

AEI PROGRAM ON American Citizenship

POLICY BRIEF 13 • SEPTEMBER 2013

Tocqueville's "Most Powerful Barrier": Lawyers in Civic Society

By Adam J. White

This essay is the seventh in a series exploring the role of professions in a modern, liberal democratic society and their effect on the civic culture of the nation. To read the other papers in this series, or for more information about AEI's Program on American Citizenship, visit www.citizenship-aei.org.

To those of us who want to believe that *The Federalist* is the "true account of the Constitution and of the regime it was calculated to engender," the early weeks of summer always put our faith to the test.¹

Every June, the Supreme Court concludes its year's work by releasing many—maybe all—of the term's most controversial decisions. That annual spectacle, in which judges and lawyers dominate political headlines for a week or more, often casts no little doubt on Publius's famous prediction that "the judiciary, from the nature of its functions, will always be the least dangerous" branch of the federal government, exercising "neither force nor will, but merely judgment."² Whatever one thinks of the court's decisions that term, one cannot deny that the court's justices, and the lawyers that bring the cases to bar, wield enormous power in American politics.

The justices recognize that power, of course. Two decades ago, Justice Anthony Kennedy looked out his chambers' windows to the end-of-term commotion on the marble plaza below and remarked to a reporter, "Sometimes you don't know if you're Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line"; moments later, he and his colleagues entered the courtroom and issued their decision in *Planned Parenthood v. Casey*, controversially reaffirming the basic right to abortion first recognized in *Roe v. Wade*.³

This year, Justice Kennedy stood once again at the center of the political maelstrom, writing the court's opinion striking down the Defense of Marriage Act's

federal definition of marriage. Justice Antonin Scalia dissented from that decision and began his own opinion not with his views on the merits of the specific marriage-rights question, but with a broader denunciation of the court's outsized role in American life:

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. . . . [W]e have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

"We might have covered ourselves with honor today," Justice Scalia concluded, "by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide."⁴

Let the people decide? This is the question that has challenged us since the founding: under the Constitution, which was intended to provide, in Publius's words, "a republican remedy for the diseases most incident to republican government," how much power should we commit to the countermajoritarian body of judges and lawyers?⁵ Stated differently, if the Constitution establishes a

republican government under which the people’s “reason” would “control and regulate the government” yet the people’s “passions” would “be controlled and regulated by the government,” then how should judges and lawyers heed the people’s reason yet regulate the people’s passions?⁶

While these questions have been considered by countless scholars and politicians, few have rivaled the insights offered by the “perceptive Frenchman”—as Justice Scalia called him, in another case⁷—Alexis de Tocqueville. In *Democracy in America*, Tocqueville observed that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.” Yet Tocqueville offered this not to criticize judges and lawyers, but to *praise* their habits of mind. To Tocqueville, lawyers and courts were the natural conservative force in civic society—our best brake against the “revolutionary spirit and unreflective passions of democracy.”⁸

But whatever the merits of Tocqueville’s assessment in 1835, today we face a different state of affairs. Lawyers are no longer a conservative check on revolutionary political passions; quite the reverse. Indeed, as this essay attempts to explain, virtually *all* of Tocqueville’s particulars seem quaint in hindsight—and the legal profession’s evolution raises important questions on the place that lawyers ought to occupy in civic society today.

“The Most Powerful Barrier . . . against the Lapses of Democracy”

In *Democracy in America*, Tocqueville identifies three natural checks against the threat of “the tyranny of the majority in the United States”: first, the dispersion of political power away from the central government and toward the “hidden shoals” of local communities; second, the legal profession; and third, the jury system, a “political institution before everything” that “make[s] all feel that they have duties toward society to fulfill and that they enter into its government.”⁹ Of the three, Tocqueville placed the most confidence not in decentralization or in juries but in lawyers: “When one visits Americans and when one studies their laws, one sees that the authority they have given to lawyers and the influence that they have allowed them to have in the government form the most powerful barrier today against the lapses of democracy.”¹⁰

By Tocqueville’s telling, the legal class had the public’s trust because the people know that lawyers’ “interest is to serve the people’s cause”; indeed, although the lawyer is drawn “to the aristocracy by his habits and his tastes,” he first and foremost “belongs to the people by his interest and by his birth[.]” Thus lawyers, drawn from the people yet trained to be an elite class, become the “natural liaison” between the two classes—the “sole aristocratic element that can be mixed without effort into the natural elements of democracy and combined in a happy and lasting manner with them.”¹¹

Of course, not all early Americans shared Tocqueville’s happy assessment of the legal profession. Jeffersonian populists, writes Gordon Wood, “urged each other to ‘keep up the cry against Judges, Lawyers . . . and all other designing men,’” and to do “their utmost at election to prevent all men of talents, lawyers, rich men from being elected.”¹² Far from inspiring the trust of their countrymen, Wood writes, early American lawyers’ constant pursuit of clients, and their eagerness to “support[] any cause that offers” had “obliterated all [lawyers’] regard to right and wrong.”¹³

In any event, lawyers undeniably occupied a place of central importance in an early American society dedicated to the rule of law and wary of the threat of tyranny of the majority. They “controlled the judicial branch and dominated the legislature and the executive,” writes law professor Russell Pearce; “in partnership with judges, lawyers became the ‘ex officio interpreters of our national credo.’”¹⁴ Even if Tocqueville overstates the extent to which lawyers were the “sole enlightened class” earning the people’s trust or the extent to which they are “naturally called upon” to occupy public office, the fact remains that the people largely did entrust them with public office. Thus, Tocqueville’s investigation of the nature of lawyers’ habits and functions deserves further consideration.¹⁵

“The Habits of Order”

Tocqueville identified several reasons explaining and justifying lawyers’ central role in civic society, but of these, one particularly stands out: the lawyer’s natural habits of mind. “Men who have made the laws their special study have drawn from their work the habits of order, a certain

taste for forms, a sort of instinctive love for the regular sequence of ideas, which naturally render them strongly opposed to the revolutionary spirit and unreflective passions of democracy.” This “special knowledge,” he urged, “assures them a separate rank in society.”¹⁶

If in Tocqueville’s time publicly minded lawyers prized precedent above all, then today’s legal profession seems too often to argue primarily from abstract theories of rights.

The “habits of order” were essential to the practice of law, because American law, like English law, rested on the common law—“legislation founded on precedents,” as Tocqueville put it, a case-by-case accretion of experience and decisions stretching back to time immemorial and proceeding forward just as slowly and incrementally. In the American legal profession, “taste and respect for what is old is therefore almost always joined with love of what is regular and legal.”¹⁷

And this induced lawyers to justify their arguments not in terms of abstract theory or subjective preference but, rather, in terms of broader societal experience: “When you listen to an English or American lawyer, you are surprised to see him cite the opinion of others so often and to hear him speak so little of his own.” Tocqueville contrasted this with the rationalism and ideology central to his own nation’s law: “The English or the American lawyer inquires into what has been done, the French lawyer into one ought to wish to do[.]”¹⁸

Tocqueville’s characterization of early American lawyers’ dedication to precedent is reflected in the young nation’s overwhelming demand for copies of William Blackstone’s treatise on the English common law, *Commentaries on the Law of England*.¹⁹ As the University of Virginia School of Law’s G. Edward White recounts, “the treatises, even after the Revolution, were overwhelmingly English in origin,” yet the 1769 edition was “a huge success in North America,” selling nearly 1,600 copies of the

four-volume set at \$16 per set.²⁰ American commitment to Blackstone’s version of British common law posed such a threat to revolutionary democracy that Thomas Jefferson would grouse that Blackstone (along with David Hume) had “done more towards the suppression of the liberties of man” than “all the millions of men in arms of Bonaparte[.]”²¹

Perhaps Jefferson would take heart knowing that the American legal profession’s prejudice in favor of precedent (let alone Blackstone) would eventually fall to the side. And that brings us to the first way in which the modern American legal profession has departed from Tocqueville’s account: if in Tocqueville’s time publicly minded lawyers prized precedent above all, then today’s legal profession seems too often to argue primarily from abstract theories of rights.

Mary Ann Glendon of Harvard Law School examined this shift in *A Nation under Lawyers* (1994). Before the 1970s, she wrote, “judicial hagiography emphasized prudence, practical reason, mastery of craft, persuasiveness, a sense of the legal system as a whole, the ability to preserve principled continuity while adapting the law to changed social and economic conditions—and above all, self-restraint.”²² And this self-restraint, in turn, comprised “structural restraint” (such as respect for the separation of powers and federalism), “interpretive restraint,” and “personal restraint.”²³

By the 1970s, however, “it was clear to all concerned that the rules, the playing field, and the players would never be the same.” Judges began to use their powers “with increasing frequency as the pace of social and economic change quickened.” This evolution, Glendon astutely notes, was exacerbated, perhaps even driven, by the evolution of the legal community itself: “Without the support of a professional community oriented toward” traditional values, “it is hard to stay the course.” Ultimately, “lawyers and laypeople began to imagine that wise judges in black robes could cure social ills, and many unwise judges down the line began to believe they had the magic touch.”²⁴

That loss of structural and personal restraint was matched by a loss of interpretive restraint, as Glendon examines in her earlier book *Rights Talk* (1991). In the course of her analysis, she distinguishes the “real rights of men”—our “patrimony from our forefathers, the product of practical reason and the experience of men in civil

society”—from the modern conception of rights, the result of “sterile theorizing about ‘natural’ or ‘universal’ man.”²⁵ The new approach to rights, “in all its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.”²⁶

But as Glendon further explains, “rights talk” is popular precisely because its modern roots trace to America’s celebrated victories over racism. *Brown v. Board of Education* and other landmark civil-rights cases “shone like a beacon, lighting the way toward an America whose ideals of equal justice and opportunity for all would at last be realized.” But Americans’ “justifiable pride and excitement at the great boost given to racial justice by the moral authority” of *Brown* “seems, in retrospect, to have led us to expect too much from the Court”—and, *a fortiori*, from the lawyers who bring those cases to the court.²⁷

Glendon expresses this sentiment from a conservative standpoint, but her point is echoed by some on the left as well. The most recent example is Larry Kramer, who writes that “*Brown* and the other judicial innovations that soon followed were thus a wrenching test of the traditional liberal commitment to judicial restraint.”²⁸ Yet few have put it more succinctly than Nathan Glazer when he concluded that *Brown* “was indeed a heroic period in the history of the court. But even heroes may overreach themselves.” And like Glendon, Glazer affixes at least some of the blame on lawyers: “The courts will not be allowed to withdraw from the broadened positions they have seized, or have been forced to move into,” because of the lawyers that bring cases to court.²⁹

Yet who can blame lawyers for heroically pursuing justice in the courts? The success of Thurgood Marshall and his colleagues at the National Association for the Advancement of Colored People (NAACP) “etched itself into the American memory as a place where worthy representatives of a unified minority group made claims on a society that often did not want to hear them,” writes Harvard Law School’s Kenneth Mack in *Representing the Race* (2012). “Lawyers for other minority groups now model themselves on the work of the NAACP. Lawyers for conservative political groups do also.”³⁰

We honor not just *Brown v. Board of Education* but also *Loving v. Virginia*, which desegregated marriage. And we denounce the court’s “anticanon”—the cases in which

lawyers dissuaded judges from vindicating fundamental rights: for example, *Dred Scott v. Sandford*’s entrenchment of slavery, *Plessy v. Ferguson*’s defense of racial segregation, and *Korematsu v. United States*’ defense of wartime internment of Japanese Americans.³¹

And thus in any individual case, there will be some—many—who feel strongly that a given case requires Supreme Court intervention to vindicate individual rights. But the difficulty arises when we look past individual cases, toward Glendon’s broader trend, and we realize that excessive invocation of judicial power to advance new theories of rights wholly unmoored from tradition and national experience comes at a cost to republican self-rule.

The first of those costs is the “impoverishment” of political dialogue, as the public grows ever more accustomed to channeling political disputes into the absolutes of “rights talk.” In the long run, the evolution of politics from a system of prudence and accommodation to a clash of absolutes risks damaging the public’s capability of achieving political compromise.

Second, the modern approach to formulating and litigating abstract rights divorced from tradition and precedent risks fostering a certain cynicism toward precedent and tradition per se: a lawyer first devises an abstract theory of the “right” he wants to obtain in court and then he goes about the work of tailoring the precedents to fit his claim. This problem was best described by Justice Scalia, borrowing terms from another American tradition:

[E]very newborn American lawyer[s] . . . image of the great judge . . . is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.³²

Finally, the legal profession’s modern preference of removing too many issues from the political sphere and reframing them in terms of new “rights” to be decided by lawyers and judges does not merely impoverish political dialogue, but it also risks devaluing political action

altogether. Harvard’s Richard Parker presses this point when he writes, “[t]he idea is that active engagement in political life—win or lose—is good for you and for your community.” It is not merely good “insofar as its likely outcomes are good”—it is good in and of itself.³³ Yet when the legal profession—and the public, following lawyers’ lead—routinely removes certain issues from the political sphere to be decided instead by judges and lawyers applying “higher law,” we “appear not fully to grasp how this inflated discourse deflates ordinary people as political actors.”³⁴

In the long run, the evolution of politics from a system of prudence and accommodation to a clash of absolutes risks damaging the public’s capability of achieving political compromise.

Tocqueville favored the legal profession’s role as the primary “barrier” against the “lapses of democracy.” That said, Tocqueville wrote not merely of democracy’s dangers but also, more importantly, of democracy’s promise. As Harvey Mansfield and Delba Winthrop stress in the introduction to their translation of *Democracy in America*, “[i]n the end, Tocqueville was a democrat, and more of a democrat than many of his contemporaries.”³⁵ And so one must ask, when the modern legal profession persistently endeavors to remove so many issues from the democratic process under the banner of newly constructed “rights,” does it still serve as a barrier to democracy’s excesses, or as a barrier to democracy per se?

A “Tendency . . . to Reduce the Judicial Power”

Although Tocqueville suggested that “the people in a democracy do not distrust lawyers, because they know that their interest is to serve the people’s cause,” he also believed in the tendency of the people “to reduce the

judicial power” and, thus, the power of the legal profession. Remarking on state efforts to subject judges to democratic control, Tocqueville warned that “sooner or later these innovations will have dire results[.]” Tocqueville would have been surprised, then, to learn that his prediction proved false, even while lawyers and the courts have increased their role as a check against democracy.

As Larry Kramer observes in *The People Themselves*, the Warren Court practically invited a popular backlash in 1958 when it announced in *Cooper v. Aaron*—another desegregation case—that “the federal judiciary is *supreme* in the exposition of the law of the Constitution.”³⁶ The court’s assertion of “judicial supremacy” would have been anathema to Abraham Lincoln, who warned that “if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers.”³⁷ If any case’s rhetoric invited the populist backlash that Tocqueville assumed to be inevitable, *Cooper v. Aaron* was that case.

“But,” Kramer writes, “here is the striking thing: after *Cooper v. Aaron*, the idea of judicial supremacy seemed gradually, at long last, to find wide public acceptance.” The court’s decisions were still often controversial, but “[o]utright defiance . . . seemed largely to disappear.”³⁸ Counterintuitively, while lawyers and judges expanded their power in the civic sphere, the public seems no more eager to rein them in.

At least that is what political scientist James Gibson found in his recent study of public attitudes toward the Supreme Court: “In general, the American people are reasonably satisfied with how well the Court does its job, with 70.7% of the respondents rating the Court as doing a pretty good or great job.” But even more interesting is the fact that the court earned such high ratings from respondents who disagreed with the court’s decisions: less than half of the respondents said they found the court’s decisions to be “about right,” leading Gibson to conclude that the public’s satisfaction with the court depended on more than merely their “ideological position.”³⁹ To be clear, not all polls indicate such overwhelming approval of the court’s work; in Gallup’s annual poll, the court’s overall public approval hovers around 50 percent.⁴⁰

But looking past surveys, the best evidence of the Supreme Court’s institutional prestige may be found

in the preferences of the public's representatives in the other branches of government. The court's assertion of "judicial supremacy" in *Cooper v. Aaron* is matched, perhaps even exceeded by, the other branches' acquiescence to the court's supremacy as the ultimate arbiter of constitutional meaning.

A recent example is former president George W. Bush's signing of the McCain-Feingold campaign finance reforms of 2002. Presented with legislation that, by his own admission, raised questions about government regulation of political speech under the First Amendment, Bush did not veto the legislation or even promulgate a presidential "signing statement" stating his views on the constitutional question and pledging to apply the law accordingly. Instead, he ceded the entire matter to the Supreme Court: "I expect that the courts will resolve these legitimate legal questions as appropriate under the law."⁴¹

Proposals occasionally arise to curb the court's jurisdiction over controversial subjects, but they rarely succeed. There is certainly no sustained effort to reduce courts' and lawyers' power, despite Tocqueville's prediction. Citizens have entrusted the Constitution almost entirely to lawyers and judges.

"No Banner of Its Own"

Tocqueville mispredicted the public's ultimate view of lawyers and judges. But he also mispredicted lawyers' views of themselves as a class. In *Democracy in America*, he assures us that lawyers "form a power . . . that has no banner of its own"; rather, the legal profession "envelopes society as a whole, penetrates into each of the classes that compose it, works in secret, acts constantly on it without its knowing, and in the end models it to its desires."⁴² (Here, too, Tocqueville echoes Publius, who wrote that lawyers "truly form no distinct interest in society, and according to their situations and talents, will be indiscriminately the objects of the confidence and choice of each other, and of other parts of the community."⁴³)

True, lawyers penetrate every class and every interest group. But if they are working to model society to the legal profession's desires, they no longer do so in secret. Much of the legal profession acts as a distinct class unafraid to act publicly and politically.

The most obvious example of this is the American Bar Association (ABA). It was founded in 1878 "to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law and encourage cordial intercourse among the members[.]" If, as an early historian of the ABA admitted, the organization's early purposes "were, it must be confessed, somewhat miscellaneous," then the ABA quickly found its role in national politics.⁴⁴

Citizens have entrusted the Constitution almost entirely to lawyers and judges.

Within less than two decades, the ABA would take credit for spurring Congress to undertake a full reorganization of the federal judicial system into its modern system of "circuits" in order to increase the efficiency of federal litigation.⁴⁵ But the ABA's work was not limited to just the improvement of the workings of the courts. It undertook general social causes, beginning in the 1920s with "an educational project on constitutional government, intended to combat what were regarded as socialistic tendencies," and opposition to the Ku Klux Klan.⁴⁶

And its social activism continues today. In 2009 and 2010, the ABA passed formal resolutions calling on Congress to repeal the Defense of Marriage Act provision denying marriage benefits to same-sex couples and calling on all states to "eliminate all of their legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry."⁴⁷

But most importantly, the ABA's lawyers now play a central role in the federal government itself, enjoying semiofficial status as the evaluator of federal judicial nominations since 1948. The ABA occupies this role despite studies showing that its recommendations evince substantial ideological bias in favor of "liberal" nominees.⁴⁸

When President George W. Bush decided in 2001 to not rely on the ABA to formally vet his judicial nominees, the move sparked substantial criticism, beginning with the ABA itself. The association's president announced: "we cannot think of any constructive

purpose this serves. . . . As the best representative of all segments of the legal profession, the ABA is in the best position to” evaluate nominees. She urged that the ABA’s own work “has done much to instill public confidence and trust in the judiciary.”⁴⁹ Eight years later, President Obama’s corresponding decision to reinstate the ABA’s formal gatekeeping role was celebrated by those who denounced Bush’s decision.⁵⁰

The legal profession exerts an even stronger force at the state level, where in many states lawyers are empowered not just to rate the governor’s judicial nominees but also to pick his or her nominees in the first place. In several states, commissions comprised primarily of lawyers are empowered by state constitutions to propose slates of judicial nominees from which the governor is obligated to choose his or her judicial appointments. Known as the “Missouri Plan” (after the first state to adopt such a framework, in 1940)—or, by its proponents, as “merit selection”—the specific details vary from state to state, but they generally vest great power in lawyers to select the judges that will interpret and apply states’ constitutions and statutes.

In states with the “hardest” Missouri Plan (to borrow the taxonomy of law professor Stephen Ware), a majority of the commission’s members is constitutionally required to be lawyers or judges, and those members are in turn appointed by the state bar. In other words, lawyers pick lawyers to pick judges.⁵¹ As Ware concludes, this arrangement “gives disproportionate power to the bar in selecting the nominating commission, while eliminating the requirement that the governor’s pick be confirmed by the senate or similar popularly elected body.”⁵²

Former justice Sandra Day O’Connor is a vocal proponent of the Missouri Plan: while “it would be hyperbole to call merit selection an unbounded success,” she writes, it is “far better than the alternative.” Namely, better than judicial elections, which “conflict with the promise that a judge’s only constituency is the law.”⁵³

In the end, O’Connor’s defense of the Missouri Plan, like the ABA’s defense of its gatekeeper role, provides an interesting contrast to Tocqueville’s suggestion that lawyers and judges would win the public’s trust because they carried no banner separate from the broader public. Instead, O’Connor suggests that lawyers and judges would win the public’s trust only by separating themselves from—and insulating themselves against—the people.

“What Dominates among Lawyers”

Of course, Tocqueville was not so naïve as to suggest that lawyers were immune to the ordinary pull of self-interest. Even as he urged that lawyers’ “interest is to serve the people’s cause” and that the public does not “suppose them to have ulterior motives,” he conceded that “[w]hat dominates among lawyers, as among all men, is particular interest, and above all the interest of the moment.”⁵⁴ Tocqueville believed that the American republic would channel those self-interests toward the public interest, by the rank that lawyers would occupy in society and by their aforementioned habits of mind. Perhaps, to borrow another line from Publius, Tocqueville believed that for lawyers, as for elected officials, “the interest of the man” would “be connected with the constitutional rights of the place.”⁵⁵

Others have expressed belief that lawyers’ self-interest, rightly understood, could promote the public interest and order—first among them Abraham Lincoln:

Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good man. There will always be enough business. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife and put money in his pocket? A moral tone ought to be infused in the profession which should drive such men out of it.⁵⁶

Before long, however, the growth of corporate power led many to question whether the bar’s interests could truly be aligned with the public interest. Just a half century after Tocqueville’s account, another European visitor to the United States, Britain’s Viscount James Bryce (later ambassador to the United States) dedicated a chapter of his *The American Commonwealth* to “the Bar.” His assessment was a far cry from Tocqueville’s: “as compared with the facts of sixty years ago, it is clear that the Bar counts for less as a guiding and restraining power[.]”⁵⁷

Bryce ascribed this change to lawyers’ commercial priorities, reporting that “some judicious American

observers” saw in the prior three decades “a certain decadence in the Bar of the greater cities.”⁵⁸ A few years later, Bryce would conclude that “lawyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise.” And, far from retaining Tocqueville’s lawyerly habits of mind, they were “less than formerly the students of a particular kind of learning, the practitioners of a particular art.”⁵⁹

Louis Brandeis famously responded, not by rejecting Bryce’s indictment of the profession completely, but by suggesting “I am inclined to think that this view is not *altogether* correct”; invoking Tocqueville, he urged lawyers to focus less on pursuing the aims of corporate clients and more on the public interest, particularly amidst “the ever-increasing contest between those who have and those who have not.”⁶⁰

Perhaps a bit more feasibly, Brandeis’s fellow progressive (and Harvard Law School’s Dean Emeritus) Roscoe Pound urged mid-century lawyers to remain wary of “the general and increasing bigness of things in which individual responsibility as a member of a profession is diminished or even lost, and economic pressure upon the lawyer [to] make the money-making aspect of the calling the primary or even the sole interest.”⁶¹ But in offering such instruction, Pound, like Brandeis, was effectively conceding that Tocqueville and Lincoln’s basic premise no longer held: a lawyer’s self-interest was substantially at odds with prior notions of the legal profession’s virtues, and thus it would fall to the lawyers to restrain the former for the good of the latter.

Sixty years after Pound, the profession faces these questions more urgently than ever. In the intervening decades, the shifting landscape of legal practice has fostered no shortage of jeremiads criticizing the legal profession’s evolution. But no one has so eloquently considered the state of the modern legal profession against the backdrop of the historical ideal as Anthony Kronman in *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).

Kronman’s defense of the lost ideal or “lawyer-statesman” begins with expressly Tocquevillian premises. The ideal lawyer is distinguished not merely by civic motives or by “his special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it”⁶² but also—perhaps above all—by

his “practical wisdom,” the conservative habits of mind that Tocqueville praised.⁶³

And, like Tocqueville, Kronman stressed that such prudence was fostered by classical legal education and the common-law method, both of which ideally instill in lawyers a “tendency to look with suspicion on broad generalizations, to search for the qualifying exception to every abstraction, to insist on the importance of details,” and, ultimately, a willingness to see politics and civic life not as a clash of absolutes but, rather, as “a whole series of unthought-out local compromises and adjustments that reflect the plurality of human goods and soften the consequences of their inevitable conflict.”⁶⁴

That ideal, Kronman argues, is undermined today by a number of factors such as excessively theoretical modes of thought in American law schools. Most importantly, Kronman argues that the very nature of modern corporate legal practice undermines the lawyer-statesman ideal. As large law firms grow ever larger, “the nature of the work that lawyers at these large firms do . . . has become more specialized.”⁶⁵

That specialization no doubt has benefits, as Adam Smith would gladly reiterate. But those benefits are not without costs: first among them is “a decrease in the ability of any single lawyer to see a client’s problem whole and to address all the issues it presents.”⁶⁶ The same might be said for the legal profession’s relation to civic society: as lawyers increasingly specialize in defining and advocating new, abstract rights on narrowly defined issues, the less apt lawyers may become in recognizing how their causes fit into society’s broader fabric of interests, traditions, compromises, and constitutional structure.

Kronman identifies one more way in which the evolution of large-firm legal practice changes lawyers’ relationship to society: “the culture of today’s large firm not only tolerates a degree of candor about money that would have seemed completely unprofessional a generation ago, but actively encourages lawyers to be more and more exclusively preoccupied with it.”⁶⁷ While some might consider that change merely a “candid acknowledgment of what before was disingenuously concealed,” Kronman mourns the loss of what Tocqueville saw to be the lawyers’ nobler objectives:

A culture that reinforces the idea that the practice of law affords deeper satisfactions than the mere production of

income is bound to affect the ideals that lawyers share . . . and thus to exert a strong counterpressure against the natural interest that lawyers have always had in making money When this norm is relaxed, or reversed, as it has been in recent years, the counterpressure is removed and the interest in moneymaking begins inevitably to play a larger role in defining the aims of professional life[.]⁶⁸

As large firms are driven more and more by “productivity” metrics—primarily the industry’s standard benchmarks of “billable hours,” “leverage,” and “profits per partner”—the outcome is not merely a diminished interest in leaving private practice for public service but also an intensified interest of lawyers to dedicate more and more of their time (and their subordinates’ time) to billing clients, and less and less of it to other civic (and familial) pursuits.⁶⁹

Where Tocqueville saw lawyers as pursuing private interests that promoted the public interest, it is very difficult for lawyers at large law firms to meaningfully engage in civic life at all.

Or, as Chief Justice William Rehnquist urged a few years before Kronman, “if the associate is expected to bill two thousand or twenty-one hundred hours per year,” then “[d]oes such an associate have time to be *anything but* an associate lawyer in that large firm?”⁷⁰ (The question goes double for law-firm partners, who face not just billable-hour requirements, but also constant pressure to bill and collect, to recruit new clients, and to help manage the firm.)

Moreover, the professional climate that worried Rehnquist and Kronman a few decades ago seems positively quaint today, after large law firms became astonishingly more profitable. The economic turmoil of 2008 disrupted the legal profession, just as it disrupted many professions and industries, but its effect on “BigLaw’s”

corner of the legal profession was particularly acute precisely because it collided with the profession’s three-decade effort to transform itself into a new, radically more lucrative industry. “All attorneys in big law firms are making far more than they would have earned thirty years ago,” wrote retired law partner Steven J. Harper this year in a widely discussed book. “And if they were honest, a disturbingly large number of them would also acknowledge that money has not bought them happiness. . . . In so many ways—including career satisfaction, balance, and diversity—the profession has now become the principal casualty of its transformation.”⁷¹

It was one thing to ask these questions a few years ago, in times of plenty; it is quite another to ask them in an era that Harper calls, in his book’s title, *The Lawyer Bubble*. After the Great Recession, law-firm partners face a “New Normal”: there are “too many lawyers chasing too little work,” and clients have little patience to indulge the high-billing habits of prerecession times, as Citi Private Bank and Hildebrandt Consulting outline in their “2013 Client Advisory” on the legal industry.⁷²

The result is a generation of law-firm partners and associates who must work much, much harder to maintain their financial standing. To them, the overworked and alienated lawyers of Rehnquist and Kronman’s day had it easy. Where Tocqueville saw lawyers as pursuing private interests that promoted, or at least were consistent with, the public interest, it is very difficult for lawyers at large law firms to meaningfully engage in civic life at all.

Conclusion

Difficult, that is, but not impossible. Even today, every large firm can still boast of at least several lawyers who continue to exemplify the habits of mind and public spiritedness that moved Tocqueville to such heights of praise. Furthermore, as lawyer and author Jacob A. Stein reminds us, in big cities and small towns alike, “[t]here continues to be a thriving old-style law practice that is separate from the marketplace,” one that has not evolved so far from the traditional legal profession.⁷³ (Stein himself is the epitome of a lawyer whose reputation is marked both by his legal acumen and by his dedication to professionalism, craft, and community.)

Nevertheless, we face fundamental questions. Tocqueville described a legal profession in which lawyers' private motives and the public interest seemed easily reconcilable, with lawyers serving as a naturally conservative (in the small-c sense) influence. But neither of those facts seems self-evidently true today. To restore the legal profession as a whole to its Tocquevillian place in civic society would be to succeed where the exhortations of Rehnquist, Brandeis, and so many others failed. It would be a departure from well-established precedent, but in many respects, a welcome one.

Author Biography

Adam J. White is a lawyer in Washington, DC, a regular contributor to the *Weekly Standard*, and a contributing editor for *National Affairs* and *The New Atlantis*.

Notes

The views expressed in this brief are strictly my own; I do not write on behalf of my firm or any clients.

1. Martin Diamond, "The Federalist," in *As Far as Republican Principles Will Admit*, ed. William A. Schambra (Washington, DC: AEI Press, 1992), 38.
2. Alexander Hamilton, "Federalist No. 78," in *Federalist Papers* (May 28, 1788).
3. Terry Carter, "Crossing the Rubicon," *California Lawyer* 12 (October 1992).
4. *United States v. Windsor*, 525 US (2013) (Scalia, J., dissenting).
5. James Madison, "Federalist No. 10," in *Federalist Papers* (November 22, 1787).
6. James Madison, "Federalist No. 49," in *Federalist Papers* (February 2, 1788).
7. *Hein v. Freedom From Religion Foundation Inc.*, 551 US 587, 635 (2007) (Scalia, J., dissenting).
8. Alexis de Tocqueville, *Democracy in America*, trans. Harvey Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 252. For all uncited quotes from Tocqueville and for all section-heading quotes, see *Democracy in America*.
9. *Ibid.*, 250; 260–62.
10. *Ibid.*, 251.
11. *Ibid.*, 254.
12. Gordon Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf Inc., 1991).
13. *Ibid.*, 210.
14. Russell G. Pearce, "Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role," *University of Chicago Law School* 8, Roundtable 381(2001): 387. Similarly, G. Edward White writes that lawyers "served not only as private practitioners, but as legislators, representatives of persons seeking influence in legislatures, treatise writers, educators, and reporters of judicial decisions." See G. Edward White, *Law in American History: Volume 1: From the Colonial Years through the Civil War* (Oxford: Oxford University Press, 2012), 280.
15. Tocqueville had much more to say about the courts, famously dedicating another entire section of *Democracy in America* to the courts themselves and their influence on American politics. See Tocqueville, *Democracy in America*, 220.
16. *Ibid.*, 252.
17. *Ibid.*, 255.
18. *Ibid.*, 255.
19. William Blackstone, *Commentaries on the Law of England in Four Books* 1(1753), http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php?title=2140&Itemid=27.
20. White, *Law in American History*, 47.
21. Letter from Thomas Jefferson to Horatio G. Spafford, March 17, 1814, quoted in Julian S. Waterman, "Thomas Jefferson and Blackstone's Commentaries," *Illinois Law Review* 27 (1932): 629; 635.
22. Mary Ann Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrar, Straus & Giroux, 1994), 118.
23. *Ibid.*
24. *Ibid.*, 129; 131; 141.
25. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).
26. *Ibid.*, 14.
27. *Ibid.*, 6.
28. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004), 223.
29. Nathan Glazer, "Towards an Imperial Judiciary?" *The Public Interest* (Fall 1975), 123; 119.
30. Kenneth W. Mack, *Representing the Race: The Creation of the Civil Rights Lawyer* (Cambridge: Harvard University Press, 2012), 268–69.

31. Jamal Greene, “The Anticanon,” *Harvard Law Review* 125 (2011), 379.

32. Antonin Scalia and Amy Gutmann, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), 9.

33. Richard D. Parker, “Power to the Voters,” *Harvard Journal of Law & Public Policy* 25 (2000): 179; 180; 182.

34. For example, several years after penning those lines, Parker warned that the Massachusetts Supreme Judicial Court’s establishment of same-sex marriage in *Goodridge v. Department of Public Health* (2003) might someday “be remembered as emblematic of a period in which self-styled legal ‘progressives’ lost touch with the lessons of legal realism and the values of majoritarian democracy,” a peremptory attempt “to find something radically new in generic abstractions of a state constitution without much attention to anything in particular about that constitution or that state . . . It’s not to soon, now, to turn a cool eye on *Goodridge*, however much we believe in the justice of its mandate.” See Richard D. Parker, “Here, the People Rule: A Constitutionalist Popular Manifesto,” *Valparaiso University Law Review* 27, no. 3 (1994): 76. Also see *Harvard Law Bulletin*, “A Marriage Contrast: Two Professors, Two Takes on the Massachusetts Gay Marriage Ruling,” Summer 2004, www.law.harvard.edu/news/bulletin/2004/summer/viewpoints_main.php. Parker’s fellow liberal on the Harvard Law faculty, Laurence Tribe, offered a characteristically different view of the decision, celebrating it at the time and adding, years later, that “the issue of marriage equality is one bearing deeply on individual human rights and that the invocation of democratic and specifically majoritarian ideals to insist that it be resolved by majoritarian processes makes no more moral sense with respect to gay rights than it would have made with respect to issues of racial equality in the 1950s and 1960s.” See *Harvard Law Bulletin*, “Tribe Offers Predictions on Gay Marriage Rulings,” May 8, 2013, www.law.harvard.edu/news/2013/05/08_tribe-predictions-on-gay-marriage-rulings.html.

35. Harvey Mansfield and Delba Winthrop, “Editors’ Introduction,” in Alexis de Tocqueville, *Democracy in America* (Chicago: University of Chicago Press, 2000), lxxxvi.

36. *Cooper v. Aaron*, 358 US 1 (1958), 18.

37. Abraham Lincoln, “First Inaugural Address” (March 4, 1861).

38. Kramer, *The People Themselves*, 221.

39. James L. Gibson, *Public Reverence for the United States Supreme Court: Is the Court Invincible?* (St. Louis, MO: Department of Political Science, Washington University in St. Louis, July 15, 2012), 13–14, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107587.

40. Jeffrey M. Jones, “Party Divide Still Evident in Supreme Court Job Approval,” Gallup, September 28, 2012, www.gallup.com/poll/157754/party-divide-evident-supreme-court-job-approval.aspx.

41. George W. Bush, “Statement on Signing the Bipartisan Campaign Reform Act of 2002,” *Public Papers of the Presidents of the United States: George W. Bush* 1 (2004): 503.

42. Tocqueville, *Democracy in America*, 258.

43. Alexander Hamilton, “Federalist No. 35,” *Federalist Papers* (January 5, 1788).

44. Quoted in Max Radin, “The Achievements of the American Bar Association: A Sixty Year Record,” *ABA Journal* 25 (1939): 903–04.

45. Radin, “The Achievements of the American Bar Association,” 908. See also Norbert C. Brockman, “The History of the American Bar Association: A Bibliographic Essay,” *American Journal of Law History* 6 (1962): 269; 271.

46. Brockman, “The History of the American Bar Association,” 275–76.

47. American Bar Association, “ABA House of Delegates Resolution 112,” 2009; and American Bar Association, “ABA House of Delegates Resolution 111,” 2010.

48. See Susan Smelcer et al., “Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees,” *Political Research Questions* 65 (2012): 827.

49. American Bar Association, “Statement of Martha W. Barrett,” March 22, 2001, <http://web.archive.org/web/20020206045111/http://www.abanet.org/media/statement2.html>.

50. Debra Cassens Weiss, “ABA to Resume Early Review of Potential Judicial Nominees,” *ABA Journal* (March 17, 2009).

51. See Stephen J. Ware, “The Missouri Plan in National Perspective,” *Missouri Law Review* 74 (2009): 751; 762. Also see www.statecourtsguide.com/.

52. Ware, “The Missouri Plan in National Perspective,” 759.

53. Sandra Day O’Connor, “The Essentials and Expendables of the Missouri Plan,” *Missouri Law Review* 74 (2009): 480; 486–87.

54. Tocqueville, *Democracy in America*, 254; 252.

55. James Madison, “Federalist No. 51,” *Federalist Papers* (February 6, 1788).

56. Frederick Trevor Hill, *Lincoln the Lawyer* (New York: The Century Company, 1906), 102.

57. James Bryce, *The American Commonwealth* 2 (New York: The Macmillan Company, 1913), 673.

58. *Ibid.*, 675.

59. James Bryce, “America Revisited: The Changes of a Quarter-Century,” *The Outlook*, March 25, 1905, 734.

60. Louis Brandeis, *Business—A Profession* (Boston: Small, Maynard & Company, 1914), 318; 326.

61. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (St. Paul: The West Publishing Co., 1953), 354.

62. Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993), 14.

63. See, for example, *ibid.*, 15–16; 51–108.

64. *Ibid.*, 159; 161.

65. *Ibid.*, 275.

66. *Ibid.*, 289.

67. *Ibid.*, 295.

68. *Ibid.*, 296.

69. *Ibid.*, 303–07.

70. William Rehnquist, “The Legal Profession Today,” *Indiana Law Journal* 62 (1987): 151; 153.

71. Stephen J. Harper, *The Lawyer Bubble: A Profession in Crisis* (New York: Basic Books, 2013), 96–97.

72. Hildebrandt Consulting, “2013 Client Advisory,” http://hildebrandtconsult.com/uploads/Citi_Hildebrandt_2013_Client_Advisory.pdf.

73. Jacob A. Stein, *Eulogy for Lawyers: Written by a Lawyer* (Clark: The Lawbook Exchange Ltd., 2010), xviii.

Previous Briefs in This Series

- **Education for Liberty? The Shortcomings of Contemporary Civic Education Theories**, *Rita Koganzon*
- **Economists and *Res Publica*: The Virtues and Limits of Economic Analysis**, *Steven E. Rhoads*
- **Music and Civic Life in America**, *David Tucker and Nathan Tucker*
- **The Literary Profession and Civic Culture**, *Paul A. Cantor*
- **The Future of Journalism and Citizenship**, *Christopher Caldwell*
- **The Role of Political Science and Political Scientists in Civic Education**, *James W. Ceaser*