the good is what all desire. Hence, this is the first precept of law, that good is to be pursued and done, and evil is to be avoided. All other precepts of the natural law are based upon this, so that whatever the practical reason naturally apprehends as man's good belongs to the precepts of the natural law as something to be done or avoided.

AQUINAS, *supra* note 20, pt. I-II, Q. 94, art. 2.

This first rule or measure of conduct—seek the Good, avoid Evil—also finds its basis in Biblical commandments. See *Leviticus* 19:1, 18 ("The Lord spoke to Moses, saying: . . . Seek not revenge, nor be mindful of the injury of thy citizen. Thou shalt love thy friend as thyself."); *Matthew* 22:37-40 ("Jesus said to him [a doctor of laws]: Thou shalt love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole mind. This is the greatest and first commandment. And the second is like to this: Thou shalt love thy neighbor as thyself. On these two commandments dependeth the whole law and the prophets."); *Galatians* 5:14 ("All the law is fulfilled in one word, even in this, Thou shalt love thy neighbor as thyself."); *Leviticus* 19:33-34 ("If a stranger dwell in your land, and abide among you, do not upraid him: But let him be among you as one of the same country; and you shall love him as yourselves.")

important matter that a fellow human being was killed at his client's hands. The jury has a habitual grasp⁴⁴ of the first principle of natural law—*seek Good, avoid Evil*—and without further elaboration by defense counsel, the jury will immediately draw the correct conclusion that the unjustified killing of another person is evil, and that the common good of society requires that a killer who lacks a justifiable defense be removed. At the same time, we do not throw people in jail and leave them there for the rest of their lives without a trial. In a criminal trial, we shroud the defendant with a presumption of innocence. Why? Because man was created in a state of original innocence. When God walked into the Garden calling for Adam following his act of disobedience, God did not immediately expel Adam out of the Garden.⁴⁵ It was Adam's admission of guilt⁴⁶ that forced God to punish Adam. God, who knows all things, nonetheless presumes innocence in Adam's favor. So it follows that governments cannot justly do that which God cannot do, namely, presume guilt and force an accused to prove his innocence. Presuming guilt violates the first principle of natural law. This natural law foundation of presuming innocence is also the foundation for the Constitution's prohibition against *ex post facto* laws.⁴⁷

⁴⁴ This habitual grasp of the first law of nature is called *synderesis*. *See id.* at pt. I-II, Q. 94, art. 1, Reply Obj. 2 (“*Synderesis* is said to be the law of our intellect, because it is a habit containing the precepts of the natural law, which are the first principles of human actions.”); *see also* ERIC D’ARCY, *CONSCIENCE AND ITS RIGHT TO FREEDOM* 48 (1961) (“*Synderesis* is the habitual grasp of the first moral principles; its function is to dictate in general that good should be done and evil avoided”) (quoting *MANUALE THEOLOGIAE MORALIS* 197–98 (Dominicus M. Prümmer ed. 1958)); CHRISTOPHER ST. GERMAN, *DOCTOR AND STUDENT*, Dialogue I, ch. XIII, at 44 (1721) (“*Synderesis* is the natural power of the soul, set in the highest part thereof, moving and stirring it to good, and abhorring evil.”).

⁴⁵ *See Genesis* 3:21 (“For the man and his wife the LORD God made leather garments, with which he clothed them.”).

⁴⁶ Adam answered, “I heard you in the garden; but I was afraid, because I was naked, so I hid myself.” *Genesis* 3:10. How else could an innocent Adam know that he is naked or that it is wrong to be naked in the presence of another, were it not that Adam had eaten from the Tree of Knowledge? The word *innocent* denotes a lack of wrongdoing coupled with a corresponding lack of knowledge or understanding. *See* WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 726 (2d. College Ed.) (defining *innocent* as “a person knowing no evil or sin, such as a child.”).

⁴⁷ U.S. CONST. art. I, § 9 (“No . . . *ex post facto* Law shall be passed.”).

Ex post facto laws punish, as criminal, the commission of an act that was innocent when committed.⁴⁸ In essence, ex post facto laws change innocence into guilt, and punish innocence as a crime.⁴⁹ But again, not even God can change innocence into guilt. For if God is capable of doing this, then God Himself would violate the order of His creation that *Genesis* tells us is good.⁵⁰ Yet, if God is incapable of changing innocence into guilt or punishing innocence as a crime, then neither can a government nor its people do this and still act consistently with justice. For if "justice regulates human operations, it is evident that it renders man's operations good."⁵¹ Justice requires that innocence be presumed in favor of the accused. This is why bills of attainder are also naturally unjust.

A bill of attainder is a legislative judgment of conviction rendered ex parte, where the accused is denied notice of the proceedings against him and the opportunity to be heard.⁵² Denying an accused the opportunity to be heard necessarily precludes the offering of a defense in addition to denying the defendant a presumption of innocence. Bills of attainder amount to a cynical attitude towards justice, formulated by Thracymachus over two millennia ago when he stated, "the just

⁴⁸ See BLACK'S LAW DICTIONARY 580 (6th ed. 1990) ("A law passed after the occurrence of a fact or commission of an act, which retrospectively charges the legal consequences or relations of such fact or deed.")

⁴⁹ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) ("The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime. . . .").

⁵⁰ See *Genesis* 1:31 ("God looked at everything he made, and he found it very good.")

⁵¹ AQUINAS, *supra* note 20, pt. II-II, Q. 58, art. 3.

⁵² See *People v. Hayes*, 35 N.E. 951, 953 (N.Y. 1894). Doctrines such as the constitutional prohibition against bills of attainder have current relevance, as evidenced by the recent impeachment proceedings against President Clinton in the House and subsequent trial in the Senate. It may be recalled that, in an effort to cut the Gordian Knot and forestall a full trial in the Senate and possible conviction and removal of President Clinton, some members of that chamber suggested a compromise. In lieu of trial, the Senate was to censure the President and impose a substantial fine commensurate with his wrongdoing. But as Senator William Byrd of West Virginia—the "Conscience of the Senate"—noted, censuring the President and imposing a fine in the absence of a trial and an opportunity to put on a defense by the President's legal counsel, would amount to legislative conviction or bill of attainder.

is nothing else than the advantage of the stronger.'⁵³ Bills of attainder are a violation of another principle founded upon natural law, the doctrine of due process.⁵⁴

Due process of law is the natural enemy to bills of attainder and the cynicism of Thracymachus; it demands that governments, just as individual parties to a lawsuit, be constrained by another natural law principle existing at common law: *aliquis non debet esse iudex in propria causa*—let no man be judge of the justice of his own cause. Returning to *Genesis*, we recall that Adam hides himself from God immediately after he eats the forbidden fruit from the Tree of Knowledge of Good and Evil.⁵⁵ Even though man is the lawful beneficiary of a presumption of innocence, no man can judge the justice of his own cause because his original innocence has been corrupted. Like Adam immediately following his first act of disobedience and his desperate attempt to hide from God, most of us tend to

⁵³ PLATO, *THE REPUBLIC* § 338c (Paul Shorey trans. 1978) (footnotes omitted).

⁵⁴ The basic concept underlying the doctrine of due process of law stems from the old common law rule that "no man shall be condemned . . . without his day in court." *Terrell v. Allison*, 88 U.S. 289, 292 (1874). The doctrine goes back at least as far as the Magna Charta, where it is written: "No Free-man shall be taken or imprisoned, or dispossessed of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land." Magna Charta, 1217, 9 Hen. 3, ch. 35 (Eng.). Daniel Webster defined due process of law as a law "which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819). Due process of law is a direct assault on Thracymachus' cynical maxim that "justice is nothing more than the advantage of the stronger" for exactly this reason: proper notice of accusations brought against an accused, coupled with the opportunity to be heard and the opportunity to defend oneself in an orderly proceeding, balances the scales against the otherwise overwhelming power of the state. This is precisely what justice is: an adjustment whereby things are made more equal. See AQUINAS, *supra* note 20, pt. II-II, Q. 57, art. 1. Due process of law, in other words, places limits on "the advantage of the stronger" by making the weaker more equal in relation to the stronger, and therefore is a principle of natural justice. Government is good, that is, just, when it voluntarily submits to an equal playing field. The Wisconsin Supreme Court states that due process of law means process according to the "principles of natural justice . . . unless the written law constitutionally otherwise provides." *Eckern v. McGovern*, 142 N.W. 595, 619 (Wisc. 1913).

⁵⁵ See *Genesis* 3:7-8 ("Then the eyes of both of them were opened . . . When they heard the sound of the Lord God moving about in the garden at the breezy time of the day, the man and his wife hid themselves from the Lord God among the trees of the garden.").

hide our wrongdoing, when given the opportunity, in order to avoid punishment.

This same principle of natural law—let no man be judge of his own cause—is also the very foundation of our revered doctrine of separation of powers and checks and balances. James Madison appropriately writes:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them.⁵⁶

Due process of law is founded upon the natural law principle that government should be seeking justice. The evil to be avoided is criminal conviction based upon a lie, and denial of civil rights on account of bias or prejudice instead of truth. It is with good reason that James Madison writes: "Justice is the end of government. It is the end of civil society."⁵⁷

The late Professor Frederick D. Wilhelmsen has insightfully written that "natural law is still operative everywhere because it is natural in its spontaneous affirmation of the good."⁵⁸ The Constitution and the common law principles incorporated within it affirm the first law of nature, seek Good, avoid Evil, and therefore affirm natural law. Indeed, one of the greatest exponents of the Constitution, Alexander Hamilton, affirms this

⁵⁶ THE FEDERALIST NO. 10, at 79–80 (James Madison) (Clinton Rossiter ed., 1961); accord AQUINAS, *supra* note 20, pt. II–II, Q. 57, art. 2. St. Thomas adds that Justice is the cardinal virtue that directs man in his relations with others, and denotes a kind of equality, or at least some sort of adjustment, as things are brought into a more equal relationship with each other so that good may be attained.

⁵⁷ THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

⁵⁸ FREDERICK D. WILHELMSSEN, CHRISTIANITY AND POLITICAL PHILOSOPHY 19 (1978).

point in his legal brief to the landmark defamation case of *New York v. Croswell*.⁵⁹

Such is the general tenor of the Constitution of the United States, that it evidently looks to antecedent law. What is, on this point, the great body of the common law? *Natural law and natural reason applied to the purposes of Society*. What are the English courts now doing but adopting natural law.

What ha[s] the court done here? Applied moral law to constitutional principles, and thus the judges have confirmed this construction of the common law⁶⁰

It is therefore with respectful difference of opinion that I disagree with Justice Scalia when he states that judges "apply the Constitution and positive law [and only] God applies the natural law."⁶¹ Lawyers have a constitutional right to argue natural law principles, and judges have a constitutional obligation to apply natural law principles where appropriate. As Hamilton points out for us, this was done even in his day.⁶²

The role of the Catholic legal professional in republican government can be summarized in St. Thomas Aquinas' teachings. He stated that while the first law of nature, seek Good, avoid Evil, can never be eradicated, the secondary and tertiary precepts of that law can be lost if man is dulled by vice or vitiated by powers of evil.⁶³ It seems that a Catholic legal professional bears the obligation of creating and nourishing an

⁵⁹ *New York v. Croswell*, 3 Johns. Cas. 337 (1804). Defendant Harry Croswell was charged with seditious libel for publishing "The Wasp," which claimed that Thomas Jefferson, the President at the time, had slandered former Presidents Washington and Adams by calling them, amongst other things, traitors. The case was tried before the enactment of defamation laws in New York, and disputes arose surrounding the role of the jury as fact-finder.

⁶⁰ 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 830 (Julius Goebel Jr. et al. eds., 1964) (emphasis added).

⁶¹ Scalia, *supra* note 4, at 89. Legend has it that when Plato criticized Aristotle for ingratically entertaining opinions that differed from those of his mentor, Aristotle is reported to have replied: "I love Plato; however, I love truth more." It is in this spirit that I respectfully disagree with Justice Scalia, whose jurisprudence I otherwise admire and with which I am generally in agreement. It may be that in the end, I am proved incorrect and Justice Scalia correct on this issue. Until then, I hold a difference of opinion, and in the tradition of our First President, I submit my opinion to the judgment of others. See *GEORGE WASHINGTON, RULES OF CIVILITY & DECENT BEHAVIOUR IN COMPANY AND CONVERSATION* 17 (1988) ("Strive not with your superiors in argument, but always submit your judgment to others with modesty.").

⁶² See *supra* note 60.

⁶³ See *AQUINAS, supra* note 20, pt. I-II, Q. 95, art. 1.

atmosphere that is receptive to natural law as a recognized, legitimate body of law. Natural law has a claim on all men that politics cannot make. Natural law limits politics. Every time a lawyer exclaims “this is unconstitutional!,” he is in effect appealing to natural law. The claim that the Nuremberg laws of Nazi Germany constitute crimes against humanity is an appeal to natural law. The claim of Negroes in America that they should be neither slaves nor second class citizens confined to the back seats on a bus is an appeal to natural law.⁶⁴ Such appeals are as old as antiquity itself, and the Constitution appears to be soundly within this respected tradition. When King Creon of Thebes decreed that Antigone shall not bury her dead brother, the rebel Polyneices, Antigone’s act of burying her brother in violation of positive law was a defiant but justified appeal to natural law—the right to bury one’s dead is right according to nature!⁶⁵

“Democratic theory”—at least in the way that Justice Scalia seems to employ this phrase—may have no application when judicial conscience decides issues of justice.⁶⁶ If a majority of the people were to reach a two-thirds consensus that Negroes should again become slaves, that Jews should be persecuted in America as they were persecuted in Nazi Germany, that the doctrine of presumption of innocence should be repudiated, or that due process of law and the constitutional prohibitions against ex post facto laws and bills of attainder should be repealed, natural law

⁶⁴ See, e.g., *United States v. Amistad*, 40 U.S. 518 (1841) (ordering the release and repatriation of Negro slaves who took control of the slave transport ship, *Amistad*, and killed its owners and captain, on natural law grounds).

⁶⁵ SOPHOCLES, *THE ANTIGONE* §§ 450–470 (Gilbert Murray trans., 4th ed. 1954). Sophocles’ drama, *Antigone*, is universal in its importance because it raises the eternal question of the proper relation between man’s law and natural law, i.e., that which is right according to nature; see also ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE*, bk. I, § 13 (George A. Kennedy trans., 1991).

⁶⁶ See AQUINAS, *supra* note 20, pt. I, Q. 79, art. 13. (“[C]onscience, according to the very nature of the word, implies the relation of knowledge to something; for conscience may be resolved into *cum alio scientia* [that is, *knowledge applied to an individual case*]. But the application of knowledge to something is done by some act.” (emphasis added)); see also ST. GERMAN, *supra* note 44, Dialogue I, ch. XV (“[C]onscience . . . is nothing else but an applying of any science or knowledge to some particular act of man . . . [C]onscience is an habit of the mind discerning between good and evil.”). Regarding judicial conscience, it is “the application of knowledge or science to what we do . . . [It] is made in three ways . . . In the third way, so far as by conscience we judge that something done is well done or ill done, and in this sense conscience is said to excuse, accuse, or torment.” AQUINAS, *supra* note 20, pt. I, Q. 79, art. 13.

would be a formidable obstacle to *vox populi*. Natural law limits, and will always limit, politics. Natural law is our last bastion against arbitrary rule. For this reason, natural law and the Constitution will always be a thorn in the side of politics. The Constitution is fundamental law that is the embodiment of natural law in American jurisprudence.

IV. CONCLUSION

It may be archaic, perhaps unfashionable, and above all, politically incorrect to refer to the Supreme Court as the aristocratic element in republican government. Still, the original design of the Framers of the Constitution, corroborated by Tocqueville's observations about American Republicanism, suggests that it is true—the Supreme Court is the aristocratic element in the American regime. As such, and contrary to Justice Scalia's opinion, the Supreme Court possesses the moral obligation, more so than the legislative or executive branches of government, to do and say something that is opposed to the People when they violate or threaten to violate natural law. The Supreme Court, in conjunction with the Bench and Bar in general, constitute a collective aristocratic body that stands as the only counterpoise to democracy, ready to curb the excesses that are natural to republican government. This appears to be how the Framers of the Constitution reconciled the institution of the Supreme Court with "democratic theory."⁶⁷ "Democratic

⁶⁷ In spite of the passage of the Seventeenth Amendment in 1913 providing for the direct election of senators by popular vote, United States Supreme Court Justices continue to remain considerably distanced from "democratic theory," especially since they continue to be tenured for life without the interference of popular elections. Additionally, their life tenure is coupled with a "[c]ompensation, which shall not be diminished during their Continuance in Office." During the debates on the judiciary at the 1787 Constitutional Convention, James Madison argued that Justices of the Supreme Court must hold their offices by life tenure because the Court "might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of the laws." 2 THE RECORDS OF THE FEDERAL CONVENTION 34 (Max Farrand ed., 1937). Regarding the matter of compensation for Supreme Court Justices, Madison argued that the clause—"no increase or diminution [in compensation] shall be made so as to affect the persons [of the Justices] at the time of office"—should be restricted solely to "diminution" of compensation. Madison's rationale is this: "The dependence [of the Court on the Legislature] will be less if the increase alone should be permitted, but will be improper even so far to permit a dependence. Whenever an increase [in compensation] is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter." *Id.*

theory” is not sovereign, as Justice Scalia seems to suggest. Why? Because, when given the opportunity, the “many” (i.e., democracy) will tyrannize over the “few” (i.e., oligarchy), just as the “few,” when given similar opportunity, will tyrannize over the “many.” According to Hamilton, this is natural to society.⁶⁸ If justice is “right rather than might,” then justice and democracy are not always (and certainly not necessarily) synonymous because democracy is capable of tyranny.⁶⁹ Justice

at 44–45. It was Madison’s concern, as well as the concern of the majority of the Framers, that the Supreme Court be as independent as possible under the circumstances. This point was reiterated by the highly respected Chancellor James Kent of New York, who wrote: “The tenure of the office, by rendering the judges independent, both of the government and people, is admirably fitted to produce the free exercise of judgment in the discharge of their trust.” 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 274 (1971). Thus, because of life tenure and financial independence, the Supreme Court continues to be insulated, not only from the influence of the Legislature, but also from the sway of *vox populi*.

⁶⁸ See 4 THE PAPERS OF ALEXANDER HAMILTON 185 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (“Society naturally divides itself into two political divisions—the few and the many, who have distinct interests. If government [be] in the hands of the few, they will tyrannize over the many. If (in) the hands of the many, they will tyrannize over the few.”).

⁶⁹ Lest we forget, it was Athens—that paragon of democracy in the ancient world—that forced Socrates to drink the hemlock. Socrates’ “crime” was the fact that he “philosophized.” That is, Socrates sought truth in things political. The Athenian authorities reckoned that this only leads to corruption of Athenian youth. One of the morals underscoring Socrates’ death is that democracy is not necessarily friendly to freedom of speech, particularly when truth about serious matters is its express object. Closer to home, Professor Harry V. Jaffa presents a compelling argument about the tyrannical tendencies of democracy: Had Stephen Douglas’ doctrine of “popular sovereignty” prevailed over Abraham Lincoln’s natural law arguments embodied in the Declaration of Independence, slavery might very well have crept into the Western states. Democracy was at the heart of Douglas’ doctrine of “popular sovereignty.” His solution to the slavery issue was to allow the people to vote slavery “up or down” in the Western territories. His expectation was that slavery would prove to be an economic disaster in the Rocky Mountains and Pacific territories, forcing these territories to enter the Union as Free States. But as Lincoln showed, slavery could just as easily become as economically viable in coal and goal mines as it was in cotton fields. Thus, democracy does not necessarily lead to justice; in fact it can be the mid-wife of tyranny. See HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE LINCOLN-DOUGLAS DEBATES (1973).

The social and political upheavals in France in the 1790s and in Russia in 1917 began as democratic revolutions. It should not be overlooked that the Reign of Terror during the French Revolution, the Gulag Archipelago following the Russian Revolution, and more recently the policy of ethnic cleansing in the Balkan States in this decade are essentially by-products of democracy run amok. Aristotle insightfully writes:

Demagogues arise in states where the laws are not sovereign. The people then become an autocrat—a single composite autocrat made up of many members, with the many playing the sovereign, not as individuals, but

consists, in part, in protecting the “many” against the encroachments of the “few,” as well as protecting the “few” against the encroachments of the “many.”⁷⁰ Justice, in short, transcends and therefore limits politics. This was at the root of Hamilton’s insistence that the American Constitution is both a “limited constitution” and “a fundamental law.”⁷¹ At best, “democratic theory” stands in tension, more or less equal, with natural law. As Professor Gerald Stourzh has brilliantly pointed out:

The tremendous strength of the Constitution as the true sovereign of America derives from the fact—transparent in [THE FEDERALIST] NO. 78—that two distinct and not necessarily compatible titles support it: principles of natural law as well as “the people.” It is true that in the 78th Federalist, the balance inclines in favor of the sovereignty of the community. Yet all the more important are the “Phocion” papers [of Alexander Hamilton⁷²], in which the “fundamentals” of a Constitution or the “principles” of republican government convey the impression of enduring and general principles of reason and justice that remain true and valid regardless of popular approval or disapproval. The underlying assumption seems to

collectively . . . a democracy of this order, being in the nature of an autocrat and not being governed by law, begins to attempt an autocracy. It grows despotic; flatterers come to be held in honor; it becomes analogous to the tyrannical form of single-person government.

ARISTOTLE, *THE POLITICS*, *supra* note 15, bk. IV, ch. iv, §§ 26–27, at 169.

⁷⁰ See THE FEDERALIST NO. 51, at 339–40 (James Madison) (Clinton Rossiter ed., 1961). Madison states:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . Justice is the end of good government. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so in the former state, will the more powerful factions or parties be gradually induced, by a like motive to wish for a government which will protect all parties, the weaker as well as the more powerful.

Id.

⁷¹ See THE FEDERALIST NO. 78, at 466–67 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷² See Letter from Phocion to the Considerate Citizens of New York (Jan. 1–27, 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON 483 (Harold C. Syrett & Jacob E. Cooke eds., 1962); Second Letter from Phocion (Apr. 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON, *supra*, at 530.

be that arbitrariness is never legitimate or, for that matter, legal. Our contemporary addiction to legal positivism has led us to see in every act of the legislature a "law."⁷³

To say that the Bench and Bar in America are, and indeed should be, aristocrats is not an exclusive invitation to the ball. It is not an invitation to snobbery or special privilege.⁷⁴ It is, rather, an invitation to an unassuming duty.⁷⁵ It is a

⁷³ GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 60 (1970); accord EIDELBERG, *supra* note 31, at 218:

The principles of government originally established by the American people are of three kinds: (1) those which they deemed best suited for the needs and circumstances of their own society—for example, the principle of federalism; (2) those which they deemed best suited for any civilized society—for example, the principle of checks and balances or the constitutional division of powers or functions; and (3) those which they deemed intrinsic to the very nature of society. The first kind of principles would be binding upon them simply as Americans; the second, say, as Americans sharing a common heritage with nations of the West, especially with the English-speaking peoples. The third kind of principles—and these may be placed under the category of natural justice—would be binding upon them as men, as men *sub specie eterni*. Now it should be noted that of this third category of principles (but of the second as well), the original will of the American people is a mediative cause, not a creative one. Such principles are binding not in virtue of having been willed, but in virtue of their universal (or general) validity. But let us consider some these principles, for they enhance the status of the Constitution as a fundamental law.

Id.

⁷⁴ See PLINIO CORREA DE OLIVEIRA, NOBILITY 194 (1993).

The human type of the Christian gentleman, the model and prototype of Western aristocracy, has as its first and supreme ideal the imitation of the perfections of Our Lord Jesus Christ. In fact, the virtues that compose the moral profile of the Christian aristocrat (honor, abnegation, courage, magnanimity, respect, honesty, and so on) were inspired by the example and teachings of Our Lord Jesus Christ, in whom they are found in a supreme and divine degree. In conclusion, a true aristocracy is one which, seriously and enthusiastically, strives to realize the model of perfection of Our Lord Jesus Christ. It withers and fades to the degree that it strays from this high ideal.

Id.

⁷⁵ See Joseph M Proskauer, *Foreword to THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* (Julius Goebel ed., 1964). Proskauer writes:

As these [law practice] papers will amply demonstrate, [Alexander Hamilton's] contribution to the development of the administration of justice was of the greatest significance. But over and above that he demonstrated that the members of his profession were in the best sense aristocrats dedicated to the creation of a great democracy. Thus, in these papers Hamilton shows himself as both the great lawyer and the great patriot.

Cincinnatus-like call to be a source of wisdom in republican government,⁷⁶ to stand sentinel over our Constitution “regarded as a fundamental law” (borrowing Hamilton’s phrase in THE FEDERALIST NO. 78), and to lend permanence to our laws against the vicissitudes that are natural to republican government.⁷⁷ Deference and, ultimately, appeal to “enduring and general principles of reason and justice that remain true and valid regardless of popular approval or disapproval,” are lawful and legitimate vehicles for Catholic legal professionals in republican government who, as lawyers, advocate in the practice of law and who, as judges, adjudicate cases.⁷⁸ Justice, after all, is the special business of lawyers and judges, especially in a republic, since justice for the individual is always open to public scrutiny.⁷⁹ In a manner of speaking, justice is our stock in trade.

Id.

⁷⁶ Cicero points out that “wisdom or counsel” is the decisive virtue that is identified with aristocracy. MARCUS TULLIUS CICERO, DE LEGIBUS, bk. II, § 30; bk. III, §§ 24–25, 28, 38. Arguably, this virtue is appropriate, if not necessary, in our judges who are duty-bound to “declare the sense of the law” and to exercise judgment, rather than will. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). President James Madison nominated Joseph Story to the Supreme Court for his wisdom, counsel, learning, and moral qualities: “KNOW YE, That reposing special Trust and confidence in the Wisdom, Uprightness and Learning of Joseph Story, of Massachusetts, I have nominated, and by and with the advice and consent of the Senate, do appoint him one of the Associate Justices of the Supreme Court of the United States . . .” See JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 41 (1971).

Life tenure coupled with measure of financial independence that James Madison advocated during the Convention Debates on the Constitution were intended by the Framers to give the Justices of the High Court the means for exercising wisdom free from the vicissitudes of faction and politics, all for the benefit of the republic.

⁷⁷ THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷⁸ GERARD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 60 (1970).

⁷⁹ For example, the Constitution for the Commonwealth of Pennsylvania declares: “All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” PA. CONST. art 1, § 11. Republics lack a doctrine similar to the doctrine of infallibility when it comes to matters of public and individual justice. Therefore, so long as a republic such as ours espouses justice and shuns tyranny, there will necessarily exist a tension between the People and natural law—the former constituting the physical element and the latter supplying the moral element in our Constitution as sovereign or supreme law of the land. So long as this fact exists, the legal profession will always be the key, acting as a counterpoise between the People and natural law, thereby assuring as much as humanly possible that justice, rather than tyranny, prevails.

When judges officially perform their duties on the Bench, they constitute the highest tribunal of justice. As Professor Eidelberg points out:

[Judges] bring justice to the individual citizen. On their decisions may depend his life, his liberty, his property. . . . For [the] oath [that judges swear the day they take office] is the ultimate promise that the laws shall be consistent with the principles of justice embodied in the Constitution. This is the promise of judicial review.⁸⁰

God is, therefore, not alone in applying natural law. Lawyers and judges join with God, most times, when we advocate that something is unjust or decide that something is unconstitutional. Safeguarding and advocating natural law—some of those principles of natural justice embodied in the Constitution and examined earlier in this article—discharge an office that is consistent with both the Constitution and the Holy Father's recent pronouncement that the Church has an obligation to make the Gospel relevant equally to the few as to the many, to leaders as much as to the led. On this point, the Holy Father, Justice Scalia, and I can find common ground: "the Christian in a democracy is to use . . . his own voice to convert the democratic society, which will then have its effect upon the government."⁸¹ Yet, even as Catholic legal professionals may be called to stand sentinel over the right of natural law to have a voice in a republican society, Catholic legal professionals must understand that there are practical limits to natural law. For just as natural law limits politics, natural law is itself limited by revelation. Thus Catholic legal professionals should devote themselves to the study and practice of law towards this end as well. This is the more challenging task that awaits us.

This is why Tocqueville views the legal profession as a kind of aristocracy, which, in the words of St. Thomas, is "the power of government by the best, where the power of government is vested in a few." AQUINAS, *supra* note 20, pt. I-II, Q. 105, art. 1.

⁸⁰ EIDELBERG, *supra* note 31, at 240.

⁸¹ Scalia, *supra* note 4, at 87. It is worthy noting (especially in the context of this statement from Justice Scalia, who is a Catholic) that there is nothing un-American about an American Statesman being, simultaneously, a Christian Statesman. There is historical precedent for this in the life and death of Alexander Hamilton. In the opinion of prominent historians, Hamilton made efforts to receive the Sacrament following his infamous duel with Aaron Burr, and died a Christian. See JACOB E. COOKE, *ALEXANDER HAMILTON: A PROFILE* 230-55 (1967); DONALD J. D'ELIA, *THE SPIRIT OF '76: A CATHOLIC INQUIRY* 87-114 (1983).