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The Decline of the Lawyer-Politician

NICK ROBINSON†

INTRODUCTION

In *Democracy in America*, Alexis De Tocqueville famously noted, “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”¹ This observation about the close interplay of the judicial and political branches in the United States is almost certainly an over-generalization,² but it also captures a central feature of the U.S. system of government

† Robina Fellow at Yale Law School, Lecturer in Political Science at Yale University, and affiliated Fellow at Harvard Law School’s Center on the Legal Profession. I would like to thank David Wilkins, Vic Khanna, Marc Galanter, Rick Abel, Bob Kagan, Guido Calabresi, Susan Rose-Ackerman, Lawrence Lessig, Richard Abel, David Mayhew, Heather Gerken, John Witt, Shauna Shames, Alicia Bannon, Adam Lioz, Ben Schneer, William Hubbard, Robert Gordon, Gordon Silverstein, Maya Sen, Nick Carnes, Douglas McDonald, Bryon Fong, Derek Davis, and participants of a workshop at Harvard Law School’s Center on the Legal Profession for their feedback on this Article.

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1945).

2. JEB BARNES & THOMAS F. BURKE, *HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION* 1 (2015) (citing to literature arguing that de Tocqueville may have been wrong that all political disputes do not eventually become judicial ones in the U.S., but that the observation does explain a significant portion of U.S. politics); Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 *CONST. COMMENT.* 485, 487 (2004) (arguing that most national political questions that existed when de Tocqueville was writing during the Jacksonian era were not, in fact, resolved into judicial questions).

and is frequently repeated by scholars.³ What is less often emphasized is that not only do political issues in the United States often go from being debated in legislatures to argued in the courts, but that those who do the debating and arguing have frequently moved in their careers between these bodies as well.⁴ Or, at the very least, they come from the same professional background: they are lawyers.

Historically, lawyers have not only monopolized positions in the court system, but have also dominated the political leadership of the United States. Since independence, more than half of all presidents, vicepresidents, and members of Congress have come from a law background.⁵ At the state level, a similar, if less pronounced, pattern has been repeated.⁶ Yet, while lawyers' ubiquity in politics is relatively common knowledge, there

3. See, e.g., BARNHOES & BURKE, *supra* note 2, at 1.

4. De Tocqueville himself is an exception to this dearth of attention. In *Democracy in America*, he emphasized the lawyers' prevalence in the U.S. political system and described its effect on U.S. democracy. DE TOCQUEVILLE, *supra* note 1, at 280.

5. While the occupational backgrounds of all presidents and vicepresidents were coded for this Article, the conclusion that over half of all members of Congress have come from a law background was calculated through a combination of counting and sampling. According to compiled data from CQ Press from 1945 to 2016, 46% of those that have served in Congress have been lawyers, or 1,963 of the 4,275 members of Congress during this period. CQ Press, Congress Collection, <http://library.cqpress.com/congress/> (last visited June 8, 2017) [hereinafter CQ Press]. From the early 19th century to 1945, over 60%, and frequently over 70%, of the members of Congress sampled for this study were lawyers. See *infra* Section II.A. This combination of sampling and counting from different periods indicates that well over half of all members of Congress have been lawyers.

6. HEINZ EULAU & JOHN D. SPRAGUE, *LAWYERS IN POLITICS: A STUDY OF PROFESSIONAL CONVERGENCE* 11–12 (1964) (recounting studies showing that in the late 19th and early to mid-20th century, lawyers were prevalent as governors and state legislators, but not as prevalent as lawyers as U.S. presidents or members of Congress); Richard L. Engstrom & Patrick F. O'Connor, *Lawyer-Legislators and Support for State Legislative Reform*, 42 J. POL. 207, 267 (1980) (noting that in 1980, lawyer-legislators comprised from a quarter to over half of state legislatures whereas the U.S. Congress is generally comprised of over half lawyer members).

has been almost no study of how lawyers' prevalence in politics has changed over time, why these changes might have occurred, or whether a shift in the prevalence of lawyers—or the types of lawyers—in politics even matters.⁷

This Article helps address these gaps. It examines a unique data set of the occupational background of members of the U.S. Congress that spans more than two hundred years from the 1st Congress to the 114th Congress. This data shows that the proportion of lawyers in Congress has not been static. Instead, after a notable increase in the number of lawyers in the U.S. Congress after Independence, there has been a slow, but steady, decline in their numbers. In the mid-nineteenth century, almost 80% of members of Congress were lawyers.⁸ By the 1960s, this dropped to under 60%, and in the 114th Congress, the number of lawyer-members in Congress was slightly under 40%.⁹

I argue this decline has been caused in large part by new types of specialization both in politics and in law. In politics, lawyers now face new competition from what this Article refers to as a “specialized political class” comprised of political aides and members of civil society.¹⁰ Those from this political class have many, if not more, of the advantages that lawyers historically have had in politics from flexible careers

7. While scholars have largely ignored the effect of the changing prevalence of lawyers in politics, they have attempted to assess the effect of their ubiquity. For example, there have been several studies that have attempted to determine whether the presence of lawyers has had an effect on legislative outcomes. See sources cited *infra* note 195.

8. See *infra* Section II.A, Table 2.

9. See *infra* Section II.A, Table 2.

10. The term “specialized political class” is not common, but others have used variants, particularly in other countries. See, e.g., TREVOR COOK, WHITLAM'S GRANDCHILDREN: WHAT THE CLASS OF 2007 TELLS US ABOUT THE ALP 10 (Aug. 2009), <http://trevorcook.typepad.com/files/rudds-class-of-2007.pdf> (describing the rise of a “professional political class” in Australia when noting the decline of lawyers in elected office there and the rise of those who have made politics a vocation).

that frequently incentivize running for office to readymade networks of campaign contributors.¹¹ Meanwhile, in law, lawyers find themselves in an increasingly professionalized and commercialized work environment that prizes specializations like corporate law that seem to have less overlap or synergy with a career in politics.¹²

But what consequences does the decline of lawyers in Congress, and politics more generally, actually have? Certainly, it is significant for the legal profession itself, likely decreasing the number of politically ambitious young people who enter law and potentially creating a more inward looking and less public-spirited profession.¹³ It may also affect the diversity of Congress—for example, the relatively low proportion of women in the U.S. Congress compared to other advanced democracies may be partly caused by law traditionally being a gatekeeping occupation for a political career.¹⁴ In fact, evidence is presented in this Article that women members of Congress have traditionally been less likely to be lawyers, perhaps because women, in general, have faced so many barriers in the legal profession.¹⁵

11. See *infra* Section IV.A.

12. See *infra* Section IV.B.

13. In recent years, there has been a widespread view among many scholars that law has become more of a business and less of a public-spirited profession. This perception has several potential causes, including increased specialization that reduces the cohesion of the bar and increases the focus of law firms on profits. See, e.g., Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 297 (1998).

14. While the hurdles women have faced in the legal profession may contribute to their relatively low representation in U.S. politics as shown in Section II.B, this is likely not the primary reason for their low representation. For example, there is some evidence that it may be caused by the structure of the U.S. electoral system. Steven Hill, *Why Does the US Still Have So Few Women in Office?*, THE NATION (Mar. 7, 2014), <https://www.thenation.com/article/why-does-us-still-have-so-few-women-office/> (noting that, according to one ranking, the United States ranked 98th among world powers in the proportion of women in higher office as well as arguing that countries with proportional representation election systems elect more women).

15. See *infra* Section II.B.

However, this Article focuses on the significance of the lawyer-politician for the U.S. legal system. I argue that there are two primary ways the prevalence of lawyer-politicians has historically affected the justice system. First, I claim that lawyer-members of Congress have helped foster the centrality of lawyers and courts in the United States. For example, while lawyer-members of Congress do not generally vote differently than their peers on most legislation,¹⁶ this Article presents new evidence that they are more likely to oppose tort reform that caps damages and to support funding for civil legal aid.¹⁷ Lawyer-members of Congress are also more likely to sit on committees affecting the legal system and express a strong commitment to protecting judicial independence.¹⁸ More generally, lawyer-members may have historically helped foster what Robert Kagan has called the United States' emphasis on "adversarial legalism," in which lawyers, courts, and litigation disproportionately dominate policy implementation.¹⁹

Second, the decline of the lawyer-politician in Congress has corresponded to an even more precipitous drop in lawyer-politicians in the courts—in other words, judges becoming politicians or politicians later becoming judges.²⁰ In turn, a specialized class of judges, who have a narrower range of career experiences (particularly previous experience as a

16. After World War II, scholars hypothesized that lawyer-politicians would vote differently than their peers, but very limited evidence was found to support this theory. See sources cited *infra* note 195.

17. See *infra* Section V.A.

18. See *infra* Section V.A.

19. ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3, 11 (2001) (juxtaposing the prevalence of "adversarial legalism" in the U.S. to the more Weberian hierarchical legalism common in Europe).

20. There has also been a smaller, but noteworthy, drop of former prosecutors in Congress. For data on the decline of politician judges and politician prosecutors, see *infra* Table 9 and accompanying text.

judge), is replacing this earlier group of politician judges.²¹ This shift towards a more technocratic judiciary means judges are less likely to have personal political ambition influence their duties, but they also have less political experience to draw on in their work.²² The rise of a professionalized judiciary may ironically reduce judicial independence, as the president and U.S. Senate can use the judicial record of nominees for the Supreme Court or Court of Appeals to test if they have judicial philosophies that correspond with their own and, in turn, lower court judges may change their behavior to audition for a “promotion” to these higher courts.²³

Not only does the decline of lawyer-politicians in the United States affect the legal system, but it may also, albeit more speculatively, shape adherence to the rule of law by the country’s political leadership.²⁴ United States democracy emerged from a unique set of historical and political circumstances.²⁵ Significantly, it was not just the country’s laws and institutions, or the preferences of its citizens, that fostered the country’s strong commitment to the rule of law—it was also the norms that its leaders have followed.²⁶ The decline of the lawyer politician in all branches of government may undermine these governing norms: whether it is fewer politicians that are immersed in the language of rights and due process or fewer judges that are savvy to the world of politics. Of course, the arrival of those from backgrounds

21. See *infra* Section V.B.2.

22. For a discussion of this point, see *infra* Section V.B.2.

23. See *infra* Section V.B.2.

24. This Article uses the term “rule of law” broadly to encompass not only the predictable application of the law, but also due process, basic civil rights, and the independence of the courts. For an overview of the different ways the term “rule of law” has been used, see Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 3–13 (2008).

25. See *infra* note 277.

26. See *infra* Part VI.

different than the lawyer politician—whether those from a specialized political class or a professionalized judicial class—bring their own advantages and we should not romanticize the lawyer politician (either historically or certainly today).²⁷ Yet, in a time when liberal democracy seems under threat globally, and many express concern for its health in the United States,²⁸ there is an urgency in exploring the role lawyer-politicians have played in supporting the rule of law in the United States and the implications of this group’s decline.

The plan of the Article is as follows. After a brief discussion in Part I of its methodology, Part II examines the historical data compiled for this Article on the occupational background of members of the U.S. Congress as well as the U.S. Executive. Part III puts forward a set of reasons for why lawyers have traditionally dominated federal elected office and Part IV lays out two arguments for lawyers’ relative decline. Part V then examines the significance of the prevalence, and decline, of lawyer-politicians in Congress and the judiciary for the U.S. legal system. The Article concludes in Part VI by exploring some of the potential implications of this decline for the rule of law in the United States.

I. METHODOLOGY

The information on the occupational background of members of Congress for this Article spans from

27. For example, law, as a gateway profession into politics, may have limited the number of women who were elected to higher office in the U.S. *See infra* Section II.B. Also, judges’ ambition for elected higher office may negatively influence their behavior. *See infra* Section V.B.1.

28. *See, e.g.,* Fareed Zakaria, *America’s Democracy Has Become Illiberal*, WASH. POST (Dec. 29, 2016), https://www.washingtonpost.com/opinions/america-is-becoming-a-land-of-less-liberty/2016/12/29/2a91744c-ce09-11e6-a747-d03044780a02_story.html?hpid=hp_no-name_opinion-card-&utm_term=.55f84f6c9891 (arguing that the United States is currently viewing the rise of illiberal democracy in its own political system).

Independence to the 114th Congress. The data for members of the 1st to the 71st Congress was compiled over twenty-year periods by coding occupational information from the biographies of members maintained in the official Biographical Directory of the U.S. Congress.²⁹ The Biographical Directory is partially incomplete on rare occasions where members had no occupational information listed,³⁰ but the Directory provides a consistent, authoritative, and relatively robust source of occupational data on members of Congress across time.

Information on the occupational background of members of Congress used for the 79th Congress to the 114th Congress was drawn from data compiled by CQ Press.³¹ For consistency, the occupational categories used by CQ Press—law, business, banking, education, medicine—were also used when coding members from the 1st to 71st Congresses.³² Members frequently had more than one occupation before serving in Congress and this was coded both in the CQ Press data and in the data compiled by the author of the earlier Congresses.

Both because of its contemporary interest and to test the robustness of the CQ Press data, the occupational profile of each member of the 114th Congress was checked against occupational information from member profiles from CQ Roll Call, which is somewhat confusingly a separate entity from CQ Press, along with official Congressional biographies.³³

29. *Biographical Directory of the U.S. Congress, 1774–Present*, U.S. CONGRESS, <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited June 8, 2017) [hereinafter *Congressional Biographical Directory*].

30. For example, Congressman James Israel Standifer has no occupation listed prior to joining Congress even though he was forty-one years old when elected to office. *Id.*

31. CQ Press, *supra* note 5.

32. For a list of occupations used by CQ Press, see *infra* note 60.

33. See *Legislative & Advocacy Solutions for Professionals*, CQ ROLL CALL, https://www.google.com/search?q=CQ+Roll+call&rlz=1C1CHZL_enUS706US70

Cleaned CQ Press data indicated that 36.5% of the 114th Congress had previously been a lawyer.³⁴ Individually cross-checking members' profiles indicated that 39.1% of members of the 114th Congress had a law degree. This discrepancy may be because CQ Press coded for "law" only if the member had practiced and not just if they had a law degree, because the member's law background was missed in the CQ Press coding, or some other reason. Regardless, the difference between the two findings is relatively small. Occupational backgrounds other than law may have larger discrepancies. For example, a member might not be coded in the CQ Press data as working as a Congressional aide if they only did so for a short period.³⁵ However, these discrepancies should be similar across time in the CQ Press data and small enough to not effect drawing conclusions about more general trends across the pre-1945 data sourced from the official Congressional Biographical Directory and the post-1945 CQ Press sourced data.³⁶ In the pre-1945 data compiled by the

6&oq=CQ+Roll+call&aqs=chrome..69i57j0l5.3345j0j4&sourceid=chrome&ie=UTF-8 (last visited June 3, 2017) [hereinafter CQ ROLL CALL]; *Congressional Biographical Directory*, *supra* note 29.

34. Some years of CQ Press data were missing occupational information. For example, for the 1945–46 Congress, five members had no occupational information listed. This missing data is more prevalent in more recent Congresses. In the 114th Congress, seventy members had no occupational background listed, which is far greater than any other Congress perhaps because the data is still relatively recent. For instance, the 113th Congress was missing occupational information for only six members. CQ Press, *supra* note 5. When no occupational information was provided, the member was removed from the data set to maintain consistency in coding.

35. *See infra* Section IV.A (describing inconsistencies in coding for Congressional aides between CQ Press and CQ Roll Call data).

36. Today, the House of Representatives has 435 members and the Senate 100 members. *Members of the U.S. Congress*, CONGRESS.GOV, <https://www.congress.gov/members?q={%22congress%22:%22115%22}> (last visited June 8, 2017). In all data sets for this Article, non-voting members in the House of Representatives are not counted. During a Congressional term, members may retire, die, or otherwise leave office and be replaced by new members. If this occurs, the occupation of both the original and new member are coded, meaning that for some Congresses, the data set may be larger than the

author, if a member either studied or practiced law, they were coded as having a law background.

One limitation of this data set is that it does not track how long a member was in an occupation before entering elected office or how long they were in another elected office before becoming a member of Congress. Therefore, a member who worked as a lawyer for two years is coded the same as one who worked in a law practice for twenty years. Nonetheless, the data is still indicative of the general occupational background of members. For example, all members coded for “law” at least went through legal training and the vast majority likely practiced in some law setting for at least a limited period.³⁷

This Article also makes a unique contribution in calculating the proportion of all presidents, vicepresidents, and cabinet secretaries that have been lawyers. I coded this data by examining the occupational background for all persons holding these offices using official and unofficial biographical sources.³⁸

total allotted members of Congress.

37. Some of the CQ Press data on the occupational background of members of Congress has been compiled elsewhere, *See* BROOKINGS, VITAL STATISTICS ON CONGRESS, tbls. 1-8 & 1-12 (Apr. 2014), http://www.brookings.edu/~media/Research/Files/Reports/2013/07/vital-statistics-congress-mann-ornstein/Vital-Statistics-Chapter-1-Demographics-of-Members-of-Congress_UPDATE.pdf?la=en; R. ERIC PETERSON, CONG. RESEARCH SERV., REPRESENTATIVES AND SENATORS: TRENDS IN MEMBER CHARACTERISTICS SINCE 1945 8–11 (2012). However, this data has not yet been analyzed in a systematic manner or in an academic paper. Nor has this CQ Press data been combined with earlier data of members of Congress from before 1945 to provide a broader historical view of the occupational background of members of Congress from Independence to the contemporary era.

38. The primary unofficial source used for occupational information about cabinet secretaries was Wikipedia. While Wikipedia is generally not a preferred source, studies have shown it to be generally as accurate as other reference sources. Jim Giles, *Special Report: Internet Encyclopedias Go Head to Head*, 438 NATURE 900 (2005) (finding that selected articles on science in the online version of Encyclopedia Britannica and Wikipedia were substantially similar in accuracy as judged by a panel of experts). Wikipedia is also often the only available consistent and centralized source of biographical information for many cabinet secretaries.

Finally, the Article also draws on a variety of other sources in its analysis of the impact of lawyers' prevalence in Congress including official voting records³⁹ as well as donor and wealth data from Open Secrets.⁴⁰

II. LAWYERS IN POLITICS: THE U.S. CONGRESS

A. *Lawyers' Presence in Congress*

Lawyers' historic dominance of the U.S. political system is striking even if it has waned over the last several decades. 59% of U.S. presidents have been lawyers although just four of the last ten⁴¹ and 68% of vice presidents.⁴² Since independence, some 63% of cabinet positions have been occupied by lawyers, ranging from 100% of Attorney Generals, 78% of Secretaries of State, 70% of Secretaries of the Treasury, 25% of Secretaries of Veterans Affairs and 23% of Secretaries of Labor.⁴³ And all Supreme Court judges have come from a law background.⁴⁴

39. *See infra* Section IV.A.

40. Center for Responsive Politics, *Interest Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/> (last visited June 9, 2017).

41. *The Presidents*, WHITE HOUSE, <https://www.whitehouse.gov/1600/Presidents> (last visited June 9, 2017).

42. *Congressional Biographical Directory*, *supra* note 29 (searching for "Vice-Presidents").

43. *See infra* Table 1.

44. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 321–33 (2007) (providing the legal training of all U.S. Supreme Court justices).

TABLE 1. Percent of Lawyer Cabinet Members (1789–2016)⁴⁵

Cabinet Position	Percent Lawyers
Vice President (1789–2016)	68% (32 of 47)
Attorney General (1789–2016)	100% (82 of 82)
Secy State (1789–2016)	78% (53 of 68)
Secy. Treasury (1789–2016)	70% (52 of 74)
Secy. War (1789–1947)	74% (42 of 57)
Secy. Navy (1798–1947)	66% (31 of 47)
Postmaster General (1829–1971)	58% (31 of 53)
Secy. Interior (1849–2016)	69% (35 of 51)
Secy. Agriculture (1889–2016)	37% (11 of 30)
Secy. Commerce (1903/1913–2016) ⁴⁶	37% (16 of 43)
Secy. Labor (1913–2016)	23% (6 of 26)
Secy. Defense (1947–2016)	25% (6 of 24)
Secy. Health and Human Services (1953–2016) ⁴⁷	36% (8 of 22)
Secy. Housing and Urban Development (1965–2016)	50% (8 of 16)
Secy. Transportation (1966–2015)	59% (10 of 17)
Secy. Energy (1977–2015)	38% (5 of 13)
Secy. Education (1979–2015)	33% (3 of 9)
Secy. Veterans Affairs (1989–2016)	25% (2 of 8)
Secy. Homeland Security (2003–2016)	100% (4 of 4)
<i>Total</i>	<i>63% (437 of 691)</i>

45. “Cabinet-rank” officials, who are not cabinet members, are not included in Table 1. For a list of cabinet and cabinet-rank positions, see *The Cabinet*, WHITE HOUSE, <https://www.whitehouse.gov/administration/cabinet> (last visited June 8, 2017).

46. From 1903–13, there existed a Department of Commerce and Labor. Jonathan Grossman, *The Origin of the U.S. Department of Labor*, U.S. DEP’T LAB., www.dol.gov/oasam/programs/history/dolorigabridge.htm (last visited June 9, 2017). The tally of lawyers who were Secretary of Commerce also includes the four secretaries that were secretary of Commerce and Labor all of whom were

The pervasiveness of lawyers in politics was already well established at the nation's founding. Twenty-five of fifty-six of the signers of the Declaration of Independence were lawyers,⁴⁸ while 53% of the members of the 1st Congress were trained in law.⁴⁹ Although well represented in this early period, the number of lawyers in Congress was to grow markedly. It is difficult to emphasize enough how pervasive lawyers were in the U.S. Congress through much of the nineteenth century and well into the first half of the twentieth. During this period, anywhere from 60% to almost 80% of the body was comprised of lawyers.⁵⁰

To be a lawyer in the nineteenth century almost inevitably drew one near elected office. For example, James Gordon found in his study of the Kentucky Bar of 1850 that 28% of lawyers that he sampled in the state had held elected office in the last five years.⁵¹ Similarly, drawing on historical data from the American Bar Association, one can estimate

lawyers.

47. This tally for the Department of Health and Human Services also includes the number of lawyers who served as secretary of the Department of Health, Education, and Welfare, which was in existence from 1953 to 1979 and was a predecessor to both the Department of Health and Human Services and the Department of Education. *HHS Historical Highlights*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.hhs.gov/about/historical-highlights/index.html> (last visited June 9, 2017).

48. U.S. Nat'l Archives & Recs. Admin., *Signers of the Declaration of Independence*, ARCHIVES.GOV https://www.archives.gov/files/founding-docs/declaration_signers_gallery_facts.pdf (last visited Aug. 23, 2017).

49. *See infra* Section II.A, Table 2.

50. *See infra* Section II.A, Table 2.

51. James Gordon sampled 100 members of the Kentucky Bar in 1850. He also found that in 1850–51, 34 of the 100 Representatives in the Kentucky House were lawyers and 16 of the 38 Senators in the state Senate. Both the Governor and Lieutenant Governor were also lawyers. On the basis of archival research, Gordon found there were only 1,166 lawyers in the state at the time. This means that in 1850, 1 out of every 22 lawyers in the state was a current member of the state legislature, Governor or Lieutenant Governor. JAMES W. GORDON, *LAWYERS IN POLITICS: MID-NINETEENTH CENTURY KENTUCKY AS A CASE STUDY* 121, 125–26, 233, 236 (Harold Hyman et al. eds., 1990).

that in 1890, about one out of every 265 lawyers in the country was a current member of Congress.⁵² Today, the proportion of lawyers in the U.S. population is higher, but only about one out of every 6,000 lawyers is a current member of Congress.⁵³ While the fraction of lawyers currently in Congress is still striking, if one was a lawyer in the nineteenth century, one was clearly part of a select political elite. As De Tocqueville remarked in the early nineteenth century, lawyers' place in U.S. society was comparable to that of a political "aristocracy."⁵⁴ It is a position that lawyers have arguably never fully relinquished even if, as a group, they have seen a relative decline in their electoral fortunes.⁵⁵

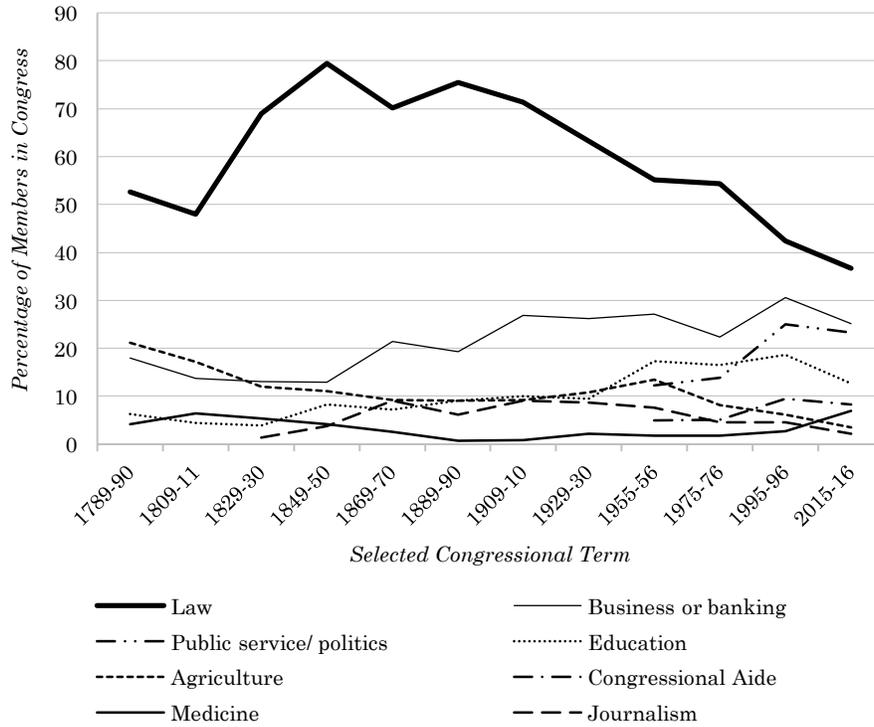
52. In 1890, there were an estimated 89,630 licensed lawyers in the country. AM. BAR ASS'N, TOTAL NATIONAL LAWYER COUNTS, 1878–2013 (2013), http://www.americanbar.org/content/dam/aba/administrative/market_research/total_national_lawyer_counts_1878_2013.authcheckdam.pdf. In the 51st Congress, there were 340 lawyers. *Congressional Biographical Directory*, *supra* note 29.

53. In 2013, there were an estimated 1,268,011 licensed lawyers in the country. AM. B. ASS'N, *supra* note 52. In the 114th Congress, there were 209 members with a law background. CQ Roll Call, *supra* note 33.

54. DE TOCQUEVILLE, *supra* note 1, at 304 ("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 If I were asked where I place the American aristocracy, I should reply without hesitation, that it . . . occupies the judicial bench and the bar.").

55. Largely because of this pervasiveness, U.S. lawyers have been called "the high priests of politics." EULAU & SPRAGUE, *supra* note 6, at 11.

FIGURE 1. Percent of Members of Congress in Select Occupations (1789–2015)⁵⁶



56. CQ Press, *supra* note 5; *Congressional Biographical Directory*, *supra* note 29.

TABLE 2. Percent of Members of Congress in Select Occupations (1789–2016)⁵⁷

Occupation	1789–90	1809–11	1829–30	1849–50	1869–70
Law	52.6	48.0	69.0	79.5	70.2
Business or banking	17.9	13.7	13.0	12.9	21.4
Public service/ politics	–	–	–	–	–
Education	6.3	4.4	3.9	8.2	7.2
Agriculture	21.1	17.2	12.0	11.0	9.2
Congressional Aide	–	–	–	–	–
Medicine	4.2	6.4	5.3	4.1	2.6
Journalism	–	–	1.4	3.8	9
Real Estate	–	–	–	–	–

57. Occupational data of members of Congress from 1789–90 to 1929–30 was compiled using the Biographical Directory of the United States Congress. *Congressional Biographical Directory*, *supra* note 29. Data on members of Congress from 1945 to 2016 is from CQ Press. CQ Press, *supra* note 5. For all data compiled, a member of Congress or cabinet member is considered a lawyer if they were trained in law or admitted to the bar whether or not they practiced. Where a cell is left blank in the table, it is because the occupational information was not recorded in the data set. Individual members of Congress may come from multiple occupational backgrounds. Therefore, columns may add up to more than 100%.

TABLE 2 (continued)

1889-90	1909-10	1929-30	1945-46	1955-56	1965-66
75.4	71.3	63.2	55.7	55.1	57.5
19.3	26.8	26.2	25.1	27.1	22.5
—	—	—	9.1	12.2	13.7
9.1	10	9.4	17.1	17.3	17.0
9.1	9.2	10.6	11.9	13.4	11.0
—	—	—	2.7	5.0	5.9
0.7	0.8	2.1	2.8	1.8	1.3
6.2	9	8.6	8.9	7.6	6.6
—	—	4.0	2.5	3.5	2.9

TABLE 2 (continued)

Occupation	1975-76	1985-86	1995-96	2005-06	2015-16
Law	54.3	48.0	42.4	39.1	36.5
Business or banking	22.4	30.0	30.6	27.8	25.5
Public service/ politics	13.9	10.4	25.0	24.6	23.0
Education	16.5	13.0	18.6	15.0	12.4
Agriculture	8.1	7.6	6.2	4.7	3.4
Congressional Aide	5.1	7.4	9.5	9.2	8.4
Medicine	1.7	1.5	2.7	5.6	6.9
Journalism	4.6	5.4	4.6	2.6	2.1
Real Estate	3.5	5.0	6.2	5.1	4.7

There are four main occupational backgrounds from which most members of Congress come: law, business, education, and public service/politics.⁵⁸ As Figure 1 and Table 2 show, those from a law background still dominate Congress, but not in the unrivaled manner they did in the early part of the twentieth century with lawyers now numbering less than 40% of members of Congress.⁵⁹ This gradual decline has not seen lawyers replaced with the entry of a broad cross-section of Americans into the halls of

58. This Article examines some of the variation in the types of law backgrounds of members of Congress as well as of public service/politics. However, more work needs to be done to explore the diversity of other occupational categories. For example, some members of Congress from a business or banking background may have owned a small business, others worked as middle management, while others were executives at large companies.

59. See *supra* Table 2.

Congress. Instead, there has been the rise of a handful of new groups that have successfully competed with lawyers. Specifically, since World War II, there has been a marked increase in the number of members who were part of a specialized political class comprised of political aides and members of civil society, which is demarcated above by “public service/politics” and “congressional aide.” These will be discussed in greater detail in Section IV.A of this Article.⁶⁰

B. *The Characteristics of Members of Congress from a Law Background*

Along a number of demographic and partisan measures lawyer members of Congress are different than other members more generally. Take gender—the data set on the occupational background of members of Congress compiled for this Article shows that female members of Congress are historically less likely to come from a law background than male members, although this gap has narrowed in recent years.⁶¹ Female members may be less likely to be lawyers

60. Some occupational backgrounds tallied by CQ Press are not in Table 2 or Figure 3 because a relatively small proportion of members were from that background. These occupational backgrounds are: real estate, engineering, clergy, law enforcement, construction/building trades, aeronautics, acting/entertainer, and computers/technology. CQ Press, *supra* note 5.

61. Of the thirty-one women who served in Congress before World War II, only two were lawyers even though during this period lawyers constituted well over half of members of Congress. *People Search*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/People/Search?filter=6>. (last visited June 10, 2017). The historically low proportion of women lawyers in Congress can partially be explained by the fact that some women members of Congress inherited their political career from their husband—either taking over their husband’s congressional seat when he died or continuing their electoral campaign after his death. For example, of the twenty-four women in the 98th Congress, five were women who were appointed or elected at least in part because of the death of their spouse. *Familial Connections of Women Representatives and Senators in Congress, Women Who Directly Succeeded Their Late Husbands*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Familial-Connections-of-Women-Representatives-and-Senators-in-Congress/> (last visited June 10, 2017). Still, this leaves nineteen women,

because of barriers women have historically faced both attending law school and in the profession.⁶² Since law is a traditional “gateway” occupation into politics, the hurdles women have faced in law may be one factor that has historically reduced women’s numbers in Congress.⁶³

including three lawyers, whose success is not directly attributable to their husband’s political career. If this smaller sample is used, then 16% of these women in the 98th Congress were lawyers, which is still a statistically significant difference with the number of male members of Congress who were lawyers ($p=.002$). Similarly, in the 88th Congress, five women who served in Congress had husbands who died either in Congress or while running for Congress. *Id.* If these political wives are excluded, 12.5% of the remaining group were lawyers, which is also a statistically significant difference ($p=.008$).

62. For more on the barriers women have faced in law, see Deborah Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1075–76 (2011). Less than 10% of those enrolled in JD courses nationwide were women until the 1970s. AM. B. ASS’N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947–2011, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf. However, since the early 1990’s, graduating classes at law schools have been about evenly split between men and women, which may help explain why the gender gap among lawyers in Congress has narrowed. *Id.*

63. For other potential factors, see Hill, *supra* note 14.

TABLE 3. Proportion of Male and Female Lawyer Members of Congress⁶⁴

Congress	Percent of Female Members of Congress Who are Lawyers	Percent of Male Members of Congress Who are Lawyers	Statistically Significant Difference? (P<0.05) ⁶⁵
83rd (1953–54)	7.7% (1 of 13)	56.6% (307 of 542)	Yes
88th (1963–64)	7.7% (1 of 13)	59.3% (320 of 540)	Yes
93rd (1973–74)	56.3% (9 of 16)	54.7% (297 of 541)	No
98th (1983–84)	12.5% (3 of 24)	51.2% (265 of 518)	Yes
103rd (1993–94)	13% (7 of 54)	47.8% (236 of 494)	Yes
108th (2003–04)	20.8% (15 of 72)	42.2% (197 of 467)	Yes
113th (2013–14)	33% (33 of 100)	39% (172 of 441)	No

64. CQ Press, *supra* note 5.

65. The list of the P-values for the following comparisons are as follows: 83rd Congress p=0.00; 88th Congress p=0.00; 93rd Congress p=0.904; 98th Congress p=0.00; 103rd Congress p=0.00; 108th Congress p=0.00; 113th Congress p=.255. In recent Congresses, Democrats are more likely to be lawyers than Republicans so this gender gap is even more striking. *See supra* Section II.B, Table 5.

TABLE 4. Proportion of White and Racial Minority Lawyer Members of Congress

Congress	Percent of Minority Members of Congress Who are Lawyers	Percent of White Members of Congress Who are Lawyers	Statistically Significant Difference? (P<0.05)
83rd (1953–54)	75% (3 out of 4)	55.2% (304 of 551)	No
88th (1963–64)	61.5% (8 out of 13)	58% (313 of 540)	No
93rd (1973–74)	53.8% (14 out of 26)	55% (292 of 531)	No
98th (1983–84)	30.5% (11 out of 36)	50.8% (257 of 506)	Yes
103rd (1993–94)	37.5% (24 out of 64)	44.8% (217 of 484)	No
108th (2003–04)	40.3% (27 out of 67)	39% (185 of 474)	No
113th (2013–14)	40% (34 out of 85)	37.4% (171 of 457)	No

On the other hand, racial minorities including African Americans, Hispanics, and Asians in Congress have historically not been less likely to be a lawyer than other members of Congress since World War II.⁶⁶ This seems counter-intuitive since both racial minorities and women have faced discrimination and unequal representation within the profession.⁶⁷ The causes of this discrepancy

66. CQ Press, *supra* note 5.

67. The legal profession continues to struggle with diversity. In 2010, 88% of lawyers were white, 5% African American, 4% Hispanic, and 3% Asian. AM. B. ASS'N, LAWYER DEMOGRAPHICS (2015), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.auth

deserve further research.

Lawyer-members of Congress are, as a group, also different from their colleagues in their partisan affiliation. In recent years, a larger percentage of Democrats, who are members of Congress, have been lawyers than those who are Republicans.⁶⁸ In the 114th Congress, 43% of Democrats in Congress had been trained in law compared to 31% of Republicans while in the 109th Congress, it was 44% of Democrats as compared to 34% of Republicans.⁶⁹ While Republican members of Congress are less often lawyers, this does not mean constituents in districts that are won by Republicans are more averse to voting for a lawyer. Rather, there is evidence that lawyers in society are more likely to, on average, lean towards the Democratic Party compared to the Republican Party.⁷⁰ As such, it may just be that there are fewer Republican-leaning lawyers to run for office compared to Democratic leaning lawyers interested in running for office.

checkdam.pdf. Meanwhile, in 2013, the U.S. population was 63% white, 13% African American, 17% Hispanic, and 5% Asian. *U.S Census Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited June 10, 2017).

68. *See infra* Table 5.

69. *See infra* Table 5.

70. Adam Bonica, Adam S. Chilton & Maya Sen, *The Political Ideologies of American Lawyers* 17 (Coase-Sandor Inst. for Law and Econ., Working Paper No. 732, 2015) (finding that lawyers are significantly more liberal than conservative).

TABLE 5. Percentage of Occupational Backgrounds in the 114th and 109th Congresses by Political Party⁷¹

	114th Congress (2015–16)			109th Congress (2005–06)		
	Repub.	Dem.	All	Repub.	Dem.	All
Law	31.2	42.7	36.5	33.7	44	38.4
Business or Banking	32.4	17.1	25.5	36.4	16.9	24.5
Public Service/ Politics	15.4	32.2	23	18.6	31	24.2
Education	6.3	19.4	12.4	11.7	18.1	14.7
Medicine	8.7	4.7	6.9	6.9	4	5.5
Congressional Aide	9.1	7.1	8.4	8.6	9.7	9.1

Lawyer-members of Congress come from a varied set of legal careers. In the 114th Congress, forty-three members or roughly 20% of lawyer-members of Congress were former prosecutors⁷² and over half had spent some time in private practice.⁷³ Government service, such as working at a US Attorney's office, the State Attorney General's Office, or for a government department, was also common as was work for nonprofits or activist causes.⁷⁴ At least seven had been public defenders.⁷⁵ As will be discussed in greater detail in Section V.B, previous experience as a judge, which was once relatively common before World War II, has precipitously declined and in the 114th Congress, only fifteen members

71. CQ Press, *supra* note 5.

72. JENNIFER E. MANNING, CONG. RESEARCH SERV., MEMBERSHIP OF THE 114TH CONGRESS: A PROFILE 3 (2015), <http://fas.org/sgp/crs/misc/R43869.pdf>.

73. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33.

74. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33.

75. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33.

had formerly been in a judicial office.⁷⁶

Similarly, the graduates of certain law schools have been disproportionately represented. In the 114th Congress, 209 entering members had a law degree.⁷⁷ Harvard Law School graduated nineteen of these members, more than any other law school, with Georgetown University Law Center being next, graduating fourteen.⁷⁸ Other law schools were less prolific, although it should be noted class sizes can vary considerably among law schools.⁷⁹ The University of Virginia and the University of Texas graduated seven, Yale and Boston College five, NYU four, and the University of Michigan four.⁸⁰ Nationally, prominent law schools like Stanford, the University of Chicago, the University of Pennsylvania, Duke, and Berkeley all graduated only 1 member of the 114th Congress each, and others produced none.⁸¹

Finally, there have been significant regional variations in which states are most likely to elect lawyer-members of Congress. Strikingly, the South has historically had a disproportionate number of members of Congress who are lawyers as well as members who were former judges.⁸² This is true despite the South not having more lawyers per

76. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33.

77. CQ ROLL CALL, *supra* note 33.

78. *Id.*

79. For example, both Harvard and Georgetown are large law schools, with class sizes between 500 and 600 students, while Yale or the University of Chicago have between 150 and 200 students in each graduating class. For a current list of total enrollment in law schools, see *Best Law Schools*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=a1d108> (last visited June 8, 2017).

80. CQ ROLL CALL, *supra* note 33.

81. Columbia Law School, for example, does not have a graduate in the 114th Congress. U.S. NEWS & WORLD REP., *supra* note 79.

82. See *infra* Table 6; Congressional Biographical Directory, *supra* note 29.

capita.⁸³ This pattern is noticeable since at least the beginning of the twentieth century⁸⁴ and has continued to recent Congresses although Table 6 indicates in the 114th Congress, the Northeast elected more lawyers than the South.⁸⁵

This discrepancy in the rate of electing lawyers between different regions is even more conspicuous when examining specific states. For example, from 1945 to 2015, California had 414 representatives in Congress of which 29% were lawyers, while Alabama had seventy-four members in Congress of which 70% were lawyers.⁸⁶

This regional discrepancy is also true of judges. For example, in the 114th Congress, of the fifteen members of Congress who had held judicial positions, all but two were from the South and six were from Texas.⁸⁷ This is a pattern which begins much earlier in the nation's history. In the 71st Congress, for instance, of the fifty-two members of Congress who were former judges twenty-seven, or 52%, were from the South.⁸⁸

83. In 2014, of the eleven states in the Northeast, only Maine and New Hampshire had fewer lawyers than the national median of 305 per 100,000 for states. AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY: LAWYER POPULATION BY STATE (2015), http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2015.authcheckdam.pdf. Of the fourteen states in the South, ten had fewer lawyers than the national median—Texas, Florida, Oklahoma, and Louisiana had more. *Id.*

84. For example, in the 61st Congress of 1909–10, 71% of members of Congress were lawyers. CQ Press, *supra* note 5. Meanwhile, 78% of members from Southern states were lawyers compared with 68% from non-Southern states. CQ Press, *supra* note 5.

85. *See infra* Table 6.

86. CQ Press, *supra* note 5.

87. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33.

88. *Congressional Biographical Directory*, *supra* note 29.

TABLE 6. Percent of Elected Members of Congress Who Are Lawyers from Different Regions of the United States

	114th Congress (2015–16)	109th Congress (2005–06)	104th Congress (1995–96)	All Members of Congress (1945–2015)
West ⁸⁹	28.4%	28.7%	34.1%	34.3%
South ⁹⁰	42.2%	42.9%	51.1%	53.6%
Northeast ⁹¹	50.0%	39.6%	40%	48.1%
Midwest ⁹²	35.1%	40.8%	41.7%	43.9%
Nat'l Average	39.0%	38.4%	42.5%	45.8%

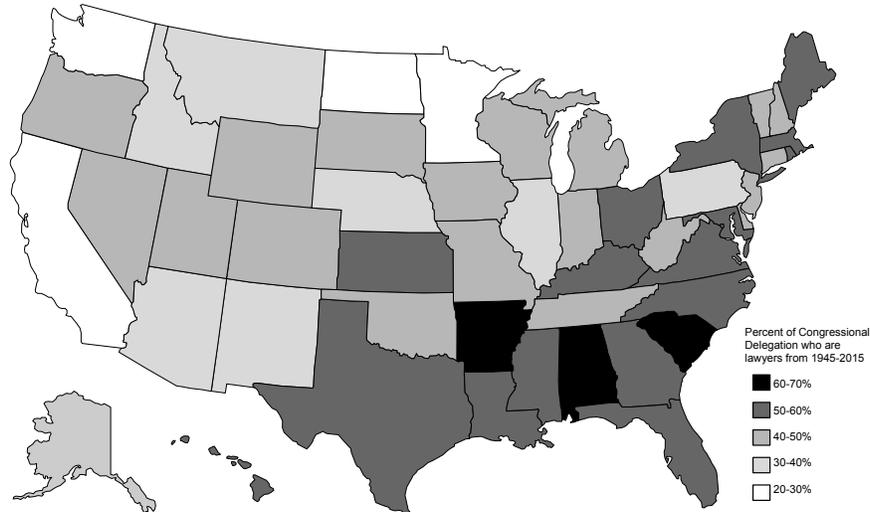
89. Includes members of Congress from: Alaska, Arizona, California, Colorado, Hawaii, Indiana, Montana, North Dakota, New Mexico, Nevada, Oregon, South Dakota, Utah, Washington, and Wyoming.

90. Includes members of Congress from: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

91. Includes members of Congress from: Connecticut, Delaware, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

92. Includes members of Congress from: Iowa, Illinois, Indiana, Kansas, Missouri, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

FIGURE 2. Percent of Congressional Delegation (1945–2015) that are Lawyers⁹³



Part of the reason the South elects more former judges, and by extension lawyers, to Congress is likely structural. In the South, many judges have also historically been administrators or executive officials. In Texas, for example, county judges are still considered the chief executive of the county as well as frequently having broad judicial duties.⁹⁴ Another part of the reason that the South elects more lawyers may be cultural and historical. John Baker has found evidence that, particularly in the 1950s before the professionalization of many state legislatures, states with a more traditionalistic political culture, such as those in the South, were more likely to have representatives of higher occupational status in their legislatures, which may help

93. CQ Press, *supra* note 5.

94. DAVID B. BROOKS, TEXAS ASS'N COUNTIES, GUIDE TO TEXAS LAW FOR COUNTY OFFICIALS (2016), <https://county.org/member-services/legal-resources/publications/Documents/Guide-to-Laws-for-County-Officials.pdf>.

explain the prevalence of lawyer-politicians in the South.⁹⁵

III. EXPLAINING THE SUCCESS OF LAWYERS

This section puts forward five arguments for why lawyers have historically dominated the U.S. Congress and U.S. electoral politics more generally: lawyers' prevalence in U.S. society; self-selection and professional incentives; a politicized legal system; comparatively better access to resources to run for office; and demand from voters for lawyer politicians. While not exhaustive, taken together these arguments provide a compelling explanation for lawyers' traditional electoral success.

A. *More Lawyers in the United States*

While many democracies elect a large number of lawyers to public office, the United States elects among the most.⁹⁶ Part of the reason behind this phenomenon is likely that there are more lawyers per capita in the United States than most other countries.⁹⁷ As of 2013, about 0.4% of the United States population was a lawyer.⁹⁸ In Canada, which also has

95. John Baker, Exploring the "Missing Link": Political Culture as an Explanation of the Occupational Status and Diversity of State Legislators in Thirty States, 43 *WESTERN POL. Q.* 597, 608 (1990).

96. See MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* 60 (1995) (finding that of 14 countries surveyed, the United States had the most lawyer-members of national legislatures of any country except Colombia); *There Was a Lawyer, An Engineer, and a Politician . . .*, *ECONOMIST*, Apr. 18, 2009, <http://www.economist.com/node/13496638> (finding that lawyers were well-represented in the elected bodies of democracies, but that the United States proportionally had the most lawyers of those democracies surveyed).

97. A 2006 study of twenty-six countries in Europe, Canada, the United States, and Japan found that the United States had more lawyers per capita than all the others except Greece. CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, *FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS* 26 (2011).

98. *Compare* AM. BAR ASS'N, *ABA NATIONAL LAWYER POPULATION SURVEY: HISTORICAL TREND IN TOTAL NATIONAL LAWYER POPULATION 1875–2015* (2015), http://www.americanbar.org/content/dam/aba/administrative/market_research/t

a relatively high proportion of lawyers, it was 0.33%.⁹⁹ In other words, there are about 1.2 times as many lawyers in the United States per capita as in Canada.¹⁰⁰ Approximately 17.4% of the 40th Parliament in Canada were lawyers.¹⁰¹ If this ratio were increased by 121%, to more closely parallel the lawyer population ratio of the United States, than the Canadian Parliament would be 21.1% lawyers. This is still far below levels of lawyer representation in the U.S. Congress, but it is closer. Still, the large per capita number of lawyers in the United States does not explain why lawyers in many countries disproportionately go into politics in the first place, or why lawyers are more numerous in the U.S. Congress compared to other countries even when taking into account the comparatively larger number of lawyers in the United States.

B. *Self-selection and Professional Incentives*

One clear potential explanation for the prevalence of

otal_national_lawyer_counts_1878_2015.authcheckdam.pdf, with U.S. CENSUS BUREAU, MONTHLY POPULATION ESTIMATES FOR THE UNITED STATES: APRIL 1, 2010 TO DECEMBER 1, 2014 (2014), <http://www.census.gov/popest/data/national/totals/2015/index.html>.

99. Compare FED'N LAW SOC'YS CAN. STATISTICAL REPORT (2013), <http://flsc.ca/wp-content/uploads/2015/03/2012-statistical-report.pdf>, with STATISTICS CAN., CANADA'S TOTAL POPULATION ESTIMATES 2013 (2013), <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm>.

100. Compare *Congressional Biographical Directory* supra note 29, with CQ Press, supra note 5.

101. In the 40th House of Commons, there were a total of 315 members of which fifty, or 15.9%, were lawyers. *Occupations of Members of the House of Commons*, PARLIAMENT CAN., <http://www.parl.gc.ca/parlinfo/compilations/HouseOfCommons.aspx?Menu=HoC> (last visited June 8, 2017). In the 40th Senate, there were 123 Senators of whom twenty-six were lawyers or 21.1% *Occupations of Senators*, PARLIAMENT CAN., <https://lop.parl.ca/ParlInfo/Lists/Occupation.aspx?Menu=HOC-Bio&Section=b571082f-7b2d-4d6a-b30a-b6025a9cbb98&Parliament=8714654b-cdbf-48a2-b1ad-57a3c8ece839&Name=&Party=&Province=&Gender=&CurrentParliamentarian=False&Occupation=&OccupationType=> (last visited June 8, 2017). In other words, seventy-six of 438, or 17.4%, members of Parliament in Canada were lawyers.

lawyers in electoral politics is that the practice of law naturally orients lawyers towards politics. As such, lawyers are more likely to think about running for office than others. According to a 2002 Knowledge Networks survey, only 5% of the U.S. population has ever considered running for elected office.¹⁰² However, in a survey conducted in 2001 and again in 2008 of persons from the four backgrounds of persons most likely to have considered running for elected office—lawyers, business leaders, educators, and political activists—those from a law or activist background were most likely to have considered running for office, with 58% of lawyers and 71% of activists surveyed having considered it.¹⁰³

Part of the reason lawyers might think of running for office at a higher rate is their frequent interactions with the political process. After political activists, lawyers were the most likely of the four occupations surveyed to report having attended a state legislative meeting, interacted with an elected official socially or as part of their job, or having an elected official as a family member or as a friend.¹⁰⁴ Lawyers and political activists were also the most likely of the groups surveyed to think of themselves as qualified to run.¹⁰⁵

This self-confidence about their political abilities comes in part from their education. Lawyers are trained in interpreting, crafting, and arguing about law in an often highly competitive environment. As one commentator on the U.S. legal profession observed, “[t]here has always been a strong link between the legal profession and elected office. Lawyers tend to view themselves as the architects of our

102. JENNIFER LAWLESS, *BECOMING A CANDIDATE: POLITICAL AMBITION AND THE DECISION TO RUN FOR OFFICE* 24 (2011) (stating that less than 1% of Americans have ever run for elected office).

103. *Id.* at 107 (also finding 34% of business leaders also considered running for office and 40% of educators).

104. *Id.* at 116.

105. *Id.* at 119 (finding 61% of lawyers surveyed thought they were qualified or very qualified for elected office whereas 60% of activists felt similarly).

modern political system, both writing the laws as well as interpreting them.”¹⁰⁶ Given this context, it perhaps should be expected that those who have developed these skills in this environment would then be more likely to pursue a career in politics.¹⁰⁷

There is also evidence that those who go into law have traditionally been more interested in politics in the first place. Eulau and Sprague found in their 1957 survey of four state legislatures that legislators who were lawyers were significantly more likely to report that they became interested in politics in childhood than legislators who were not lawyers.¹⁰⁸ Those who are interested in politics at an early age may be more likely to view a legal career as both being a historic gateway into politics and a practical platform from which to run.¹⁰⁹

Law also provides unique professional incentives to run for office. Holding elected office, particularly at the state level, where legislative roles have traditionally been part-time, can help many lawyers further their legal careers by giving these lawyers expanded professional networks, a

106. Harvard Law Sch. Ctr. on the Legal Profession, *Running for—or from—Office? New Lawyers Face Tough Choices*, THE PRACTICE (Nov. 2015), <https://thepractice.law.harvard.edu/article/running-for-or-from-office/>.

107. A predilection for competition has been hypothesized as one possible factor that influences who will run for office. Kristin Kanthak & Jonathan Woon, *Women Don't Run? Election Aversion and Candidate Entry* 59 AM. J. POL. SCI. 595 (2015) (arguing that women are less likely to become political candidates because they are less likely than men to take part in competitive elections compared to volunteering to be a randomly chosen representative). Law may train practitioners to be competitive giving them an edge in electoral politics.

108. EULAU & SPRAGUE, *supra* note 6, at 57. For example, 53% of lawyer legislators in California said they became interested in politics in childhood while only 34% of non-lawyer legislators said the same. *Id.* Lawyer legislators in the four states studied were also more likely than non-lawyer legislators to say family members were a source of political socialization, that they had family members in politics, or that educational experience was the source of their political interest. *Id.* at 58–61.

109. *See id.* at 54–55 (“Law,” he wrote, “is of course the business which best fits in with politics.”).

raised profile, and the ability to attract more clients, either while they are holding office or afterwards.¹¹⁰ This advantage to elected office was particularly prominent historically, when states barred lawyer advertisement and so politics was a way to spread the word among potential clients about one's practice.¹¹¹

In general, law is often different than many occupations, where taking time off to run for and hold office could be an obstacle from achieving further success in one's field. As Max Weber noted in the early twentieth century, lawyers have traditionally had more flexible careers that allow them to take time away from their practice for politics.¹¹² Being in elected office also allows a lawyer to stay up-to-date on legislative changes¹¹³ and, at least in part-time state legislative work, can serve as a supplemental source of income during lean years of practice.¹¹⁴ Having previously held elected office can be a valuable prestige marker in the legal profession in a way that it may not be in other occupations providing a potential gateway for legal or quasi-legal positions in government or other lines of business after

110. Joseph Schlesinger, *Lawyers and American Politics: A Clarified View*, 1 *MIDWEST J. POL. SCI.* 26, 27 (1957) (noting that the legal profession is compatible with politics as lawyers can return to practice from politics with few professional costs).

111. EULAU & SPRAGUE, *supra* note 6, at 43–44 (making a similar observation about lawyer advertisements in the mid-20th century).

112. In *Politics as a Vocation*, Max Weber observed that one either needed to survive off of politics or, alternatively, have an independent source of income. Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 84–85 (H.H. Gerth & C. Wright Mills eds. & trans., 1946). He argued that landowners, who collected rent, could engage in politics, but it was more difficult for a large-scale entrepreneur, who needed to tend to his business. *Id.* at 85. As a result, he claimed “[f]or purely organizational reasons, it is easier for the lawyer to be dispensable; and therefore the lawyer has played an incomparably greater, and often even a dominant, role as a professional politician.” *Id.*

113. DONALD R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 34–35 (1960) (observing, “[t]he law changes relatively slowly, and a politician is in a position to keep up with many of the changes in the law while active in politics”).

114. EULAU & SPRAGUE, *supra* note 6, at 43.

office. For example, there is some evidence members of the U.S. Congress, who are lawyers, go into lobbying after leaving office at a higher rate than other members.¹¹⁵

C. A Politicized Legal System

Compared to those from other occupations, lawyers in the United States have one very distinct advantage in electoral politics: there are simply more public, and specifically more elected, offices available to them.¹¹⁶ The United States is exceptional amongst democracies in having elections in most of its states for many of its prosecutors, judges, and state attorney generals.¹¹⁷ Lawyers monopolize

115. Of the 119 members of Congress who left the 111th Congress (2008–10), 46 (or 39%) later became lobbyists. *Revolving Door: Former Members of the 111th Congress*, OPENSECRETS.ORG, <https://www.opensecrets.org/revolving/departing.php?cong=111> (last visited June 6, 2017). Of the members who left the 111th Congress, 50 were lawyers. *Compare id.*, with CQ Press, *supra* note 5. Of these lawyers, 60% became lobbyists, while 40% did not. *Compare* OPENSECRETS.ORG, *supra* note 115, with CQ Press, *supra* note 5.

116. Paul L. Hain & James E. Pierson, *Politics Revisited: Structural Advantages of Lawyer Politicians*, 19 AM. J. POL. SCI. 41, 41 (1975) (finding that lawyers move to other positions after their time in the state legislature at a higher rate than non-lawyers and this is a result of their ability to advance through “lawyers-only positions”); Schlesinger, *supra* note 110, at 26 (noting lawyers’ advantage in politics may arise from their monopoly of offices related to the administration of justice).

117. U.S. DEP’T JUST., STATE COURT ORGANIZATION 5 (2011), <http://www.bjs.gov/content/pub/pdf/sco11.pdf> (finding in 75% of U.S. states and the District of Columbia, judges are required to be elected at the trial level for their initial term and, in 90% of states, for their subsequent term as well as the fact that in 48% of states and the District of Columbia, judges are elected at the appellate level for their initial term and, in 81% of states, for their subsequent term); U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005 2, (2005), <http://www.bjs.gov/content/pub/pdf/psc05.pdf> (noting that in 2005, only Connecticut, Alaska, New Jersey, and the District of Columbia did not have elected chief prosecutors—district attorney, county attorney, state’s attorney general, or prosecuting attorney); JED HANDELSMAN SHUGERMAN, THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 5 (2012) (finding just one lower court in France that relied on popular elections for judicial selection and noting that major democracies around the world had turned judicial selection over to judges and judicial selection committees); Michael Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012) (noting that no other country

these elected positions in the justice system as well as appointed legal positions, which provide them more paths to higher office than are available to non-lawyers. Ironically, it was populist campaigns that created elections for many of these positions in the justice system hoping in part to create more voter accountability over lawyers in these offices.¹¹⁸ However, an unintended consequence of these elections may have been that it gave lawyers an advantage compared to non-lawyers in politics, which arguably helped ensure that an elite legal class dominated political life in the United States more generally. Lawyers simply have more options of elected offices to run for, practice in running campaigns, and high-profile elected and unelected offices from which to wage the next campaign.

The presence of former state attorney generals in the U.S. Senate provides a useful illustration of how lawyers may benefit from this monopoly. Eight members of the 114th Congress, all in the Senate, were former state attorney generals.¹¹⁹ Besides a governorship, state attorney generals are arguably the most prominent statewide office one can hold in state politics. The position of state attorney general is exclusive to lawyers, an office which is elected in forty-three states.¹²⁰ It then provides these lawyers who are attorney generals a platform with high political visibility

besides the U.S. has elected prosecutors.).

118. Ellis, *supra* note 117, at 1531 (“Supporters of elected prosecutors [in the nineteenth century] argued that popular election would give citizens greater control over government, eliminate patronage appointments, and increase the responsiveness of prosecutors to the communities they served.”). Judges in the United States were elected starting in 1831 and in most states by 1862. Matthew Streb, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 1, 9 (2007).

119. CQ ROLL CALL, *supra* note 33.

120. Patrick Jonsson, *Two Attorney Generals Indicted in One Week: What Gets Top Cops in Trouble?*, CHRISTIAN SCI. MONITOR (Aug. 8, 2015), <http://www.csmonitor.com/USA/Justice/2015/0808/Two-attorneys-general-indicted-in-one-week-What-gets-top-cops-in-trouble> (noting that forty-three states have elected state attorney generals).

upon which to campaign for further elected office.¹²¹ In the 114th Congress, 51% of the Senate had a law background compared to just 35% of the House of Representatives, which continues a pattern of lawyers being more prevalent in the Senate than the House.¹²² Part of this discrepancy may be explained by lawyers' monopolization of state attorney general positions. For instance, if lawyers who had been state attorney generals were removed from the Senate and replaced with non-lawyers, then the Senate would be full of only 43% lawyers, a figure much closer to the proportion of lawyers in the House.¹²³

Generally, prosecutorial positions, while not providing as prominent a position as a state attorney general, benefit lawyers' electoral chances in a similar manner. Being a District Attorney, U.S. Attorney, or other prosecutor provides a track record of public service and a platform of fighting for law and order from which to run for further office.¹²⁴ Not all these positions are elected,¹²⁵ but many are, and there is an accepted understanding in the United States that a prosecutor position is a gateway for a larger political career. In support of this belief, one need to look no further than Congress. Twenty-five percent of lawyers in the 114th

121. William P. Marshall, *Break Up the Presidency? Governors, State Attorney Generals, and Lessons from the Divided Executive* 115 YALE L. J. 2442, 2453 (2006) ("the Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor's office").

122. CQ Press, *supra* note 5. Since 1945, about 44% of all members of the House of Representatives have been lawyers while 57% of the Senate have been lawyers. *Id.*

123. *Id.*

124. *Prosecutor or Politician?*, ECONOMIST (Jan. 13, 2010), http://www.economist.com/blogs/democracyinamerica/2010/01/prosecutor_or_politician ("For many aspiring politicians [in the United States], the position of prosecutor has become a stepping stone to higher office").

125. See e.g., *U.S. Attorneys Manual Title 3-2.120: Appointment*, DEP'T JUST., <http://www.justice.gov/usam/usam-3-2000-united-states-attorneys-ausas-special-assistants-and-agac#3-2.100> (last visited June 10, 2017).

Congress had previously held a prosecutorial position.¹²⁶

Judgeships have also historically given lawyers another platform to monopolize from which they can pursue further office although, as discussed in more detail in Section V.B, this pathway has been declining in use. Twenty-eight percent of the lawyer-members of the first U.S. Congress had previously been a judge.¹²⁷ Lawyer-member comprised about 22% in the 21st Congress of 1829–30, 16% in 1869–70; 14% in 1929–30, and 7% in 2013–14.¹²⁸ The high prevalence of former judges in the early Congresses may have been because there were a limited number of prominent lawyers in the early Republic so they were more likely to occupy a number of key positions. Also, political leaders considered many state and local judgeships patronage positions, before they became elected offices, and so were often awarded to political insiders with further political ambitions.¹²⁹ Over time though, as Section V.B claims, a change in social norms and a move toward merit commissions in appointing judges has made it less likely judges will enter politics.¹³⁰

Not only have lawyers' political fortunes benefited from a set of elected and unelected legal offices they monopolize, but the bar and court system, more generally, have historically been deeply embedded in U.S. politics. Judges in the nineteenth century were well known for developing the common law in the absence of statutory law, and today, judges are still central to resolving many of the largest

126. CQ ROLL CALL, *supra* note 33.

127. *Congressional Biographical Directory*, *supra* note 29.

128. *Id.*

129. SHUGERMAN, *supra* note 117, at 6 (finding judicial elections were adopted in the U.S. in response to the earlier “partisan patronage politics of appointments” that was perceived to limit judicial independence).

130. *Id.* at 6–7; CQ ROLL CALL, *supra* note 33. In Australia, there has been a similar story of a declining number of politicians as judges. Douglas McDonald, *Politicians as Judges*, AUSTRALIAN PUB. L. (Aug. 13, 2015), <http://auspublaw.org/2015/08/politicians-as-judges/>.

political disputes in the country and crafting policy.¹³¹ As James Gordon has argued, the practice of law in the United States has historically been “the adjustment, in a structured and peaceful fashion, of conflicts between individuals or interests. . . . The lawyer who saw himself as a facilitator of consensus in the face of conflict was drawn to the political arena because it was the battlefield upon which the most complicated and knotty issues in American life had to be resolved.”¹³²

The politicization of the U.S. legal system has been both deep and wide, providing elected and unelected positions exclusively to lawyers in a legal system that orients lawyers towards public life and resolving political disputes. It should not be surprising that lawyers have found such fertile ground for a broader political career.

D. *Access to Resources*

Lawyers also benefit from having access to more resources than most Americans. Some of these resource advantages are personal. Lawyers earn more than typical Americans,¹³³ come from more “elite” family backgrounds,¹³⁴ and frequently have flexibility in their careers to take

131. See generally ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (1921) (providing a famous account of the role of judge-made law in the Anglo-American tradition).

132. GORDON, *supra* note 51, at 77–78.

133. The mean salary for lawyers in 2014 was \$133,470 while the mean salary for the average U.S. worker in 2014 was \$47,230. Bureau of Labor Statistics, *Occupational Employment Statistics: May 2014 National Occupational Employment and Wage Estimates United States*, U.S. DEPT LAB., http://www.bls.gov/oes/current/oes_nat.htm#00-0000 (last visited June 10, 2017).

134. Quoc Trung Bui, *Who Had Richer Parents, Doctors or Artists?*, PLANET MONEY (Mar. 18, 2014), <http://www.npr.org/blogs/money/2014/03/18/289013884/who-had-richer-parents-doctors-or-artists> (using a government longitudinal study that tracked 12,000 Americans, which found that lawyers had, on average, the highest household income during childhood of any occupation tracked including CEOs, doctors, and financial analysts).

significant time off to engage in politics.¹³⁵

Lawyers also have professional resources they can draw upon. They can solicit campaign contributions from their broader professional network, which can include the business community, wealthy individuals, and unions.¹³⁶ They also receive contributions from other lawyers. In the 113th Congress, members of the House of Representatives, who were lawyers, received 7.3% of their contributions from lawyers compared to 4.7% for other members.¹³⁷ As such, members of Congress, who were lawyers, received 55% more contributions from lawyers than their peers.¹³⁸ Lawyer-politicians can then leverage these advantages in campaign contributions, personal wealth, and flexibility in their career for electoral benefit.

E. Demand for Lawyer Politicians

Finally, part of the reason why lawyers might dominate Congress is because the public may perceive them to be better representatives than those from other occupations. In their profession, lawyers frequently have to deal with similar issues as in politics such as debating what makes a just society, the balancing of different social interests, and arbitrating between opposed parties.¹³⁹ Before the

135. WEBER, *supra* note 112, at 85.

136. *A Presidential Run: A Conversation with Larry Lessig*, PRACTICE (Nov. 2015) (noting that lawyers, as a social group, generally “have the biggest Rolodexes” to fund campaigns).

137. *Compare* Center for Responsive Politics, *supra* note 40, with CQ Press, *supra* note 5.

138. *Compare* Center for Responsive Politics, *supra* note 40, with CQ Press, *supra* note 5.

139. EULAU & SPRAGUE, *supra* note 6 at 99 (arguing that the modern lawyer is not so much an advocate as a negotiator and that this may translate well onto the political stage); Schlesinger, *supra* note 110, at 31 (noting lawyers held in prestige as skilled arbitrators of social conflict with special skills in debate); ECONOMIST, *supra* note 96 (“The law deals with the same sort of questions as politics: what makes a just society; the balance between liberty and security, and

widespread adoption of legislative aides, representatives frequently had to craft and work on proposed laws themselves.¹⁴⁰ As such, members of the public might reasonably conclude that lawyers were technically better equipped and professionally more inclined toward politics and lawmaking than those from other backgrounds.¹⁴¹

Despite widespread negative stereotypes of lawyers,¹⁴² the public has also traditionally viewed law as a high-prestige occupation¹⁴³ and individual lawyers are often very well respected within their communities. Some voters may even perceive lawyers as having a desirable independence from business and other vested interests. As Alexis de

so on. Lawyerly skills—marshalling evidence, appealing to juries, command of procedure—transfer well to the political stage.”).

140. Congress had almost no staff at the end of World War I. By 1930, the House had 870 employees and the Senate 280. By 1947, this had increased to a combined total of 2,030. By 1976, it was 10,190. This number has remained relatively steady to the present. By 2010, there was 11,397 staff. *Vital Statistics on Congress: Staffs of Members of the House and Senate, 1890–2010*, BROOKINGS, http://www.brookings.edu/~media/Research/Files/Reports/2013/07/vital-statistics-congress-mann-ornstein/Vital-Statistics-Chapter-5-Congressional-Staff-and-Operating-Expenses_UPDATE.pdf?la=en (last visited June 10, 2017).

141. EULAU & SPRAGUE, *supra* note 6, at 15–16 (noting lawyers prominence in politics is ascribed, in part, to lawyers technical competence in law).

142. See generally MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2006) (detailing a long tradition of making fun of lawyers through jokes).

143. Robert W. Hodge, Paul M. Siegel & Peter H. Rossi, *Occupational Prestige in the United States, 1925–63*, 70 AM. J. SOC. 286, 290 (1964) (finding that law was a high prestige profession in the 1960s); *Prestige Scores for All Detailed Categories in the 1980 Census Occupational Classification*, NAT'L OPINION RESEARCH CTR., <http://ibgwww.colorado.edu/~agross/NNSD/prestige%20scores.html> (last visited Aug. 24, 2017) (using the 1989 General Social Survey, the study found that lawyers have a prestige score of 74.77, which is well above that of most other listed occupations). However, a 2014 Harris poll found lawyers tied for the 10th most prestigious occupation out of 23 surveyed behind police officers and nurses. *Doctors, Military Officers, Firefighters, and Scientists Seen as Among America's Most Prestigious Occupations*, HARRIS POLL (Sept. 10, 2014), http://www.theharrispoll.com/politics/Doctors_MilitaryOfficers_Firefighters_and_ScientistsSeen_as_Among_America_s_Most_Prestigious_Occupations.html.

Tocqueville famously noted, “[i]n America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class.”¹⁴⁴ In this view, lawyers are more like Anthony Kronman’s “lawyer statesmen”—above the fray, providing wise counsel, and worthy of a citizen’s trust and vote,¹⁴⁵ while being aligned with middle class interests and values.¹⁴⁶

Such a stylized view of lawyers’ position in the United States is almost certainly overly optimistic. However, while there are clearly stereotypes of ambulance chasing lawyers, there are also well-known images of lawyers as advocates for civil rights or the marginalized, statesmen, or law and order prosecutors, which lawyer candidates benefit from when they run for office.

III. LAWYERS’ ELECTORAL DECLINE

In recent years, the proportion of lawyers in the U.S. Congress has hit an all-time low.¹⁴⁷ There is also evidence of a similar general decline in lawyer representatives in state legislatures.¹⁴⁸ This decline of lawyers in the U.S. Congress, and politics more broadly, is all the more striking because there are now more lawyers in the United States than ever before, both in overall numbers and as a percent of the population.¹⁴⁹ This Part argues that at least two factors are

144. DE TOCQUEVILLE, *supra* note 1 at 278.

145. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 3 (1993).

146. MILLER, *supra* note 96, at 72–73 (detailing arguments that lawyers are representatives of a middle class society).

147. *See supra* Table 2.

148. Jeffrey W. Stempel, *Lawyers, Democracy, and Dispute Resolution: The Declining Influence of Lawyer-Statesmen Politicians and Lawyerly Values*, 5 NEVADA L. J. 479, 485 (2005) (finding that in 6 of 8 state legislatures studied, there was a decline in the prevalence of lawyer representatives between 1950 and 2000).

149. There were 1,268,011 licensed lawyers in the United States in 2013;

driving this decline in electoral dominance: the rise of competing political elites and changes in the legal profession itself.

A. The Rise of a Specialized Political Class

It might seem obvious that lawyers would face new challenges to their electoral dominance in an era when more Americans are educated than ever before.¹⁵⁰ However, it is not a broad cross-section of Americans that is dethroning lawyers, but rather a handful of occupational groups that are challenging their dominance; in particular, the ascent of a specialized political class that provides an alternative gateway to electoral office.

After World War II, the United States witnessed an increase in the number of legislative, executive, and campaign aides,¹⁵¹ the expansion of lobbying, the development of think tanks,¹⁵² and a greater professionalization of public interest work.¹⁵³ In other words,

574,810 in 1980; 221,605 in 1950; 114,460 in 1900; and 64,137 in 1880. AM. B. ASS'N, *supra* note 52. In 1980, the population of the United States was about 226,500,000; in 1950, 151,300,000; in 1900, 76,000,000; and, in 1880, 50,000,000. U.S. CENSUS BUREAU, POPULATION, HOUSING UNITS, AREA MEASUREMENTS, AND DENSITY: 1790 TO 1990 (Aug. 27, 1993), <http://www.census.gov/population/www/censusdata/files/table-2.pdf>. In other words, lawyers were .4% of the population in 2013; .25% in 1980; .15% in 1950; .15% in 1900; and .13% in 1880. Compare AM. B. ASS'N, *supra* note 52, with U.S. CENSUS BUREAU, *supra* note 149.

150. In 1950, 34% of the U.S. population had graduated four years of high school. By 2000, this was 80%. U.S. CENSUS BUREAU, EDUCATION 158 (2007).

151. BROOKINGS, *supra* note 140.

152. THOMAS MEDVETZ, THINK TANKS IN AMERICA 5–8 (2012) (describing the rise of think tanks in the United States, particularly their rapid expansion from the 1960s onwards).

153. The nonprofit sector of the U.S. economy was relatively small until the 1960s when Lyndon Johnson's Great Society helped spur the creation of many new non-profits, many of which benefited from increased government funding. It is estimated that over 70% of the nonprofits that exist today were created since the 1960s. KELLY LEROUX & MARY K. FEENY, NONPROFIT ORGANIZATIONS AND CIVIL SOCIETY IN THE UNITED STATES 59 (2015). For more on the

a thick ecosystem of full-time jobs was created that revolved around the political process, particularly in Washington D.C. and state capitals across the country. Lawyers occupied many of these new positions, but one did not have to be a lawyer to succeed in these new career paths. Indeed, most members of Congress from this professional background are not lawyers.¹⁵⁴

Those in this specialized political class have many, if not more, of the advantages of lawyers in charting a route to elected office. While not possible here, a closer study of those in specialized political class would likely show that they have frequent interaction with elected officials, the potential to access a politicized donor base through their professional work, an intimate knowledge of the political system and policy issues, and a career that both allows for flexibility to run for elected life and which would likely be furthered by holding elected office. Indeed, many in this political class might even benefit from running for office and losing, because, in the campaign process, they inevitably gain name recognition and connections that they can then leverage into other political-related jobs. This ecosystem of positions allows those in this specialized political class to sustain themselves both inside and outside elected office during the course of a larger career in and around politics.

professionalization of nonprofit work, see Walter Powell & Hokyu Hwang, *The Rationalization of Charity: The Influences of Professionalism in the Nonprofit Sector*, 54 ADMIN. SCI. Q. 268 (2009).

154. In the 114th Congress, of the 125 members from a politics/public service background, thirty-four were also lawyer, while twenty-seven of the eighty-one members, who were former Congressional Aides, were also lawyers. CQ Press, *supra* note 5.

FIGURE 3. Percent of Members of Congress in Select Occupations (1945–2015)¹⁵⁵

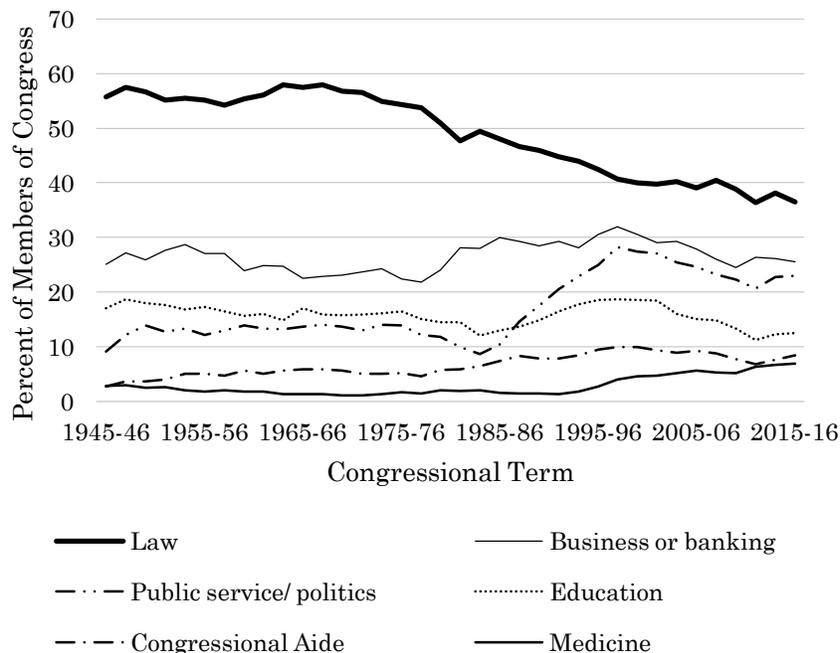


Figure 3 above shows the rise of those from a public service/politics background in Congress, with a particular spike from the mid-1980s to mid-1990s. The CQ Press data on which Figure 3 is based classifies public service/politics and Congressional Aide separately even though Congressional Aide arguably ought to be considered a subcategory of public service/politics.¹⁵⁶ According to this data, in the 114th Congress, 29% of members either had a Congressional Aide or a public service/politics background,

155. *Id.*

156. Thirteen of forty-five members of Congress, who were listed as having a background as a Congressional Aide, also were listed with a background of public service/politics” in 2015–16. *Id.*

which makes this combined grouping more prevalent than business or banking.¹⁵⁷

The number of persons coming from a Congressional aide background is actually under-represented in the chart above. According to compiled CQ Press data, which the chart uses, 8.5% of the 114th Congress, or forty-five members, had the occupational background of Congressional aide.¹⁵⁸ However, supplementing this data with CQ Roll Call data and an independent search of members of Congress biographical profiles, eighty-one members, or 15%, had once been a Congressional Aide.¹⁵⁹ This discrepancy may be because CQ Roll Call was more likely to demarcate that a member had been a Congressional aide no matter how long they held this position, while CQ Press may have only marked categorized members as such if they had been a Congressional aide for a substantial period.

Cross-referencing CQ Press and CQ Roll Call data reveals that in the 114th Congress, there were thirty-two former campaign aides, twenty-six former state legislative aides, twelve former governor aides, and eleven former White House aides as well as aides from other local, state, and federal officials.¹⁶⁰ Some, but certainly not a majority, of these members of this specialized political class went to public policy school. There were twenty-eight members of the 114th Congress who had a Master's in Public Administration (MPA) or a Master's in Public Policy (MPP).¹⁶¹

157. *Id.*

158. *Id.*

159. CQ ROLL CALL, *supra* note 33; *Congressional Biographical Directory*, *supra* note 29.

160. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33.

161. There were eighteen MPAs and ten MPPs. Of these twenty-eight public policy graduates, twelve were from Harvard's Kennedy School. There were thirty-three MBAs in the 114th Congress. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33.

The rise of a specialized political class has largely escaped scholarly scrutiny in the United States. However, in other countries, like the United Kingdom and Australia, commentators have noted the rise of a similar specialized political class of individuals who have had a career working in politics before winning elected office themselves.¹⁶² This comparative data suggests that larger features of modern politics, not contingent to the United States, may both help create this specialized political class and enables them to be particularly successful in winning elected office.

A handful of other occupational groups have also seen greater representation in Congress in recent decades. Health professionals, particularly doctors, have increased their representation in Congress to over 6%, a level seemingly not witnessed since the early Republic.¹⁶³ The increase of doctors in Congress could be driven in part because of the expansion of health care as a part of the economy and the controversial partial nationalization of the sector. Most doctors in the current 114th Congress are Republican¹⁶⁴ and several have publicly expressed that one of their motivations to run for

162. PETER OBORNE, *THE TRIUMPH OF THE POLITICAL CLASS* (2007) (describing the development of a political class in the United Kingdom, quite distinct from the rest of the population, that is comprised of members of Parliament, assistants to MPs, and lobbyists and employees of the voluntary sector); COOK, *supra* note 10, at 10 (describing the rise of a professional political class in Australia composed of union officials, political staffers, local government councilors, and party officials); Kate Jones, *Professional Politicians as the Subjects of Moral Panic*, 43(AUSTRALIAN J. POL. SCI. 243, 248 (2008) (noting how in Australia, “[t]he proliferation of staff for all members of parliament that has developed since the 1970s has made it easier, at least in the financial sense, to live for politics because there are now far more possibilities of making a living in a political environment at an earlier stage of a political career, or even after losing a seat”).

163. *See supra* Section II.B, Table 2.

164. Of the thirty-five members of the 114th Congress from a medicine background, twenty-five are Republican. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33. Doctors though are even more heavily Republican. Of the eighteen doctors in Congress, fifteen are Republican. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33. There are also three dentists, who are all Republican. CQ Press, *supra* note 5; CQ ROLL CALL, *supra* note 33.

Congress was to repeal or amend the Affordable Care Act.¹⁶⁵ Health professionals in the 114th Congress have among the highest median personal wealth of any occupational background represented in Congress.¹⁶⁶ They also disproportionately used donations from other health professionals to fund their campaigns.¹⁶⁷

While the relative number of lawyers in Congress has declined since World War II, those from a business background have fared better with their representation holding relatively steady having a slight rise in the 1980s and early 1990s.¹⁶⁸ In other words, as a specialized political class has pushed out lawyers, this is not true of those from a business background perhaps indicating that those from a business background have, in fact, become more competitive in politics relative to lawyers.

B. Specialization and Professionalization of Lawyers

Changes in the legal profession itself have likely also contributed to the decline of lawyers in the U.S. Congress

165. See, e.g., *Bucshon Talks About Life After Congress*, EVANSVILLE COURIER & PRESS (Apr. 18, 2017, 11:56 AM), <http://www.courierpress.com/story/news/politics/2017/04/18/bucshon-talks-life-after-congress/100574794/> (“I ran originally because of a lot of big issues [are] happening in our country, and I think we just now have the opportunity with a Republican president to make some changes in health care and regulations and also taxes—things that I’ve been campaigning on, really, for seven years.”).

166. Of the twenty-five members of the 114th Congress who have medicine listed first as an occupation by CQ Press, their median wealth is about \$1.8 million. Compare CQ Press, *supra* note 5, with Center for Responsive Politics, *Net Worth 2014*, OPENSECRETS.ORG, <http://www.opensecrets.org/pfds/overview.php?type=W&year=2013> (last visited June 10, 2017). Compare this figure to law at about \$700,000, business at \$860,000, education at \$760,000, and public service/politics at \$400,000. Compare CQ Press, *supra* note 5, with Center for Responsive Politics, *supra* note 166.

167. In 2012, health professionals gave 14.28% of campaign contributions to members of the House of Representatives from a medical background compared to just 5.14% of contributions to the campaigns of other members of Congress. CQ Press, *supra* note 5; Center for Responsive Politics, *supra* note 40.

168. See *supra* Table 2.

and electoral politics more broadly. The initial increase of the proportion of lawyers in Congress from Independence into the late nineteenth century may have been caused in part by the “de-professionalization” of the bar particularly during the Jacksonian Era in which educational and training requirements were dramatically reduced in many states allowing more people to enter the profession.¹⁶⁹ After 1870, restrictions on entry into the profession began to increase and formal legal training particularly through law schools rose in prominence.¹⁷⁰ After World War II, law became a strictly post-graduate degree where previously many pursued law as an undergraduate degree.¹⁷¹ As the path into law became more formalized and restricted, this may have reduced the number of lawyers in proportion to the educated population, and many of those interested in politics may have decided to forgo the increasing rigors of joining the bar and instead pursue an alternative path to elected office.

The public face of lawyers also metamorphosed from the late nineteenth century into the twentieth century. While in the nineteenth century stories abounded of the public coming to courtrooms to listen to the oratorical skills of top lawyers and to be entertained by the cases of the day,¹⁷² by the end of the century, many elite lawyers moved from the courtroom to the corporate boardroom. Top lawyers no longer required

169. ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 129–72 (1965) (describing the decline of bar associations and associated standards for practice in many states in the early nineteenth century); EULAU & SPRAGUE, *supra* note 6, at 32.

170. EULAU & SPRAGUE, *supra* note 6, at 32–33.

171. The Juris Doctorate, a post-graduate degree, was first offered in the United States at the University of Chicago in 1902. David Perry, *How did Lawyers Become “Doctors”? From the LL.B. to the J.D.*, PRACTICE (2013), <http://www.mobar.org/uploadedFiles/Home/Publications/Precedent/2013/Winter/doctors.pdf>. In 1971, all ABA approved law schools adopted the Juris Doctorate (JD). *Id.*

172. CHROUST, *supra* note 169, at 101 (noting that in the frontier of the United States court day was “a great social event, and to go ‘a-courting’ was a favorite pastime”).

large public followings to bring in business and instead could rely on relationships with corporations or senior partners at corporate law firms.¹⁷³ This evolution from oratorically gifted community leader, such as Daniel Webster, to that of a legal technician in a law firm likely reduced the competitive advantage of many lawyers in the political arena.¹⁷⁴

As the salaries of corporate lawyers increased, particularly starting in the 1970's and 1980's, talented lawyers also had more financial incentive to stay in private practice.¹⁷⁵ As one Congressman recently lamented, members of Congress make roughly the same salary as a first-year associate fresh out of law school at a top corporate law firm.¹⁷⁶ Given the increasing cost of law school, the relatively low salaries of politicians have become even more unpalatable.¹⁷⁷ At the same time, politics has become more

173. GORDON, *supra* note 51, at 80 (“Whereas reputation among the people had been central to success in the 1840s, in the later part of the century entry into the foremost ranks of the profession was assured if a handful of the *right* people consulted the office-bound senior partner.”) (emphasis in original).

174. Robert L. Nelson & John P. Heinz, *Lawyers and the Structure of Influence in Washington*, 22 L. & SOC'Y REV. 237, 240 (1988).

175. McDonald, *supra* note 130 (finding in the Australian context that high-paid barristers express concern of going into politics because of the potentially negative impact on their income including the expectation that they leave practice); Richard Perez Pena, *Making Law vs. Making Money: Lawyers Abandon Legislatures for Greener Pastures*, N.Y. TIMES (Feb. 21, 1999), <http://www.nytimes.com/1999/02/21/weekinreview/nation-making-law-vs-making-money-lawyers-abandon-legislatures-for-greener.html> (arguing that there has been a decline of lawyer representation in state legislatures because lawyers have more lucrative alternatives elsewhere and it has become harder to maintain a practice while being a legislator both because of the work involved and financial disclosure requirements).

176. *Confessions of a Congressman: 9 Secrets from the Inside*, VOX (July 12, 2015), <http://www.vox.com/2015/2/5/7978823/congress-secrets> (highlighting comments made by an anonymous member of Congress).

177. Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177, 178 (2012) (noting law school tuition has increased four-fold in real terms in private schools between 1971 and 2011 and public law schools in the past two decades).

of a full-time job even at the state and local level,¹⁷⁸ and lawyers may have to suspend their practice if elected to office. With increasing specialization and competition within law, lawyers may simply have less time, decreasing the appeal of elected office.

Just as the costs of running for office have increased for lawyers, some of the benefits have also declined in value. For example, when there were bar-imposed restrictions on advertising, lawyers once ran for political office in part to advertise their legal practices.¹⁷⁹ The Supreme Court has since ruled many of these restrictions unconstitutional, which has made running for office, as a form of advertising, less necessary.¹⁸⁰

Finally, lawyers as a group may have become less interested in public service. Many scholars and practitioners have lamented that the profession has become less public-spirited and increasingly commercialized.¹⁸¹ Even amongst those lawyers who want to improve society, going into politics seems to have lost some of its attraction. A recent survey of Harvard law students found that only 15% had

178. For example, a number of state legislatures have gone from part-time to full-time jobs. In 2014, at least ten state legislatures could be considered full-time, sixteen could be considered part-time, and twenty-four a hybrid. *Full- and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES (June 1, 2014), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx>. A number of states introduced professionalizing reforms in the 1960s and 1970s for their legislatures. Baker, *supra* note 95, at 601.

179. Schlesinger, *supra* note 110, at 27 ("Political campaigning is generally regarded as an effective form of ethical advertising.").

180. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court ruled that lawyer advertisement was protected commercial speech under the First Amendment, thus finding unconstitutional wholesale bans on lawyer advertising.

181. See generally Kronman, *supra* note 145 (lamenting the decline of the public spirited values of the profession); Robert Gordon, *Portrait of a Profession in Paralysis*, 54 STAN. L. REV. 1427, 1440–46 (2002) (arguing the profession used to have a *noblesse oblige* and eagerness to take on society's problems and that today lawyers have largely given up on collective public spiritedness).

seriously thought about running for office compared to 19% of Harvard Kennedy School students.¹⁸² Many of the surveyed law students wanted to contribute to public service, but did not think elected office was the most effective way to do so.¹⁸³ With the popularity of Congress at record lows,¹⁸⁴ lawyers could simply believe that running for Congress, or other elected office, is not a fruitful avenue for social change. Indeed, given the widespread disparagement of politicians, some lawyers may just view elected office including Congress as below their social status.¹⁸⁵

V. SIGNIFICANCE FOR THE LEGAL SYSTEM

This final part argues that the decline of lawyers in Congress, and politics more generally, has affected the U.S. legal system in two significant ways. First, a decline of lawyer members of Congress means Congress is less likely to further a lawyer- and court-centric vision of public governance. Second, a decline of lawyers, and particularly judges, within the political system has helped lead to a court system staffed not by lawyer politicians, but by a more specialized class of judges causing the judicial system to

182. Shauna Shames, *The Rational Non-Candidate: A Theory of (Uneven) Candidate Deterrence* (Apr. 1, 2014) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

183. *See id.* (presenting her research findings which supported her conclusion that, based upon the results, there were “few positive expectations [from participants] about the usefulness of politics to solve problems they care about”). As one recent Harvard Law student explained, “[m]any . . . come to HLS thinking that they will run for elected office at some point may become hesitant to do so because they see other alternatives as better—alternatives in which they could have a bigger impact.” PRACTICE, *supra* note 106.

184. In 2013, 9% of the U.S. public surveyed by Gallup stated that they approved of the way Congress was handling its job, which was the lowest result since Gallup began surveying Congressional popularity in 1974. *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> (last visited June 10, 2017).

185. McDonald, *supra* note 130 (finding in Australia that members of Parliament may now be viewed as a low status occupation not fit for a high status lawyer).

become more inward looking, technocratic, and potentially less independent.

A. *Lawyers as Legislators*

Since the beginning of the Republic, lawyer-politicians have been perceived as having disproportionate influence in shaping the country's politics and policies. There have been at least two strands of thought about lawyers' impact: first, that they act in their occupational self-interest to promote policies that are frequently detrimental to the rest of society and, second, and more charitably, that they promote an approach to politics and policy that is uniquely grounded in the constitution, rights, and the rule of law.

Each of these strands has been present since early in the Republic's history. For instance, the 1st Congress passed the 1789 Judiciary Act, which created the U.S. court system as we know it.¹⁸⁶ Controversially at the time, the Act set up federal district and circuit courts—the Constitution had only specified the requirement of having a federal Supreme Court.¹⁸⁷ During the Senate debate, Senator Maclay opposed the Act, which he feared would strengthen the U.S. court system and ultimately be used by the federal government to control the states.¹⁸⁸ Maclay noted that lawyer-members of Congress had spearheaded the Act. He wrote in his journal:

[I]t was fabricated by a knot of lawyers, who joined hue and cry to run down any person who will venture to say one word about it. This

186. *Landmark Judicial Legislation: Judiciary Act of 1879*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_02.html (last visited May 28, 2017) (providing a short history of the Judiciary Act of 1789).

187. *Id.*

188. See WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA, 1789–91 117 (Edgar S. Maclay ed., 1890). (“I opposed this bill from the beginning. It certainly is a vile law system, calculated for expense and with a design to draw by degrees all law business into the Federal courts. The Constitution is meant to swallow all the State Constitutions by degrees, and thus to swallow, by degrees, all the State judiciaries.”)

I have repeatedly experienced . . . [Senator] Grayson, though a lawyer, told me yesterday that it was in vain to attempt anything [against the Bill]. The people who were not lawyers, on a supposition that lawyers knew best, would follow the lawyer¹⁸⁹

Significantly, he claimed in his journal that he felt lawyers pushed for district and circuit courts in part to create more appeals, and so business, for the legal profession.¹⁹⁰

Some forty years later, after visiting the United States in the 1830's, Alexis de Tocqueville took a very different perspective on what he saw as the substantial positive influence of lawyer politicians on U.S politics. His relevant observation in *Democracy in America* is worth quoting at length:

As most public men [in the United States] are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs 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 society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate. 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 without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but it finally fashions it to suit its purposes.¹⁹¹

De Tocqueville's vision of lawyers furthering the language of the law in U.S. politics is sweeping and difficult to verify. Scholars that have attempted to empirically show

189. *Id.* at 97.

190. *See id.* at 108 (looking at England, he observed that, by the time two parties reached the House of Lords, they had spent so much money going through lower courts that "one or both are completely ruined For never was so admirable a machine contrived by the art of man to use men's passions for the picking of their pockets.").

191. DE TOCQUEVILLE, *supra* note 1, at 280.

the differences that lawyers may make in politics in narrower areas have had mixed results. For example, McCloskey and Brill did find in their book *Dimensions of Tolerance* that compared to the general public, or even community elites, that legal elites were more likely to support civil liberties such as free speech, association, and due process rights.¹⁹² Still, this does not prove that lawyer politicians then indoctrinate these values in the American public, or even that lawyer politicians are more likely to uphold these values in their work as representatives.¹⁹³

The last Part of this Article speculates about the role lawyer politicians may have historically played in cementing rights and the rule of law into the political discourse of the nation, but this section makes a more limited set of claims. It argues that lawyers in Congress have been more likely to promote a specific vision of the court system—one that may be in their own occupational self-interest, but also one that is seemingly based on their understanding of what is in the best interests of the country. The influence of lawyers in promoting this vision has almost certainly reduced since the 1st Congress, when Senator Maclay complained about lawyer-members of Congress steamrolling through the 1789 Judiciary Act for their own purposes.¹⁹⁴ Not only are there proportionally fewer lawyers in Congress today, but the growth of policy aides, think tanks, and lobbying groups means that the influence of lawyer-members in crafting and promoting legislation related to the legal system has

192. HERBERT McCLOSKEY & ALIDA BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES*, 53–54 Table 2.1, 129 Table 3.6, 148–49 Table 4.1 (1983).

193. Anecdotal evidence also casts doubt on such broad claims. *See e.g.*, Andrew Hacker, *Are There Too Many Lawyers in Congress?*, N.Y. TIMES (Jan. 5, 1964), <http://www.nytimes.com/1964/01/05/are-there-too-many-lawyers-in-congress.html> (noting that during the McCarthy Era, most of the House members of the Committee for Un-American Activities were lawyers and not particularly sensitive to due process rights).

194. MACLAY, *supra* note 188, at 117.

declined. Yet, even in recent years, the evidence shows that lawyer-members of Congress have disproportionate influence over the U.S. legal system and, on average, have approached it differently compared to other members.

One way to see this difference is through voting records. A number of post-World War II studies have found that whether a member of Congress is a lawyer or not is rarely a significant factor that influences a member's voting stance.¹⁹⁵ That said, there is evidence that a member's occupational background does affect legislators' behavior in specific contexts with potentially significant policy consequences. For example, one study from the 1970s found that lawyer-members of legislatures in four states were less supportive of no-fault insurance proposals.¹⁹⁶ Susan Rose-Ackerman and Robert Evenson, in a study in the 1980s, found that, controlling for other variables, states with more farmer legislators were more likely to support funding for more agricultural research.¹⁹⁷ Similarly, Nick Carnes has

195. EULAU & SPRAGUE, *supra* note 6 at 122–23 (noting that studies have generally found little difference between the behavior of lawyer and non-lawyer representatives); MILLER, *supra* note 96, at 4 (commenting that a set of quantitative studies from the 1950s to the 1990s could not demonstrate discernible differences in the voting behavior of lawyer and non-lawyer legislators). Political scientists point to other factors as affecting Congressional performance, which have little to do with members' previous occupations. RICHARD F. FENNO JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 137 (1978) (finding that the behavior of members of Congress were shaped by a desire to be reelected, a desire to gain power within Congress, a desire to promote their public policy preferences, and a desire to secure gain outside Congress); DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13 (1974) (arguing that the major driver of members of Congress actions is a desire to be reelected).

196. James A. Dyer, *Do Lawyers Vote Differently? A Study of Voting on No-Fault Insurance*, 38 *J. POL.* 452, 454–55 (1976) (finding evidence that lawyers are less supportive of no-fault insurance legislative proposals in New York, California, Florida, and Minnesota, but no such effect in two roll call votes in the US Senate).

197. Susan Rose-Ackerman & Robert Evenson, *The Political Economy of Agricultural Research and Extension: Grants, Votes, and Reapportionment*, 67 *AM. J. AG. ECONOMICS* 1, 8 (1985) (showing that states where farmers were able to organize more successfully to elect other farmers to legislatures were more

documented that members of Congress from a working class occupational background are less likely to vote for conservative economic policies.¹⁹⁸

An analysis of Congressional voting records by the author finds that lawyers in Congress also vote differently than other members on certain issues affecting the legal system. For example, in recent years, lawyer members of the House of Representatives are more likely to support funding for the Legal Services Corporation (LSC). The LSC is the primary vehicle through which the federal government funds civil legal aid programs in the country.¹⁹⁹ Of the four votes examined, two, in 2011 and 2014, were to eliminate the LSC's budget entirely—both were defeated.²⁰⁰ There was also a vote in 2015 to cut the LSC's budget by \$25 million and to use the money to increase the funding of the Federal Bureau of Intelligence by the same amount.²⁰¹ In 2014 the House voted to increase the budget of the LSC by \$15 million using money from the Drug Enforcement Agency's budget.²⁰²

likely to support increased funding for agricultural research).

198. See Nicholas Carnes, *Does the Numerical Underrepresentation of the Working Class in Congress Matter?* 37 LEGIS. STUD. QUAR. 5, 22 (2012) (noting how “the underrepresentation of the working class in Congress skews roll-call voting in favor of conservative policies”).

199. *Who We Are*, LEGAL SERVICES CORP., <http://www.lsc.gov/about-lsc/who-we-are> (last visited Nov. 1, 2016).

200. 157 CONG. REC. H899 (2011) (proposing to eliminate the LSC's \$324 million budget in 2011); *Final Vote Results for Roll Call*, U.S. HOUSE OF REPRESENTATIVES: OFFICE OF THE CLERK (Feb. 16, 2011, 2:22 PM), <http://clerk.house.gov/evs/2011/roll054.xml>; 160 CONG. REC. H4961 (2014) (proposing to eliminate the LSC's \$350 million budget in 2014 and to apply the savings to the spending reduction account); *Final Vote Results for Roll Call 253*, U.S. HOUSE OF REPRESENTATIVES: OFFICE OF THE CLERK (May 29, 2014, 6:40 PM), <http://clerk.house.gov/evs/2014/roll253.xml>.

201. 161 CONG. REC. H3701 (2015); *Final Vote Results for Roll Call 275*, U.S. HOUSE OF REPRESENTATIVES: OFFICE OF THE CLERK (June 3, 2015, 1:47 PM), <http://clerk.house.gov/evs/2015/roll275.xml>.

202. 160 CONG. REC. H4930 (2014); *Final Vote Results for Roll Call 248*, U.S. HOUSE OF REPRESENTATIVES: OFFICE OF THE CLERK (May 29, 2014, 2:15 PM), <http://clerk.house.gov/evs/2014/roll248.xml>.

Both of these proposals were also defeated.²⁰³ None of these votes are pure gauges of members' support for the LSC as each vote involved tradeoffs between LSC funding and the funding of other agencies or using money cut from the LSC to reduce the budget deficit. However, the 2011 and 2014 votes on whether or not to eliminate the LSC's budget entirely are likely the best barometer of members' support for the LSC as the votes were not merely a question of increasing or decreasing the LSC's budget compared to other competing needs, but of eliminating the LSC altogether.

In these four votes, Democrats overwhelmingly voted as a block to support LSC funding, but there was more variation among Republicans.²⁰⁴ Among these Republicans, Table 7 shows that lawyer members of the House were more likely to support funding for the LSC than non-lawyer members in all four votes.²⁰⁵ However, only in one—the vote to eliminate all LSC funding in 2014—was this result statistically significant (at $p=0.007$, the result is highly statistically significant).²⁰⁶ Overall, these findings present substantial evidence that lawyer members of the House, specifically Republican lawyer members, are more likely to support LSC funding.²⁰⁷

Lawyer-members of the House of Representatives also

203. U.S. HOUSE OF REPRESENTATIVES: OFFICE OF THE CLERK, *supra* note 200; U.S. HOUSE OF REPRESENTATIVES: OFFICE OF THE CLERK, *supra* note 201.

204. *See infra* Table 7. As Table 7 shows, the exception is the 2014 vote to increase LSC funding by \$15 million with cuts to the DEA, which divided a more substantial group of the Democrats.

205. *See infra* Table 7.

206. *See infra* Table 7.

207. *See infra* Table 7. Republican lawyer-members of Congress certainly do not support the LSC monolithically and many non-lawyer members also support LSC funding. Further, the support of lawyer-members may not be particularly strong. For example, in 2014, while forty-six Republican lawyer-members of the House voted against eliminating the LSC's entire budget, the same year only four Republican lawyer members of the House voted for increasing the LSC's budget by \$15 million by reducing the DEA's budget.

seem to be more likely to oppose certain types of tort reform. In March 2012, the House of Representatives voted on a bill that limited punitive damages in medical malpractice claims to \$250,000 and allowed judges to restrict the payment of contingency fees to lawyers.²⁰⁸ It passed the House 223 to 181 with most Republicans supporting the bill and most Democrats opposing it.²⁰⁹ However, ten Republicans voted against this bill, of whom eight were lawyers, and seven Democrats voted for it, of which only one was a lawyer.²¹⁰ The high presence of Republican lawyers voting against the bill is highly statistically significant ($p=0.00$).²¹¹

208. For the legislative history of the bill, see Protecting Access to Healthcare, H.R. 5, 112th Cong. (2012), CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/5/all-actions> (last visited May 28, 2017).

209. *Final Results for Roll Call 126*, U.S. HOUSE OF REPRESENTATIVES OFFICE OF THE CLERK, <http://clerk.house.gov/evs/2012/roll126.xml> (last visited May 28, 2017).

210. Compare *id.*, with CQ Press, *supra* note 5.

211. See *infra* Table 8.

TABLE 7. House of Representatives Lawyer and Non-Lawyer Support of Amendments for Funding of Legal Services Corporation (LSC) (2011–2015)²¹²

Eliminate All LSC Funding (2011)	Yes	No	% Yes
Democrats	1	191	—
Republican Non-lawyer	125	47	72.7%
Republican Lawyer	45	21	68.2%
			<i>p=0.492</i>
Eliminate All LSC Funding (2014)			
Democrats	0	186	—
Republican Lawyers	31	46	40.3%
Republican Non-Lawyers	85	58	59.4%
			<i>p=.007</i>
Increase \$15 million (2014)			
Democrat Lawyers	71	11	86.1%
Democrat Non-Lawyers	92	15	86.0%
			<i>p=0.905</i>
Republican Lawyers	4	73	5.2%
Republican Non-Lawyers	6	139	4.1%
			<i>p=0.718</i>
Cut \$25 million (2015)			
Democrats	3	181	—
Republican Lawyers	48	27	64%
Republican Non-Lawyers	112	55	67.1%
			<i>p=0.641</i>

212. CQ Press, *supra* note 5.

TABLE 8. Tort Reform Limiting Medical Malpractice Claims, 112th Congress

Party and Lawyer Status	Yes	No	% Yes
Republican Lawyers	55	8	87.3%
Republican Non-Lawyers	161	2	98.8%
			<i>p=0.00</i>
Democratic Lawyers	1	72	1.4%
Democratic Non-Lawyers	6	99	5.7%
			<i>p=0.142</i>

In these case studies, the variation in voting behavior of lawyer and non-lawyer members of Congress may be, in part, a product of occupational self-interest. Self-interest could help explain why lawyer-members are more likely to be opposed to no fault insurance (which would reduce tort litigation). These lawyer-members of Congress may not themselves be personal injury attorneys, but since lawyer-members are more likely to receive campaign contributions from other lawyers, their vote may be in response to a key constituency.²¹³

However, in the case of votes on the LSC occupational self-interest is a less likely story: few lawyer-members of Congress come from a legal aid background, legal aid employs relatively few lawyers, and legal aid lawyers have relatively little money to make campaign contributions.²¹⁴ Instead, a possible explanation for these votes is the effect of professional affinity. For instance, because of their

213. See Center for Responsive Politics, *supra* note 40 (highlighting the total amount of campaign contributions during the 2016 election cycle made by lawyers and lobbyists, as a sector).

214. Only 1% of U.S. lawyers in 2005 were either a legal aid attorney or a public defender. *Lawyer Demographics: Year 2015*, AM. B. ASS'N (2015), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf.

professional training, it may be easier for lawyers to understand what civil legal aid is and the need for it, which could be obscure to other members, or lawyer-members may place more value on legal access issues given their law background. Similarly, lawyer-members of the House may be more inclined to believe that a liberal tort system is more likely to generate beneficial social outcomes.

These examples of votes on legal aid funding and tort reform show that, on certain issues affecting the legal system, having more lawyer legislators can matter to legislative outcomes. Being a lawyer or not also influences how members of Congress approach the justice system in other ways. For instance, lawyer-members of Congress are more likely to sit on the judiciary committee. In 2016, fourteen of the twenty members (or 70%) of the Senate Judicial Committee were lawyers²¹⁵ as were twenty-eight of thirty-nine members of the House Judicial Committee (or 72%).²¹⁶ As a result, lawyer-members have a disproportionate say on issues related to the legal system through their work on these committees. In a study from the 1990s, Mark Miller argues that, because of the high number of lawyer-members, the two judicial committees in Congress act in a more court-like fashion than other committees and that the constitutionality of the actions of these committees are more closely scrutinized by members.²¹⁷ Miller also

215. *Compare Committee Members*, U.S. SENATE COMMITTEE ON THE JUDICIARY, <http://www.judiciary.senate.gov/about/members> (last visited Dec. 10, 2016), *with* CQ Press, *supra* note 5.

216. Lynette P. Perkins, *Member Recruitment to a Mixed Goal Committee: the House Judiciary Committee*, 43 J. POL. 348, 358 (1981) (finding that lawyers were more likely to volunteer for an assignment on the House Judiciary Committee because they felt they already had expertise in the area and so would require less learning); *Compare Full Committee*, U.S. HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE, <http://judiciary.house.gov/index.cfm/committee-members> (last visited May 28, 2017), *with* CQ Press, *supra* note 5.

217. See MILLER, *supra* note 96, at 160 (finding “[g]enerally, the Judiciary Committee [in the House] reacts to constitutional questions in a very judicial, courtlike fashion. Although political considerations are always important, the

presents evidence that lawyer legislators generally have more favorable attitudes towards the courts and are more likely to express a desire to protect their independence, by being less likely to want to strip courts of their jurisdiction or overturn their decisions through legislation.²¹⁸

Other scholars have noted that members of Congress often cite their occupational background as inspiration for both running for office and the legislation that they prioritize while in Congress.²¹⁹ This is true of lawyers as well. For example, some lawyers in Congress will highlight their experience as prosecutors in describing why they sponsor bills related to criminal justice.²²⁰ Lawyers in Congress also organize around issues in which they have previous professional experience. Indeed, the founding members of the Congressional Legal Aid Caucus, the Congressional Criminal Justice and Public Safety Caucus, and the Congressional Prosecutors Caucus are not surprisingly almost all lawyers.²²¹

best constitutional or legal argument almost always wins.”).

218. *Id.* at 104–05, 121.

219. *See, e.g.*, NICHOLAS CARNES, *WHITE COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING* 64–65 (2013) (listing examples of legislators who state they draw on their previous occupation when making legislation).

220. *See, e.g.*, *Former Prosecutor Rep. Swalwell Announces Support for Rational Federal Marijuana Policy*, SWALWELL.HOUSE.GOV, <https://swalwell.house.gov/media-center/press-releases/former-prosecutor-rep-swalwell-announces-support-rational-federal> (last visited May 28, 2017) (describing how the Congressman’s prosecutorial experience led to a belief that marijuana laws needed to be rationalized).

221. *Compare* Sam Wright, *Members of Congress Launch Bipartisan Legal Aid Caucus*, ABOVE L. (Dec. 8, 2015, 12:58 PM), <http://abovethelaw.com/2015/12/members-of-congress-launch-bipartisan-legal-aid-caucus/> (showing Representatives Joseph Kennedy and Susan Rice, both lawyers, were founding members of the Legal Aid caucus), *and* *Bipartisan House Coalition Launches Caucus Aimed at Criminal Justice Reform*, JEFFRIES.HOUSE.GOV (July 14, 2015), <http://jeffries.house.gov/media-center/press-releases/bipartisan-house-coalition-launches-caucus-aimed-at-criminal-justice> (three of the four founding members of the caucus were lawyers), *with* CQ Press, *supra* note 5.

More generally, lawyer-members of Congress may be more likely to support using tactics to solve social problems that resonate with their experience in the legal profession. Robert Kagan and others have argued that compared to other countries, the United States has embraced “adversarial legalism” to achieve public policy goals, whether in relation to the environment, criminal law, consumer harm, or social welfare benefits.²²² This approach to public policy involves formal legal contestation that is driven by the disputing parties²²³ as opposed to policy implementation through a Weberian bureaucratic legalism driven by hierarchical authority, which is more common in Europe.²²⁴ Adversarial legalism relies on the creation of rights, strong judicial review, and assertive lawyers.²²⁵

The central role of adversarial legalism in the United States is likely part of the reason lawyers have had such a high profile in the country fostering their success in politics. However, adversarial legalism itself is arguably produced in part by lawyers’ prevalence in politics in the first place. This is not to say that lawyers’ ubiquity in politics is the sole or even primary reason that adversarial legalism thrives. A fractured political system and longstanding voter distrust of strong government are likely more significant drivers.²²⁶ And certainly, not all lawyers support adversarial legalism and

222. For a definition of adversarial legalism, see KAGAN, *supra* note 19, at 9. For further study of the effect of adversarial legalism in the United States, see BARNES & BURKE, *supra* note 2, at 4–5.

223. KAGAN, *supra* note 19, at 9.

224. *Id.* at 11.

225. BARNES & BURKE, *supra* note 2, at 1–3 (discussing importance of rights, courts, and litigation to adversarial legalism); KAGAN, *supra* note 19, at 12–14 (detailing how adversarial legalism is based in lawyers bringing cases to the courts, frequently on the basis of rights).

226. KAGAN, *supra* note 19, at 14–16 (finding that a “fragmented state” and a mistrust of government are key elements of why adversarial legalism has flourished in the United States).

many promote other ways of solving policy challenges.²²⁷ Yet, in a country where lawyers are so embedded in the political system—and these lawyers are taught a specific legal ideology in law school and by the bar about how to address societal problems that prioritizes courts, private rights of action, and an ethics of zealous advocacy,²²⁸—it should not be surprising that adversarial legalism has flourished in the United States.

The effect on the U.S. legal system of having so many lawyers in Congress has frequently been diffuse and subtle, but also significant and frequently measurable. It has arguably helped lead to a greater role for lawyers and courts in the U.S. system of government. As the next Section shows, the legal system has not just been affected by whether or not lawyers are members of Congress, but also by whether or not former or aspiring politicians have themselves held office in the justice system.

B. *Politicians in the Courts*

The United States is often described as having a politicized judiciary.²²⁹ At the federal level, the Presidency is viewed as the key to controlling appointments to the courts and the confirmation of judges in the Senate frequently witnesses heated partisan debate.²³⁰ At the state level, many judges are elected often through partisan elections while

227. *Id.* at 55 (“many judges and lawyers strive to dampen adversarial legalism”).

228. *Id.* at 55–56.

229. CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17–18, 20–21, 23, 26–27 (2006) (showing that Democratic and Republican appointed federal judges vote differently from each other in many domains).

230. *Nominations*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last visited June 11, 2017) (noting that nearly a quarter of Supreme Court justice nominations to the Supreme Court since 1789 have failed to be confirmed).

governors directly appoint many other judges.²³¹ Meanwhile, prosecutors are elected in most states, while U.S. Attorneys are appointed directly by the president at the federal level.²³²

The U.S. legal system though has also historically been politicized in another less noticed way. Practicing lawyers, and more specifically judges and prosecutors, have commonly later become politicians while politicians have frequently later become judges and, less often, prosecutors.²³³ Over the years though, there has been a decline of lawyers whose careers crisscross the legal system and, more explicitly, the political branches of government. As this Article has emphasized, there has been an overall decline of lawyers in Congress, but as illustrated in Table 9 below, there has been an even more substantial drop in the prevalence of former judges in Congress.²³⁴ At the same time, there has been a drop in former members of Congress becoming judges.²³⁵ The number of former prosecutors in Congress has also declined at least from the rates of the 71st Congress.²³⁶

231. For a description of the selection process of judges at the state level, see U.S. DEP'T JUST., *supra* note 117, at 5.

232. 28 U.S.C. § 541(a)-(b) (stating that U.S. Attorneys are appointed by the president for a four-year term); U.S. DEP'T JUST., *supra* note 117, at 2, 11.

233. *See infra* Table 9.

234. *See infra* Table 9.

235. *See infra* Table 9.

236. The strikingly high number of former prosecutors in Congress in the 71st Congress was likely in part caused by the central role prosecutors played in the Progressive Era, which gave them an ideal platform for higher office. JOHN L. WORRALL, *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 8–9 (2008) (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (noting that while prosecutors were seen as a rather insignificant office in the justice system for much of the 19th century, beginning in the early 20th century, as they solidified their powers in the executive branch, they gained prominence).

TABLE 9. Experience of Lawyer Members of Congress as Judge or Prosecutor

Congress	Judge Before	Judge After	Prosecutor Before
21st (1829–30) ²³⁷	22%	20%	17%
71st (1929–30) ²³⁸	16%	10%	40%
114th (2015–16)	7%	–	25%

1. Aspiring Politicians in the Courts

The high number of judges and prosecutors who have traditionally gone into politics has almost certainly affected the historic functioning of the legal system. The experience of the U.S. Supreme Court provides a prominent example. Supreme Court justices do not usually have congressional aspirations, but until the mid-twentieth century, a number of Supreme Court justices had presidential or vice presidential ambitions. For example, Justice Charles Hughes became the 1916 Republican nominee for president.²³⁹ In his research, William G. Ross finds that between 1832 and 1956, one or more justices attempted to obtain a presidential or vice presidential nomination in three quarters of presidential elections.²⁴⁰

237. Six percent of lawyer members of Congress were a judge both before and after serving in Congress. *Congressional Biographical Directory*, *supra* note 29. They are included in Table 9 in the tally of lawyers who were a judge before office and those after.

238. Two percent of lawyer members of Congress were a judge both before and after serving in Congress. *Congressional Biographical Directory*, *supra* note 29. They are included in Table 9 in the tally of lawyers who were a judge before office and those after.

239. William G. Ross, *Presidential Ambitions of U.S. Supreme Court Justices: A History and an Ethical Warning*, 38 N. KY. L. REV. 115, 141 (2011).

240. *Id.* at 115.

Ross claims that these political aspirations, at times, distracted Supreme Court justices from their judicial work and tempted them to frame their decisions to appeal to constituencies that could assist their candidacy.²⁴¹ He argues these ambitions also pushed other judges on the bench to delay or speed up opinions in order to help or hurt the advancement of their colleagues' political careers.²⁴² If nothing else, the justices' political aspirations undermined the perceived independence of judges. For example, after Justice Chase unsuccessfully sought the Democratic nomination for president in 1868, *The Nation* wrote that he had "destroyed popular confidence in his decisions," particularly in relation to Reconstruction in the South.²⁴³ Decades later, in reflecting on the presidential aspirations of Supreme Court justices, Justice Felix Frankfurter openly worried, "[w]hat is more inimical for good work on the Court than for a Justice to cherish political, and more particularly Presidential, ambition?"²⁴⁴ Similarly, Justice Roberts, in 1954, lamented that a number of justices:

have had in the back of their minds a possibility that they might get the nomination for President. Now, that is not a healthy situation because, however strong a man's mentality and character, if he has this ambition in his mind it may tinge or color what he does, and that is exactly what the Founding Fathers wanted to remove from the minds of the Supreme Court, to make them perfectly free knowing that there was no more in life for them than the work of

241. *Id.* at 116. "Yale Law Professor Alexander Bickel warned that 'the recurrence of justices with manifest political aspirations would in time destroy an institution whose strength derives from strength based on confidence.'" *Id.* at 161.

242. *Id.* at 121 (discussing how the Supreme Court may have delayed releasing the *Dred Scott* decision until after the presidential election to dash the political hopes of Justice McLean, who dissented, who aspired to be the Republican candidate for president).

243. *Id.* at 125.

244. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 787 (1957).

the Court.²⁴⁵

Such political ambitions can also influence judges' behavior in state courts. For example, Chief Justice Roy Moore of the Alabama Supreme Court is a controversial judge, who today is often in the political spotlight. In the early 2000's, he ordered the erection of a large replica of the Ten Commandments at the Alabama Supreme Court's courthouse. A federal judge ordered the removal of the replica, which Moore ignored, and he was eventually suspended.²⁴⁶ Roy then unsuccessfully ran for Governor of Alabama in 2006 and 2010²⁴⁷ before again being successfully elected as Chief Justice of the Alabama Supreme Court. In 2015, he ordered county probate judges to ignore a federal ruling requiring them to issue same sex marriage licenses. He was eventually suspended for these actions in May 2016.²⁴⁸ Although Chief Justice Moore's judicial orders may or may not have been linked to his larger political aspirations, his actions can at least be rationally perceived as being taken in part to advance his larger political career.²⁴⁹

245. Ross, *supra* note 239, at 146 (quoting Hearing Before Subcomm. No. 4 of the Comm. on the Judiciary on S.J. Res. 44, H.S. Res. 27, and H.S. Res. 91, 83rd Cong. 22 (1954) (statement of Robert H. Jackson, Associate Justice, United States Supreme Court)).

246. *Ten Commandments Judge Removed from Office*, CNN.COM (Nov. 14, 2003, 6:56 AM), <http://www.cnn.com/2003/LAW/11/13/moore.tencommandments/>.

247. Mark Joseph Stern, *Oh, Alabama. Not Roy Moore Again?*, SLATE (Jan. 11, 2013, 1:18 PM), http://www.slate.com/articles/health-and-science/science/2013/01/roy_moore_re_elected_in_alabama_ten_commandments_supreme_court_chief_justice.html.

248. Campbell Robertson, *Roy Moore, Alabama Judge, Suspended Over Gay Marriage Stance*, N.Y. TIMES (May 6, 2016), <https://nyti.ms/2ov5DXy>.

249. Similarly, Ted Poe, a county judge in Texas, became well known in the early 2000's for the unorthodox sentences he gave to criminals such as ordering thieves to carry signs in front of stores they robbed stating their crime. *U.S. Congressman Ted Poe Second District-Texas*, POE.HOUSE.GOV, https://poe.house.gov/_cache/files/e/b/eb06871c-ab0c-4b8d-87b5-04f5c658b88d/FD9352320542AD025AA666D7A04B9A14.ctp-longer-biography.pdf (last visited

Prosecutors provide another illustration of how a lawyer's aspirations for higher elected office can influence how they perform their duties in the justice system. While members of Congress were once more likely to be a former judge, today they are much more likely to be a former prosecutor,²⁵⁰ and prosecutorial positions are still widely seen as a jumping-off point towards a larger political career.²⁵¹ Yet, many commentators claim that politically ambitious prosecutors focus too much on high profile cases over more routine ones and over-zealously push for prosecutions in order to gain favorable media attention with an eye towards seeking further political office.²⁵²

2. Former Politicians in the Courts

The reduction of judges entering politics has also corresponded with a decline of former politicians becoming judges, as Table 9 indicates. It was once relatively common for politicians, and specifically members of Congress, to become Supreme Court justices. Before 1950, of the ninety-one justices appointed to that point, twenty-eight had previously been members of Congress, or about 30%, and about 70% had some experience in elected political office.²⁵³ However, after 1950, no new Supreme Court justice has been

Aug. 24, 2017). He was later elected to Congress in part based on the notoriety of these sentences. Jonathan Turley, *Shame on You*, WASH. POST (Sept. 18, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/17/AR2005091700064.html>. It is difficult to know the motivation for Poe's unconventional sentencing behavior, but, once again, it may have been partially motivated by a desire for media attention to further his personal political aims.

250. See *supra* Table 9.

251. *ECONOMIST*, *supra* note 124.

252. *Id.* Commentators have observed that elections subject prosecutors to "untoward political influences", "lead prosecutors to concentrate on high-profile investigations," "have the potential to corrupt prosecutors with campaign contributions," and "cause prosecutors to seek higher conviction rates." Ellis, *supra* note 117, at 1532.

253. EPSTEIN ET AL., *supra* note 44, at 353–66.

a member of Congress²⁵⁴ and even elected political experience is relatively uncommon. For instance, none of the current Supreme Court justices have been an elected politician.²⁵⁵

Instead, a more specialized judicial class with a narrower set of career experiences and ambitions has pushed out politician judges in federal courts.²⁵⁶ President Eisenhower declared a policy of using appeals court appointments as a stepping-stone to the Supreme Court—a selection criteria followed by many presidents since then.²⁵⁷ Since 1950, 60% of appointed U.S. Supreme Court justices previously served as a federal judge compared to 22% before.²⁵⁸ In turn, the

254. *House Members Who Became Members of the U.S. Supreme Court*, Office, U.S. HOUSE REPRESENTATIVES, http://artandhistory.house.gov/mem_bio/mem_supreme.aspx (last visited Apr. 22, 2017); *Senators Who Served on the U.S. Supreme Court*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/four_column_table/Supreme_Court.htm (last visited Apr. 22, 2017) (showing seventeen members of the House of Representatives, fifteen Senators, and three members that have served in both chambers have gone on to be judges on the U.S. Supreme Court).

255. Only Earl Warren and Sandra Day O'Connor had elected legislative or executive experience since 1950, or two of twenty-five judges. EPSTEIN ET AL., *supra* note 44, at 353–66.

256. Barry J. MacMillion, Cong. Research Serv., R43538, U.S. Circuit Court Judges: Profile of Professional Experiences Prior to Appointment 7 (2014) (finding that about 50% of active U.S. circuit judges in 2014 were a federal or state judge immediately prior to appointment); Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Effect for Career Diversity on the U.S. Supreme Court*, 91 Cal. L. Rev. 903, 933 (2003) (noting that “[b]etween 1789 and 1952, the mean percentage of justices with some political background, either in legislative or executive politics, hovered around 65%. Since 1952, that figure has dropped to 34%. Several explanations for this decline may exist, but surely the norm of judicial experience is chief among them.”) (internal citations omitted).

257. Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PENN. L. REV. 833, 835, 837–38 (2009) (noting an increase in the number of Supreme Court justices who have had experience as federal circuit court judges and finding that Supreme Court justices displayed bias towards the circuit on which they previously sat).

258. EPSTEIN ET AL., *supra* note 44, at 367–74 (finding that fifteen of twenty-five Supreme Court Justices previously served as a federal judge after 1950 compared to nineteen of eighty-seven before 1950).

nomination of more specialized federal appeals court and district court judges has likely been reinforced by the adoption of nominating commissions that were set up starting in the 1970s.²⁵⁹

This turn towards a professionalized judiciary that “promotes” many of its judges through the ranks instead of selecting them from other prestigious careers, like political office, may ironically reduce their independence. Such a system places more emphasis on screening potential circuit court and Supreme Court Judges based on their judicial philosophy, as already articulated in their judgments, and so also encourages judges to audition for elevation by adjusting their behavior to make their nomination and confirmation more likely.

While the norm of picking former federal court judges for the Supreme Court started with Eisenhower, some scholars have suggested that it originated with members of Congress who were upset with the Court’s decision in *Brown v. Board of Education*.²⁶⁰ They urged Eisenhower to pick judges who would base their decisions upon “law,” not “sociology.”²⁶¹ Nominees, who had previously been federal judges, were

259. For an overview of federal court nominating committees, see *Federal Judicial Selection*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD (last visited Apr. 22, 2017). At the state level, merit selection commissions, set up first in California in 1934, but later adopted by many other states particularly in the 1970s have played a similar role. For an overview of state nominating commissions, see SHUGERMAN, *supra* note 117, at 208–12, 286–87; *Judicial Nominating Commissions*, NAT’L CTR. ST. CT., <http://data.nesc.org/QvAJAXZfc/opensoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM17> (last visited Apr. 22, 2017). There is less data on the number of politician judges in state supreme courts. However, one study found in a survey of select state supreme courts that the number of judges with political experience declined from 37.8% to 29.2% from 1900–20 to 1950–70. Robert A. Kagan et al., *American State Supreme Courts Justices, 1900–1970*, 2 AM. B. FOUNDATION RES. J. 371, 377 (1984).

260. John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1, 41 (1959).

261. *Id.*

seen as more likely to have a more limited vision of their role.²⁶² Significantly, nominees, who have been judges, have judicial records that can be scrutinized to better ensure their political and judicial ideologies are in line with that of the president.²⁶³ Selecting lawyer-politicians such as Governors or members of Congress, to the Supreme Court or Court of Appeals allows presidents to appoint party loyalists,²⁶⁴ though they usually have no judicial track record. They may side with the president on the major issues of the day, but their overall judicial philosophy can be difficult to determine without a judicial track record.

The turn towards selecting former federal judges for the Supreme Court may also cause judges to audition for these roles. As Epstein, Landes, and Posner have found, federal appeals court judges, who are considered likely candidates to be nominated to the Supreme Court, are more likely to support tough on crime decisions perhaps so they are not tagged as “soft on crime” during the nomination process.²⁶⁵ There is some evidence that district court judges may also alter their behavior if they believe they are likely to be considered for the Court of Appeals.²⁶⁶

The rise of a specialized judicial class not only raises concerns about the judiciary’s independence, but also impoverishes its decision-making by reducing the number of professional experiences, especially political experiences,

262. Epstein et al., *supra* note 257, at 910.

263. *Id.* (noting that a common complaint of appointing former federal judges to the Supreme Court is that it gives the president and the Senate an opportunity to assess the political ideology of potential candidates).

264. *Id.* (remarking that Eisenhower moved away from politician picks in part to avoid the image of cronyism that had accompanied the picks of former presidents).

265. LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 359–63 (2013).

266. *Id.* at 377–79 (finding evidence that district court judges “auditioning” to be circuit judges are more likely to give longer prison sentences).

that its judges draw upon. While there are a number of methodological challenges in determining the effect of a poorly diversified occupational background on judicial performance, most studies have found some effect.²⁶⁷ A number of commentators have also lamented the seeming effect of the decline of judges with political experience. For example, in 2016, the Supreme Court unanimously narrowed the definition of what type of conduct constituted corruption claiming that political officials had to perform concrete governmental acts in exchange for bribes in order to be prosecuted.²⁶⁸ Among those who criticized this judgment was convicted former lobbyist Jack Abramoff. Abramoff claimed that he continued “to be concerned by what seems to be a lack of understanding on the part of the justices that a little bit of money can breed corruption” and he blamed the disconnect on the fact that “none of [the justices] have been in the political process.”²⁶⁹ Abramoff is not alone in his concern. Scholars have noted that judges who were formerly politicians have more intimate knowledge about how the rest of government functions including the political process, the influence of money in politics, and whether Congress has delegated away its essential powers to the executive.²⁷⁰

267. Epstein et al., *supra* note 256, at 954 (noting that “[t]o be sure, many studies . . . have their share of conceptual and analytical problems. Nonetheless, we should not ignore the common finding that a link exists between career diversity and judicial decisions. Specifically, as we depict in the Appendix, of the twenty-two studies located that investigate this linkage, nearly 70% found some sort of a relationship between career experience and judicial choices.”).

268. Adam Liptak, *Supreme Court Vacates Ex-Virginia Governor’s Graft Conviction*, N.Y. TIMES (June 27, 2016), <https://nyti.ms/2kEO9tG>.

269. Carl Hulse, *Is the Supreme Court Clueless About Corruption? Ask Jack Abramoff*, N.Y. TIMES (July 5, 2016), <https://nyti.ms/2kdIeb7>.

270. PAMELA KARLAN, *A CONSTITUTION FOR ALL TIMES* 58–59 (2013) (noting that “today’s Court is far less diverse when it comes to political experience” and that this may ironically lead to a Court with a false sense of confidence in relation to the other branches of the federal government); Gordon Silverstein, *Bench Politics*, NEW REPUBLIC (May 15, 2009), <http://newrepublic.com/article/61713/bench-politics> (arguing that more politicians on the U.S. Supreme Court would provide needed political and government experience to the Court).

Finally, politician judges have experience navigating the rest of government and engaging in the “wheeling and dealing” of politics, a skill those in the judiciary often need. Chief Justice William Howard Taft, who also served as president, brought his high-level political experience to bear when crafting and lobbying for the passage of the 1925 Judiciary Act that allowed the Supreme Court to gain almost full control over its own docket.²⁷¹ Chief Justice Charles Evan Hughes, who had been a governor and the Republican nominee for president, used quiet diplomacy to switch the votes of justices on key New Deal legislation to placate the administration of Franklin D. Roosevelt, who planned to reorganize the Supreme Court in order to overturn rulings that threatened Roosevelt’s legislative agenda.²⁷² Even if they are not convincing their colleagues to switch their votes in order to save the institution, politician judges, more generally, may have the political skills to bring greater compromise and consensus to the judiciary.²⁷³ Further, having a group of judges with diverse backgrounds may make it more likely for them to listen to each other because they believe they will hear a different perspective.

Some European countries that rely on a dedicated judicial service where judges are promoted through the ranks have recognized that a professionalized judicial class can both limit the independence of the judiciary and reduce

271. Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 10 (2003) (claiming that most scholars of Taft view his lobbying efforts for the 1925 Judiciary Act as critical for its passage).

272. MICHAEL E. PARRISH, *THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY* 25–33 (2002).

273. Linda Greenhouse, *A Judge and a Politician*, N.Y. TIMES (Dec. 31, 2009), <https://nyti.ms/2vtMKHv> (arguing that more former politicians on the Supreme Court would bring both real world experience and a proclivity to compromise); Silverstein, *supra* note 270 (claiming that former politicians, such as Chief Justices Marshall, Taft, and Warren, may have been able to bring more unanimity to the Court’s decisions).

the experiences judges have to draw upon.²⁷⁴ In part to address this problem, these systems allow those with non-judicial backgrounds on their constitutional courts.²⁷⁵

VI. POTENTIAL IMPLICATIONS FOR THE RULE OF LAW

Not only has the decline of lawyer-politicians in the United States seemingly had a direct effect on the legal system, but it could also, albeit more speculatively, impact adherence to the rule of law in the country. The United States has long been an outlier among nations in both how early it established and how long it has sustained a liberal democratic form of government.²⁷⁶ It was able to do so because of a relatively distinctive set of historical and political circumstances that are still much debated and will not be explored here.²⁷⁷ However, one of the prominent characteristics of U.S. democracy was the prevalence of a class of lawyer-politicians in its legislatures, executive mansions, and courts. This Article presents evidence that the occupational background of members of Congress and judges

274. Epstein et al., *supra* note 256, at 939.

275. *Id.* at 939–40 (documenting that in Germany, France, and Italy, it is relatively common to have those who are not judges appointed to their constitutional court). For example, in France, former presidents can be a member of the Constitutional Court as a matter of right. *General Presentation*, COUNSEIL CONSTITUTIONNEL, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/general-presentation/general-presentation.25739.html> (last visited Apr. 18, 2017).

276. See MICHAEL BURRAGE, *REVOLUTION AND THE MAKING OF THE CONTEMPORARY LEGAL PROFESSION: ENGLAND, FRANCE, AND THE UNITED STATES* 228–29 (2006) (noting that compared to the revolutions in France and England, the U.S. Revolution was unique in that it was not terminated by an authoritarian regime); SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 13–16 (1991) (describing three waves of democratization and reverse democratization in the world between 1828 and 1990 with the first wave having its roots in the American and French revolutions).

277. See generally ROBERT E. SHALHOPE, *THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760–1800* (2004).

can affect their behavior.²⁷⁸ In a world where the rule of law is viewed as increasingly under threat and many see a rising tide of illiberalism within the United States,²⁷⁹ the decline of the lawyer-politician should give defenders of liberal democracy pause. Their decline may expose underappreciated vulnerabilities to the rule of law in the United States—a system based not just on rules, institutions, or the preferences of its people, but also on the norms that the country's leaders are immersed in and follow.²⁸⁰

At the very beginning of the United States, the potential link between lawyers as political leaders and the promotion of liberal democracy was clearly recognized. Thomas Jefferson promoted establishing professorships of law in universities because he believed, drawing on a theory developed by Montesquieu, that the country's leaders needed legal training so they would be committed to furthering the rule of law.²⁸¹ In Federalist 35, Alexander Hamilton claimed

278. For a fuller discussion of how occupational background may affect the voting behavior of elected politicians, see *supra* Section V.A. For a discussion of how occupational background may affect the decisions of federal judges, see *supra* Section V.B.2.

279. See, e.g., Zakaria, *supra* note 28.

280. Many commentators have remarked on the importance of the norms political leaders follow, not just democracy's rules and institutions, for supporting the rule of law in the United States and elsewhere. Clare Foran, *An Erosion of Democratic Norms in America*, ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/11/donald-trump-democratic-norms/508469/> (referencing an interview with Brendan Nyhan, a political scientist at Dartmouth College, where Nyhan describes how violations of norms by political leaders can lead to the breakdown of democracy); Steven Levitsky & Daniel Ziblatt, *Is Donald Trump a Threat to Democracy*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html?_r=0 (noting that democracy requires that leaders follow strong norms of fair play and restraint).

281. Paul D. Karrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 527–33 (1990) (describing Jefferson's project to develop university legal education to train an elite class responsible for political leadership who would be committed to the rule of law). Montesquieu similarly believed training in law was critical to be an active participant in a

that a lawyer, as part of the learned professions, would, if elected to the House of Representatives, be a uniquely “impartial arbiter,” who would undertake public-spirited action in the best interests of society.²⁸² Alexis de Tocqueville prominently argued that lawyers brought the language of the law to politics and so helped instill liberal values in the citizens and institutions of the young Republic.²⁸³ More recently, scholars like Terrence Halliday and Lucien Karpik have argued that the legal profession and bar associations were critical to the building of democracy in the United States.²⁸⁴

Lawyer-members of Congress do not have a monopoly on valuing rights, due process, or an independent judiciary. And some lawyer-politicians may actively subvert these values.²⁸⁵ Yet, due process and the protection of legal rights are the

democracy. *Id.* at 528.

282. THE FEDERALIST NO. 35 (Alexander Hamilton) (“Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts, to which his commerce is so nearly allied? Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society?”).

283. DE TOCQUEVILLE, *supra* note 1, at 280.

284. Terrence C. Halliday & Lucien Karpik, *Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism*, in *LAWYERS AND THE RISE OF POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES* 39–41 (1997); FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 223–25 (2003) (arguing that the legal profession more broadly has played a public-spirited and liberalism promoting role in the U.S.); Robert Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 *THEORETICAL INQUIRIES* L. 441, 449–59 (2010) (arguing that there is relatively strong historical evidence in many countries for lawyers having played a significant role in promoting rights consciousness and cultures of legalism, while claiming there is a more mixed record of lawyers promoting political freedom).

285. Indeed, in other countries, lawyers have not always mobilized on the behalf of the rule of law and have acted to subvert these regimes. *See* Halliday & Karpik, *supra* note 284, at 59–60 (noting how the example of lawyers complicity in Nazi Germany shows that lawyers do not always promote liberal values).

tools and language that lawyers are trained in and, as already mentioned, some survey evidence indicates that, at least historically, lawyer-legislators disproportionately express supporting rule of law values such as judicial independence.²⁸⁶ At the same time, the professionalization of politics and the rise of a specialized political class in the United States may also contribute to the view that government is run by corrupt political insiders, which, in turn, increases voters' distrust of Congress and precipitates calls for extralegal reform or action for these democratic institutions.²⁸⁷ Meanwhile, a judiciary with more technocratic judges and fewer politician judges may not have the same independence or political savvy to check elected leaders that do not uphold liberal rule of law values.²⁸⁸

Other constitutional democracies have shown liberal democracies can thrive with far fewer lawyer-politicians than the United States, but these countries also have their own unique histories, and lawyers, in fact, have frequently had a critical role in supporting liberal values in these democracies as well.²⁸⁹ Furthermore, just because lawyer-politicians are not a necessary ingredient to the rule of law does not mean that they have not historically acted as a buffer against illiberal forces in the United States whether in Congress or perhaps even more significantly in the

286. MILLER, *supra* note 96, at 104–05, 117–18.

287. In recent years, the job approval rating of Congress has averaged below 20%. GALLUP, *supra* note 172. There are many reasons for this low approval rating, but one may be the rise of a specialized political class.

288. *See supra* Section V.B.

289. Halliday & Karpik, *supra* note 284, at 22–27, 39–41 (describing how lawyers and bar associations played a critical role in creating liberal societies in England, France, and the United States); *see generally* THE FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX (Terence C. Halliday et al. eds., 2012) (referencing a series of studies in former British colonies, which sought to understand which portions of the respective legal systems protected political liberalism and which portions did not).

Executive.²⁹⁰

The response to this decline should not be to go back to an era when a relatively small group of lawyer-politicians dominated both political and judicial offices, which no longer even seems possible. Today's bar is quite different than in the past—more specialized, fractured, and commercialized—which has seemingly weakened its ability to act as a public-spirited guardian of the rule of law.²⁹¹ Many lawyers that are in Congress today also were former political aides or members of civil society, which also has potentially weakened any unique professional perspective on the rule of law that lawyers may have traditionally brought to politics.²⁹² Further, other groups that have come into politics bring new perspectives and comparative advantages. For example, the bar's traditional hierarchical nature has arguably limited the number of women who could use the profession as a gateway into elected office—a drawback other occupational gateways into politics do not seem to suffer to the same degree.²⁹³ At any rate, the specialization witnessed in U.S. politics and the judiciary is seemingly part of a much

290. See generally Halliday & Karpik, *supra* note 284. The effect of the decline of lawyers in the Presidency and the cabinet is even more difficult to quantify than their decline in Congress since, for members of Congress, one can at least compare votes of members of different occupational backgrounds on the same legislation. Still, it is perhaps in the implementation of the law that norms about the rule of law play the most important role.

291. The heyday of the generalist lawyer who had the time to actively engage in civic life seems behind us—lost to a professional life that revolves around the pressures of the billable hour for corporate lawyers or just finding work for an increasing number of other lawyers. DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 172–74 (2009) (noting that the greater division of labor in the legal profession means lawyers now have less experience representing a diverse range of clients); ZAKARIA, *supra* note 284, at 225 (noting that the cartel like nature of the bar allowed lawyers to actively engage in politics, but that with increased commercial pressure they were less well situated to take on a public spirited leadership role).

292. For example, thirty-eight of the 209 lawyers in the 114th Congress had also been members of the specialized political class. CQ Press, *supra* note 5.

293. See Section II.B.

broader trend of specialization across occupations that seems unlikely to disappear.²⁹⁴

This Article does not attempt to develop remedies to address the potential vulnerabilities created by the decline of the lawyer-politician, but one potential response could be a recommitment to training the country's leaders and citizens in law and civics. Academics and public intellectuals from Ezra Stiles in the eighteenth century²⁹⁵ to Martha Nussbaum today²⁹⁶ have made pleas for a substantial national investment in teaching civic education and critical thinking skills in order to promote democracy and responsible self-governance. This need seems particularly acute in a society where universities are increasingly preoccupied with producing market-ready graduates for jobs in corporations and the broader business world.²⁹⁷

294. The specialization that has helped lead to a decline of lawyers in politics and the decline of lawyer-politicians within the judiciary has also occurred in other fields. For example, in business, the rise of MBA graduates has likely helped lead to a fall in the number of lawyers who are Fortune 500 CEOs. Marsha Ferziger Nagorsky, *Creating Business Leaders: A Plan for the Future*, U. CHI. L. SCH. (Fall 2013), <http://www.law.uchicago.edu/alumni/magazine/fall13/businessleaders>. In policymaking circles, lawyers must now vie with public policy school graduates and those with doctorates in economics and other social sciences, which has diminished their influence in this area. Bruce Ackerman, *Why Legal Education Should Last for Three Years*, WASH. POST (Sept. 6, 2013), https://www.washingtonpost.com/opinions/why-legal-education-should-last-for-three-years/2013/09/06/55d80c06-1025-11e3-8cdd-bcdc09410972_story.html?utm_term=.f33a2c798e29.

295. Karrington, *supra* note 281, at 542.

296. MARTHA NUSSBAUM, *NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES* (2010) (arguing that education has become too focused on increasing gross domestic profit and not on equipping students to challenge authority and think critically); *see also* MICHAEL S. ROTH, *BEYOND THE UNIVERSITY: WHY LIBERAL EDUCATION MATTERS* (2015) (claiming that the United States needs to emphasize an education of students in university that cultivates individual freedom and civic virtue).

297. ROTH, *supra* note 296. Law schools themselves have been criticized for increasingly providing an education that focuses on the business of law instead of its higher public-spirited principles. BEN W. HEINEMAN JR., WILLIAM F. LEE & DAVID WILKINS, *LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY* 49 (2014) (arguing that focusing on

The United States is witnessing a shift from a republic led by lawyer-politicians to one with politicians from an increasingly specialized political class and judges that are more professionalized and technocratic than before. This is a significant shift in the country's political ecosystem. It is a period that should be approached with circumspection and a renewed commitment to ensuring not only that the country's rules and institutions are oriented towards promoting the rule of law, but also its leaders and citizens.