LIES, LIARS, AND LAWYERS AS LEGISLATORS: AN ARGUMENT TOWARDS HOLDING ATTORNEYS ACCOUNTABLE FOR VIOLATING THE MODEL RULE OF PROFESSIONAL CONDUCT 8.4(C) WHILST ACTING IN A LEGISLATIVE ROLE

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I. INTRODUCTION

On March 10, 2017, the American Civil Liberties Union (ACLU) filed a complaint with the Alabama State Bar against United States Attorney General Jeff Sessions, requesting an investigation into possible rules violations.[1] The complaint alleges a violation of Alabama Rule of Professional Conduct 8.4, which forbids a lawyer to engage in conduct involving fraud, dishonesty, or deceit.[2] The alleged misconduct occurred during sworn testimony on January 10, 2017.[3] While undergoing a confirmation hearing, Mr. Sessions responded to a question about whether or not "anyone affiliated with the Trump campaign" with the statement, "I have been called a surrogate at a time or two in that campaign and I did not have communications with the Russians."[4] One week later Mr. Sessions submitted written responses to questions posed by Senator Patrick Leahy, including the question; "Have you been in contact with anyone connected to any part of the Russian government about the 2016 election, either before or after election day?"[5] Mr. Sessions simply answered, "No."[6]

On March 1, 2017, the Washington Post reported that Mr. Sessions actually had met with the Russian Ambassador to the United States on several

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1. *ACLU Files Ethics Complaint Against Attorney General Sessions for False Statements Made During Confirmation Hearing*, AM. CIV. LIBERTIES UNION (Mar. 9, 2017), https://www.aclu.org/news/aclu-files-ethics-complaint-against-attorney-general-sessions-false-statements-made-during.
2. *Id.*; *see also* Model Rules of Prof'l Conduct r. 8.4(c) (AM. BAR. ASS'N 1983). (It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.).
3. Complaint at 2, Ala. State Bar Disciplinary Comm'n (2017), https://www.aclu.org/legal-document/sessions-ethics-complaint.
4. *Id.*
5. *Id.*
6. *Id.*

occasions.[7] Instead of admitting or clarifying such meetings, Mr. Sessions doubled down on his statements that he "never had meetings with Russian operatives or Russian intermediaries about the Trump Campaign."[8] The ACLU complaint claims that Mr. Sessions' statements and the Washington Post reports are incompatible with one another.[9]

Of course, Mr. Sessions would not be the first Washington insider to run afoul of the Model Rules of Professional Conduct for failing to be entirely truthful with Congress. Many will remember that during the impeachment hearings of President Bill Clinton, the President was untruthful on a number of occasions.[10] Rather than accept disbarment, President Clinton opted to accept a five-year suspension and $25,000 fine, as well as to resign his license to practice before the U.S. Supreme Court.[11] But these sorts of events, such as lying under oath to Congress, are uncommon and widely publicized.

Less well publicized, indeed almost taken for granted, are the statements we see on television or hear on the radio every day. For example, on October 3, 2013, during an interview on MSNBC, Senator Tom Cotton (R- AR) made the demonstrably false statement that the health care market places have "no privacy protections."[12] A reading of the Affordable Care Act would have clearly shown that federal regulations within the Affordable Care Act (which Cotton was criticizing at the time of his statement) forbid the system's data hub from storing user data.[13] Senator Cotton knew, or had reason to know that his statement was untrue, yet he made it anyway, hoping that his statements would influence voters to oppose the Affordable Care Act.

This essay looks at Model Rule of Professional Conduct 8.4(c) (often referred to hereafter simply as the Dishonesty Rule) and questions its scope and authority when applied to statements made by elected legislators who are lawyer-legislators. In using the term "lawyer-legislator," I specifically mean an elected member of a state or federal legislative body who holds a law license, though the license is not necessarily being used in the capacity as a legislator. The fact that the lawyer-legislator is not acting in a professional capacity becomes important later on.

Section II begins by discussing the origins and breadth of the ABA Model Rules of Professional Conduct.[14] Next, it turns specifically to Model

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7. *Id.*
8. *Id.*
9. *Id.*
10. *See* Clinton v. Jones, 520 U.S. 681 (1997) (Subsequently, President Clinton would be charged with perjury and obstruction of government.).
11. Stephen Braun, *AP FACT CHECK: Trump Says Bill Clinton Lost License*, THE SEATTLE TIMES (Oct. 9, 2016) https://www.seattletimes.com/nation-world/nation-politics/ap-fact-check-trump-says-bill-clinton-lost-law-license/.
12. Julie Kliegman, *The Health Care Marketplaces Have 'No Privacy Protections,' Cotton Says,* POLITIFACT (Oct. 9, 2013, 1:50 PM), http://www.politifact.com/truth-o-meter/statements/2013/oct/09/tom-cotton/aca-marketplaces-have-no-privacy-protections-cotto/.
13. *Id.*
14. *See infra* Section II.A.

Rule 8.4(c), discussing its text and meaning.[15] Afterwards, it discusses the types of officeholders that Model Rules 8.4(c) has been used to discipline, while also noting the absence of sitting legislators from the case law disciplining dishonest attorneys.[16] Finally, it discusses when and in what scenarios the Dishonesty Rule has been applied.[17]

Section III addresses how the Model Rules ought to apply to lawyer-legislators. This begins with a brief discussion of the history of lawyers in American Politics as well as the diminution of the role of lawyers in modern legislatures.[18] Next, it discusses the role of the legislator as a leader in the community and the contractual nature of the relationship between legislators and their constituents.[19] This section finishes up by arguing that compulsory enforcement of the rules is the optimum manner of interpreting the Model Rules.[20]

Section IV of this essay examines objections to using the Dishonesty Rule to force accountability among lawyer-legislators.[21] First it examines the argument that the words of elected lawyers are constitutionally protected political speech and therefore not subject to censure.[22] Next it examines the argument that statements made by elected lawyer-legislators are subject to immunity and making it impossible for courts to punish lawyer-legislators for their actions.[23]

Finally, Section V discusses the benefits of increased enforcement of the Dishonesty Rule against lawyer legislators. First, it argues that lawyer-legislators will take notice of increased enforcement, which will result in more honest discourse between elected officials and their constituents.[24] Second, it argues that because the possibility of discipline by ethics boards is limited to attorneys, self-interested politicians will force change and political ethics will shift across the board due to the creation or increased enforcement of ethics rules for those who are not lawyers.[25] Finally, it suggests two possible methods of enforcing the ethics rules: (1) state bar ethics board committees dedicated to enforcing the ethics rules against politicians; and (2) each state legislature and the United States Congress drafting rules requiring

15. *See infra* Section II.B.
16. *See infra* Section II.C.i.
17. *See infra* Section II.C.ii.
18. *See infra* Section III.A.i.
19. *See infra* Section III.A.ii.
20. *See infra* Section III.B.
21. *See infra* Section IV.
22. *See infra* Section IV.A.
23. *See infra* Section IV.B.
24. *See infra* Section V.A.
25. *See infra* Section V.B.

the filing of an ethics complaint when a lawyer-legislator is found to have been dishonest.[26]

II. MODEL RULES AND WHEN THEY APPLY

Attorneys, by way of their education and training, command a certain public image. People come to them in their time of need in order to receive good advice about how to approach sensitive or challenging issues, and they place a great amount of trust in the integrity of their attorney. Because of this position of trust which lawyers occupy, it is imperative that there be a code of ethics applicable to attorneys, and even more so when those lawyers occupy even greater levels of trust and authority, such as a seat in the House or the Senate.

A. The Model Rules

All things must begin somewhere, and the standardization of legal ethics rules began in 1905 when the American Bar Association appointed a five-member committee to discuss drafting a professional ethics code.[27] The Report of the Committee on Code of Professional Ethics, released to the ABA in the summer of 1906, addressed the need for uniform rules meant to discipline the unethical lawyers who seemed to be joining the bar in large numbers.[28] "We cannot be blind," the report said, "to the fact that, however high may be the motives of some, the trend of many is away from the ideals of the past and the tendency more and more to reduce our high calling to the level of a trade."[29] Lawyers, the report continued, should only be allowed to serve during good behavior and "'good behavior' should not be a vague, meaningless or a shadowy term devoid of practical application."[30] Finally, the report recommended that ethics rules should be "crystallized into a written code" that could be used to discipline or bar from practicing a lawyer who violated its provisions.[31]

Because of the report, the American Bar Association released the Canons of Ethics in 1908; however, the Canons lacked the force of rules and tended to be viewed more as an exhortation towards morally acceptable behavior.[32] Moreover, the Canons, in their preamble, described themselves

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26. *See infra* Section V.C.i-ii.
27. Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1306 (2003), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3879&context=flr, (citing 29 ABA Reports 600 (1906)).
28. *Id*. at 1307.
29. *Id*. at 1307 (citing 29 ABA Reports 600, 601 (1906)).
30. *Id.*
31. *Id.*
32. *Id*.

as not comprising a complete set of ethics rules.[33] This lead to Supreme Court Justice Harlan Fiske Stone describing the Canons as "for the most part generalizations designed for an earlier era."[34] Nonetheless, the Canons of Ethics persisted.

In the 1960's, American Bar Association leaders again became aware of the same kind of growth that the law had experienced half a century earlier.[35] Between 1963 and 1973, law school enrollment ballooned from 49,552 to 106,102.[36] In the same time period, the number of bar admissions more than doubled.[37] In 1964, facing this wave of changes, American Bar Association President Lewis Powell, Jr. requested that the House of Delegates create a special commission (later known as the Wright Committee) to determine whether changes should be made to the Canons of Ethics.[38] The Wright Committee responded by creating the Model Code of Professional Responsibility, which was adopted by the House of Delegates in 1969.[39] Subsequently, following a major campaign by the American Bar Association, the majority of states and federal jurisdictions adopted part or all of the Model Rules of Professional Conduct.[40]

The ethics rules continued to receive scrutiny, and "in 1977, the American Bar Association created the Commission on Evaluation of Professional Standards," tasked with reevaluating the "ethical premises and problems" facing the legal profession.[41] Upon finding that the Model Code of Professional Responsibility would not be a sufficient statement of the law governing the legal profession, "the Commission undertook a six year study and drafting process."[42] In 1983, the Commission unveiled the new Model Rules of Professional Conduct.[43]

Almost concurrently with the creation and adoption of the Model Rules of Professional Conduct, steps were taken to begin to test attorneys' knowledge and understanding of the rules of ethics. In March of 1980, the first students sat for the Multistate Professional Responsibility Exam (MPRE).[44] Soon after the first sitting for the MPRE, other states were quick

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33. *Id*. at 1307–08.
34. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934).
35. Hayden, *supra* note 27, at 1308.
36. *Report of the Section of Administrative Law*, 99 ANN. A.B.A. REP. 417 516 (1974) (Exhibit: Legal Education and Bar Admission Statistics, 1963-1973).
37. *Id*.
38. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N, Preface 2016).
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *See* Hayden, *supra* note 27, at 1299.

to sign on.[45] Today, the only U.S. jurisdictions who do not require the MPRE are Maryland, Puerto Rico, and Wisconsin.[46] These jurisdictions, however, require that some testing over state ethics rules be included on the bar exam.

Between 1983 and 2002, the American Bar Association House of Delegates amended the Rules fourteen times.[47] These amendments addressed issues such as multijurisdictional practice[48] and corporate responsibility.[49] The American Bar Association also created the Standing Committee on Ethics and Professional Responsibility, tasked with interpreting the Rules, recommending appropriate amendments and clarifications, and issuing opinions interpreting the Model Rules of Professional Conduct and the Model Rules of Judicial Conduct.[50]

Given the long history of ethics rules for lawyers, the mandatory testing for those wishing to practice law, and the ready availability of opinions interpreting the Model Rules of Professional Conduct, there is no excuse for any lawyer to be unfamiliar with what is required ethically in any given situation. Many states provide services to help attorneys address possible ethical issues simply by picking up the phone.[51] Still, violations persist. The remainder of this article will look at one specific rule that is frequently violated by lawyers who have turned politician.

B. Model Rule 8.4

The Model Rules of Professional Conduct cover a variety of topics from attorney competence[52] to firm names and letterhead.[53] Most relevant to this essay is the rule governing misconduct. Model Rule 8.4 discusses the various activities which constitute attorney misconduct.[54]

First, Rule 8.4(a) states that it is misconduct to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."[55] The second, and more important, section that applies is Rule 8.4(c), which states it is misconduct to

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45. *Id*.
46. *Jurisdictions Requiring the MPRE*, NAT'L CONF. OF BAR EXAM'RS, http://www.ncbex.org/exams/mpre (last visited Oct. 15, 2017).
47. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N., Preface 2016).
48. *Id*. (rules 5.5 and 8.5 amended in 2002).
49. *See* Lawrence A. Hamermesh, *12 ABA Task Force on Corporate Responsibility: A Preliminary Report 2*, AM. BAR ASS'N, https://apps.americanbar.org/buslaw/blt/2002-11-12/tf_summary.html. (last visited Oct. 15, 2017).
50. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N., Preface 2016).
51. *E.g.*, *Ethics*, ILL. ST. BAR ASS'N, http://www.isba.org/ethics (last visited Oct. 15, 2017).
52. Model Rule of Prof'l Conduct r. 1.1 (Am. Bar Ass'n 2016).
53. *Id*. at r. 7.5.
54. *See id.* at r. 8.4.
55. *Id.* at r. 8.4(a).

"engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[56]

Rule 8.4(c) has often been invoked by courts as grounds for sanction in cases involving political campaigns.[57] In particular, it has been applied in the context of negative campaign tactics that continue to increase each election cycle.[58] The question in such cases is how to draw the line between aggressive tactics and unethical practices.[59] The scope of Rule 8.4(c) is greater than just mere campaign tactics, however, and the scope of the application of Rule 8.4(c) will be discussed later and in greater detail.

C. Model Rules as Rules of Law

Having looked in depth at the Model Rules of Professional Conduct and narrowed the rules pertinent to this argument, two questions remain to be asked: 1) to whom do these rules apply, and 2) at what times do the rules apply? While the comments and rules themselves can be quiet as to the answers to these questions, case law can reveal some manageable conclusion.

1. To Whom Do They Apply?

On its face, the question "to whom do the Model Rules of Professional Conduct apply" seems deceptively simple. The answer, of course, is to all lawyers.[60] However, Rule 8.4(c) has not been applied evenly to all lawyers engaged in public service. The political arena is packed with lawyers, some serving the public in official legal roles (judges, prosecutors, Attorneys General, etc.), some serving in high profile non-legal roles (President, Vice-President, legislators, heads of administrative agencies), and finally, some serving as advisors to all of the above.[61]

The option to apply the Rules has often been sporadic and political in nature. For example, for Presidents Nixon and Clinton, as well as Mr. Sessions, the inquiries into their behavior were spurred by political opponents taking advantage of egregious lapses in judgment. Along with sitting officials, candidates for office have also felt the wrath of courts for ethics violations.[62]

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56. *Id.* at r. 8.4(c).
57. Robert F. Housman, *The Ethical Obligations of a Lawyer in a Political Campaign*, 26 U. MEM. L. REV. 3, 53 (1995).
58. *Id*.
59. *Id*. at 54.
60. *See* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N, Preamble and Scope 2016).
61. Consider Attorney General Jefferson Sessions, for example.
62. *See* State v. Russell, 610 P.2d 1122 (Kan. 1980) *cert. denied*, 449 U.S. 983 (1980) (A candidate for the Board of Public Utilities of Kansas City was disciplined for political advertisements stating false

Thus far, however, state Supreme Courts and state-run ethics boards have turned a relatively blind eye to the actions of legislators (both local and federal), like the prior statement by Senator Cotton.[63] Why this is the case, we do not know; yet legislators are given great leeway in their interactions with their constituents, the media, and each other. Consequently, voters are less informed, the media is complicit in spreading rumors, and the reputation of the legislature is tarnished.

2. When Do They Apply?

a. Campaigns

One of the most frequent areas to which the Dishonesty Rule has been held to apply is on the campaign trail. In April 1979, attorney J.R. Russell ran for an elected position on the Board of Public Utilities of Kansas City, Kansas.[64] During the campaign, Mr. Russell released an article attacking both his opponent and the District Attorney with unsubstantiated allegations of criminal acts.[65]

While many of the allegations contained in the article were found to be mere political speech, protected under the First Amendment, the Kansas Supreme Court found that Mr. Russell had in fact violated the Dishonesty Rule by making statements that he knew to be untrue.[66] Mr. Russell's case is not unique; other cases have similarly found that despite the political aspects of certain speech, the knowledge that statement is untrue or could easily be found to be untrue through simple research constitutes a violation of the Dishonesty Rule.[67]

b. Congressional Testimony

As President Clinton learned in the aftermath of his sexual harassment case against Paula Jones, lying to Congress can have dramatic results. For lying to Congress, President Clinton received a five-year suspension and $25,000 fine from the State of Arkansas.[68] He also chose to resign his U.S.

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claims that that his opponent engaged in unlawful behavior); *see also* State *ex rel.* Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46 (Neb. 1982), *cert. denied*, 459 U.S. 804 (1982) (A candidate for County Attorney faced discipline for making false statements regarding an opponent engaging in illegal conduct.).

63. *See* Kliegman, *supra* note 12.
64. State v. J.R. Russell, 610 P.2d 1122, 1125 (Kan. 1980).
65. *See id*. at 1127–29 (discussing allegations of embezzlement in the amount of $600,000 as well as alleging that the District Attorney turned a blind eye towards illegal contracts).
66. *Id*. at 1128.
67. *See In re* Baker, 542 P.2d 701 (Kan. 1975) (untrue statements about an opponent's eligibility for a pension violated the Dishonesty Rule).
68. James Vicini, *As Sanction Looms, Clinton Resigns from High Court Bar*, L.A. TIMES (Nov. 11, 2001), http://articles.latimes.com/2001/nov/11/news/mn-2733.

Supreme Court license in the face of disbarment.[69] As for Mr. Sessions, time will tell, but it is encouraging that state ethics boards are taking such action seriously.

c. Criminal Acts

The most common example of a lawyer-legislator violating Rule 8.4(c) is when the lawyer-legislator commits a criminal act.[70] When it comes to criminal acts committed by lawyers, there is not a more shocking, nor influential, example of lawyers behaving badly than the Watergate Scandal. Most prominent amongst the conspirators was President Nixon, who was disbarred for a number of criminal charges, including allegations that he "improperly obstructed an FBI investigation of the unlawful entry into the headquarters of the Democratic National Convention"[71] as well as a host of other allegations of concealing and encouraging others to conceal information regarding the Watergate Scandal.[72]

Other sitting officials serving in non-law oriented positions have also found themselves drawing the ire of state ethics boards for unlawful activities conducted outside of their work as lawyers, such as Nixon's Vice-President, Spiro Agnew, who, two years before Nixon's own disbarment, was disbarred by the Maryland State Bar Association after being convicted of tax evasion.[73]

But, many such cases are also much less high profile, such as *In re Rivas*, in which a lawyer was convicted of multiple felonies for providing false information to the Registrar of Voters during a judicial race.[74] In the aftermath of his criminal conviction, Rivas found himself disbarred for moral turpitude.[75] However high profile the case may actually be, the most important take is that courts and ethics panels have felt more than comfortable doling out discipline for attorneys convicted of criminal actions. Further, it is beyond dispute that the Model Rules of Professional Conduct may be applied to protect the public and the Bar itself from the actions of attorneys who engage in criminal acts.

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69. *Id*.
70. *E.g.*, *In re* Richard Nixon, an Attorney, 385 N.Y.S.2d 305 (N.Y. App. Div. 1976).
71. *Id*. at 306.
72. *Id*.
73. Maryland State Bar Assoc., Inc. v. Agnew, 318 A.2d 811, 811–13 (Md. 1974) (discussing the conviction for tax evasion and subsequent disbarment of Mr. Agnew).
74. *In re* Rivas, 781 P.2d 946, 948 (Cal. 1989).
75. *Id*. at 947–51.

d. Any Time?

One other occasion stands out as significant as to when any licensed attorney can be found to be violating the Model Rules. That occasion is when a lawyer is acting in a non-legal capacity which does not require a law license or degree.[76] Courts and ethics boards have not felt restrained from meting out discipline for lawyers who abuse their positions. One example is the case of Edmund Wilson, Jr. of Missouri who was elected to the Board of Directors and later elected president of the Board at Ferrier-Harris Home for the Aged.[77] While serving as president, Mr. Wilson wrote sixty-seven checks on two bank accounts of the Home payable to himself or to cash.[78] Between March 1 and November 15, 1961 he stole $6,212.47.[79]

In reviewing the case of Mr. Wilson, Jr., the Missouri Supreme Court made a statement that will be further examined in the next section, specifically that "the purpose of proceedings of this character is not to punish the attorney; instead, it is to protect the public and the integrity of the Bar, and to preserve the courts from the ministrations of persons unfit to serve therein as attorneys."[80] That courts and state ethics boards consider themselves capable of doling out consequences for activities beyond the scope of a lawyer's legal actions is significant. This is reinforced by the comments to Rule 8.4 and is critical to holding lawyer-legislators accountable for their conduct.

III. LAWYER-LEGISLATORS AND THE DISHONESTY RULE

Lawyer-legislators have a long and storied history in American politics and have been the authors of many great changes.[81] It is difficult to discuss the legislative history of our country without acknowledging the significant roles lawyers have played as advocates of swift change[82] as well as voices of moderation.[83] However, it is because of the significance of the roles lawyers have played as legislators and leaders that it is imperative lawyer-legislators be required to deal honestly with their constituents. In an increasingly complex world, the information asymmetry between representative and represented is enormous, and it is easy for those with the information to manipulate those without, either for personal or political gain. It is for that

76. *See* Model Rules of Prof'l Conduct (Am Bar Ass'n, Preamble and Scope 2016).
77. *In re* Edmund Wilson, Jr., 391 S.W.2d 914, 916 (Mo. 1965).
78. *Id*.
79. *Id*.
80. *Id*. at 920.
81. Consider the Emancipation Proclamation ordered by Abraham Lincoln, for example.
82. Consider the roles of men like John Adams, Patrick Henry, and later Thaddeus Stephens.
83. Consider the actions of John Jay, John Dickinson, and later Abraham Lincoln.

purpose that we now examine the role of lawyers as legislators and the importance of the Dishonesty Rule.

A. The Role of Lawyers as Legislators

1. History of Lawyers as Legislators

Many of the Founding Fathers were lawyers, and since the early days of the United States, lawyers have played a pivotal role as legislators in our government.[84] As lawyers elected to public office, lawyer-legislators hold the trust of the public and are expected to fulfill the ideal that has been termed the lawyer-statesman.[85] The idea of a lawyer-statesman is a concept that has shaped the aspirations of many lawyers,[86] and it should be differentiated from the concept of the lawyer-legislator who is merely a member of a state or federal legislative body that happens to be a licensed attorney. The concept of a lawyer-statesmen, however, is bigger than just state or federal legislators; it includes presidents, judges, congressmen, and every day lawyers.[87] Therefore, it deserves a deeper look.

Yale Professor Anthony Kronman has argued that the ideal of the lawyer-statesman represents the optimal character trait is a fusion of the principled political values of a statesman combined with the normality surrounding legal practice.[88] The lawyer-statesman combines attributes such as public service along with prudence and practical wisdom.[89] Professor Hopkins has noted that the idea of the lawyer-statesman is deeper than a belief that the "virtues of prudence and public service are desirable attributes. It implies that these qualities have special importance to lawyers."[90]

Early examples of the lawyer-statesman in American history include individuals such as Alexander Hamilton, John Marshall, James Madison, and Thomas Jefferson.[91] By the 1700's, formal legal training had become fairly common in the American Colonies. Many of the wealthy families sent their sons to study law at the various Inns of Court in England, whilst others were graduates of colleges such as Harvard, William and Mary, Yale, King's

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84. Anna Massoglia, *The Founding Fathers as Lawyers*, LAWYERIST, http:/www.lawyerist.com/founding-fathers-as-lawyers (last updated July 4, 2017).
85. *See* Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS L. REV. 839, 849–50 (2005).
86. *Id*. at 849.
87. *Id*. at 843.
88. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 109 (1993); *see also* Hopkins, *supra* note 85, at 849.
89. *See id*.
90. Hopkins, *supra* note 85, at 850.
91. *See* William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J. L. & PUB. POL'Y 537 (1986).

College (now Columbia University) and College of New Jersey (now Princeton).[92] Along with formal education, many of the colonies had formally established qualifications and rules for admission to the bar.[93]

This formal education helped define the role of the lawyer-statesman in American politics. Many of the ideals behind the American Revolution were grounded in legal principles that Colonial lawyer-statesmen found to be embedded within English Law.[94] Similarly, the formal legal training allowed those same lawyer-statesmen to anticipate the effects of British statutes subsequently imposed upon the colonies, and use those anticipated effects as a political weapon.[95] Finally, as practicing attorneys, many early lawyer-statesmen contributed meaningfully to the creation of the U.S. Constitution, as well as federal and state legal structures in a manner unavailable to non-legal experts.[96]

2. Declining Role of Lawyers

Professor Hopkins has identified a general consensus that the significance of the lawyer-statesman has declined over time.[97] One of the reasons suggested for the decline is that the political issues the colonists faced during the founding of the country no longer exist.[98] While it is certainly true that the task of building a new government no longer lies ahead of us, the skills and education necessary for creating new laws and effective governance structures are as valuable now as ever before.

A second reason Professor Hopkins suggests for the declining role of lawyer-statesmen is the growth and rise to dominance of administrative agencies in both federal and state government.[99] Due to their subject matter expertise, administrative agencies often assist Congress and state legislatures with drafting legislation, relying on their own lawyers, economists and specialists to analyze the possible effects of new laws. The appearance of administrative agencies has meant that some of the skills formerly limited to those with formal legal educations, such as the ability to draft, analyze, and explain the effects of legislation, are no longer necessary for state and federal legislators.[100]

The third reason Professor Hopkins suggests for the decline in lawyer-statesmen is a fundamental change within the legal profession, intrinsically

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92. Hopkins, *supra* note 85, at 852; *see also* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 158 (1953).
93. *Id*. at 852.
94. *Id*. at 853.
95. *Id*. at 854
96. *Id*. at 854–55.
97. *Id*.
98. *Id*. at 856.
99. *Id*.
100. *Id*. at 856–57.

moving it away from the lawyer-statesman idea.[101] As firms have taken a view more interested on the bottom line, and lawyers are pressured to achieve a set number of billable hours in order to stay competitive for a partnership, the profession has moved farther away from the learned profession of its early days and has come to resemble a more general business occupation.[102]

Finally, Professor Hopkins has suggested that the nature of modern political campaigns has contributed to the decline of the lawyer-statesman.[103] He argues that the reasoning and oratorical skills developed by lawyers are less important in modern campaigns than in years past, where stump speeches and written pamphlets played into the lawyers strengths.[104] Instead, in the age of mass media coverage, Professor Hopkins believes that good marketing now dictates the results of a campaign.[105]

I would argue there is a fifth reason for the decline in the role of the lawyer-statesman; partly related to the rise of administrative agencies. The reason I would put forward is legislators now have to maintain an office staff, and most, if not all, have at least one lawyer on staff. These staff attorneys provide legal advice and analyze policy issues and their potential effects on legislation. In addition, considering that a great amount of legislation is also put forward by special interest groups (drafted by their own in-house lawyers and policy experts), the necessity for legislators to have a legal education has virtually disappeared.

B. Lawyer-Legislators and the Dishonesty Rule

1. Lawyer-Legislators Occupy a Role of Public Trust

Having looked briefly at the history of lawyers in American politics, it is clear that while the ideal of the lawyer-statesman has declined, the lawyer-legislator still occupies a role of public trust. Like all legislators, both state and federal, lawyer-legislators must endure an electoral process which places them in front of their potential future constituents and forces them to commit to a series of campaign goals and promises. Voters expect their candidates to be honest with them, or at the very least, to be more honest than dishonest.[106]

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101. *Id*. at 857.
102. *Id*. at 857–58; *see also* Richard A. Posner, *J. Byron McCormick Lecture: Professionalisms*, 40 ARIZ. L. REV. 1, 6 (1998) (lamenting that part of the decline of the lawyer-statesman is due to the demand for specialist lawyers rather than the wisdom of more generalist lawyer-statesmen).
103. Hopkins, *supra* note 85, at 858.
104. *Id*.
105. *Id*.
106. Jonathan Chew, *Republicans Want Honesty in a Leader More Than Democrats*, FORTUNE (Oct. 23, 2017, 4:07 PM), http://fortune.com/2016/04/01/poll-qualities-leadership/ (Finding that Honesty

This combination of promises and expectations create a sort of contractual relationship between legislators and their constituents. The would-be politician promises, "In return for your vote, I will represent you and your interests to the best of my ability in the legislature." Often it is either explicitly stated or heavily implied that the candidate will choose how to vote based on listening to and learning about the needs of their constituents. In order to accept this generous offer, all the constituents need to do is vote for the candidate.

The offer stands: in return for your vote, I will represent you in the legislature and cast my vote in support of your wishes, which I will discover by paying attention to your needs by various methods (town hall meetings, emails, phone calls, online surveys, etc.). Once the candidate is elected, the constituents trust their new representative to live up to their end of the bargain and deal honestly with the voters whose votes put them in office to begin with.

What the voters do not expect is a betrayal of their trust by their newly elected representative. They do not expect to be fed disinformation such as the kind offered by Senator Cotton,[107] in order to sway their vote away from their own interests and towards the interests of bigger donors. In taking votes from constituents and then intentionally or recklessly feeding them factually inaccurate information, a lawyer-legislator fails "to observe the elemental obligation of honesty."[108] Although lawyer-legislators are not acting within their capacity as lawyers, they are still subject to the rules regarding ethical behavior.[109]

To impose discipline upon lawyer-legislators for dishonest behavior is well within the bounds of propriety. The court in *In re Robert Edmund Wilson, Jr.* was clear in its statement that the purpose of disciplinary proceedings "of this character is not to punish the attorney; it is to protect the public and the integrity of the Bar, and to preserve the courts from the ministrations of persons unfit to serve therein as attorneys."[110] To punish a lawyer-legislator for behavior that is unethical but not illegal would be wrong, but to remove the credentials of a person who has demonstrated that they are not worth of trust is not punishment, rather, it is pragmatism.

2. The Dishonesty Rule was Intended for Such Positions

The drafters of the Dishonesty Rule foresaw the possibility that a lawyer holding public office may abuse the trust placed in him or her and act

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and Integrity were the two most important qualities amongst Republicans, Democrats, and Independents.)

107. Kliegman, *supra* note 12.

108. *In re* Wilson, 391 S.W.2d 914, 920 (Mo. 1965).

109. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N 1983).

110. *Wilson*, 391 S.W.2d at 920.

dishonestly.[111] Further, the drafters of the Model Rules considered the fact that those who would, through dishonesty, abuse the trust placed in them by the public, may not be fit to serve the public as attorneys or officers of the court.[112] This is not a punitive matter, but rather a protective one, intended to look after the interests of the public who may be disadvantaged by the dishonest actions of an attorney who happens to hold a public office.[113]

It is no surprise that the Dishonesty Rule first appeared after the Watergate cover-up in which President Nixon and other lawyers holding public office were convicted of conspiracy, perjury, and obstruction of justice.[114] Nor is it any surprise that subsequent courts would find that lawyers holding public office are held to a higher standard due to their "(1) professional and (2) public trustee responsibilities."[115] Given the number of important cases, and the magnitude of the subject matter, it is somewhat surprising how few cases exist reporting dishonest behavior by lawyer-politicians.[116] This could mean many things, but the two most likely are that (1) states are hesitant to initiate proceedings against lawyer-legislators for dishonest statements; or (2) states are not reporting cases in which lawyer-legislators have been the subject of disciplinary proceedings. Between these two possible reasons, the former is more likely than the latter, and among the few cases found, even fewer are on point.[117] The next section will explore several reasons why such cases may not be pursued.

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111. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 1983).

112. As the commentary to Rule 8.4 has firmly stated:
("Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation."). MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 7.

113. *Id.*

114. *See* United States v. Halderman, 559 F.2d 31, 51 (D.C. Cir. 1976) (discussing the criminal charges against several Nixon administration lawyers, including Attorney General John Mitchell, for their role in Watergate); *see also In re* Nixon, 385 N.Y.S.2d 305, 306 (N.Y. App. Div. 1976) (discussing the proceedings against Richard Nixon, a lawyer and ex-President).

115. Hopkins, *supra* note 85, at 872; *see also In re* Olson, 300 N.W. 398, 400 (Minn. 1941) (a public office is a public trust "created for the benefit of the public, not for the benefit of the incumbent"); State *ex rel.* Neb. State Bar Ass'n v. Douglas, 416 N.W.2d 515, 529-30 (Neb. 1987) ("throughout the United States, public officers have been characterized as fiduciaries and trustees, charged with honesty and fidelity in administration of their office and execution of their duties").

116. Hopkins, *supra* note 85, at 874.

117. *See, e.g.*, Comm. On Legal Ethics v. Boettner, 422 S.E.2d 478 (W. Va. 1992) (disciplinary action regarding a lawyer holding the elected position of state senator for willfully evading payment of federal income taxes).

IV. POLITICAL SPEECH OR DISHONESTY: BARRIERS TO RULE ENFORCEMENT

Assuming that it is possible to hold lawyer-legislators accountable, through either the courts or the state ethics boards, one might naturally question whether any potential defenses exist which would defeat an attempt at a disciplinary action. As Judge Easterbrook has pointed out, disbarment, while not an adversarial proceeding, still represents a case or controversy under Article III of the Constitution and is subject to judicial action.[118] Ergo, at least two possible defenses exist which could potentially defeat an attempt to sanction a lawyer legislator: (1) the existence of legislative immunity, or (2) Constitutional free speech protections.

A. Legislative Immunity

1. Are Lawyer-Legislators Protected by Legislative Immunity?

The first potential limitation on using the Dishonesty Rule to sanction lawyer-legislators, is the legislative immunity granted to legislators in state and federal legislative proceedings. Legislative immunity potentially shields lawyer-legislators who are dishonest with their constituents. Legislative immunity is the privilege of legislators to be free from arrest for statements made or actions taken during legislative proceedings.[119] Professor Hopkins traces the doctrine of legislative immunity to England in the Sixteenth and Seventeenth centuries, when actions and statements against the monarch were considered worthy of prosecution.[120] After the colonies split from England, legislative immunity, like many other doctrines and features of English law, was retained and incorporated into the new American government system.[121]

In the United States, legislators have near absolute immunity from civil actions, for either statements or conduct, within the sphere of legitimate legislative activity.[122] This immunity extends not only from the common law rulings of the courts, but also from the early documents underlying the foundation of American government.[123] It goes without saying the purpose

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118. *In re.* Michael Palmisano, 70 F.3d 483, 484 (7th Cir. 1995).
119. Hopkins, *supra* note 85, at 923.
120. *Id*. at 924; *but see* James E. Conwell, *Limitations on Legislative Immunity: A New Era for Montana's Sovereign Immunity Doctrine*, 54 MONT. L. REV. 127, 129 (1993) (arguing that the concept of legislative immunity can be traced to Sir William Blackstone's statement that "the king can do no wrong"); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *246.
121. Hopkins, *supra* note 85, at 924; *see* Tenney v. Brandhove, 341 U.S. 367, 372–73 (1951).
122. Hopkins, *supra* note 85, at 924; *Tenney*, 341 U.S. at 372–73.
123. *See* Articles of Confederation, art. V ("Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress…"); U.S. CONST. art. I §6 ("for any

of the legislator's immunity is to encourage lively debate amongst elected members of Congress. Legislators should be able to engage in debate without fear of retaliation from the executive branch or any other entity who may take exception to the words spoken on behalf of the public.[124]

The absolute immunity enjoyed by legislators appears to be a significant block to holding lawyer-legislators accountable for dishonest statements made to constituents. Professor Hopkins believes that were a state bar association to take action against a lawyer-legislator for actions undertaken in a legislative role, there would be a violation of immunity.[125] Furthermore, because the lawyer-legislator's actions would be protected by the Constitution, state bar associations would be precluded from instigating disciplinary actions at all.[126]

2. Immunity does not apply

What Professor Hopkin's argument does not address, and what the Constitution and the case law do not address, however, is whether a lawyer-legislator may be subject to discipline for untruths told to constituents. While the Constitution and Hopkins are concerned with protecting the right to speak freely and without fear of retaliation on the floor of Congress, neither contemplates the right to go on a national news channel and funnel untruths to uniformed voters as an attempt to influence voter support. The difference is more than a matter of semantics.

In the scenario imagined by the Constitution and Professor Hopkins, Senator A takes the floor and delivers a speech critical of the President's new energy policy. In the process, Senator A makes several statements known to Senator A, as well as her political opponents, to be untrue. Professor Hopkins is correct in claiming that in this scenario, during a legislative session, and on the Senate Floor, Senator A's immunity precludes any type of civil liability, perhaps even to the point of precluding a state ethics board from reviewing her actions.

But assume that after delivering her speech, Senator A leaves the floor of the Senate, exits the Senate Chamber, and sits down for an interview with a major television network. During that interview, in the course of answering

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Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other place").

124. *Tenney*, 341 U.S. at 372 (arguing that the Framers of the Constitution believed that by providing legislators with complete protection of speech they would enable him to "discharge [the] public trust with firmness and success").

125. Hopkins, *supra* note 85, at 931.

126. *Id*. at 932 (arguing that immunity would require that state bar associations refrain from any attempt to discipline the federal lawyer-politicians at issue and defer to disciplinary measures provided by the Constitution and the political process).

questions, Senator A repeats her untrue claims. The Constitution and case law do not provide any explicit protection for Senator A in this scenario. She is not acting in her legislative capacity, and as several courts have stated, she occupies a position of public trust replete with the duties of a fiduciary.[127]

Professor Hopkins conversely, argues a lawyer-legislator is not acting within their capacity as a lawyer, but instead as a public servant. Additionally, Professor Hopkins states, their actions do not threaten the effective administration of justice.[128] Lastly, according to the American Bar Association, the lawyer-legislator's actions, are not law-related actions.[129] However, these arguments do not hold water.

Numerous cases have found lawyers, acting outside of their legal capacity, have violated the Model Rules of Professional Conduct. Several cases discussed above, including *Russell*,[130] *In re Nixon*,[131] and *Wilson*,[132] have seen lawyers violating rules of conduct. Clearly, ethics boards feel lawyers who are politicians (including but not limited to lawyer-legislators) can be held accountable while acting as public servants, even if they are not acting in a legal capacity. Given these facts, it is likely a lawyer-legislator finding themselves held accountable for violating the Dishonesty Rule by lying to constituents, would be defenseless as legislative immunity would likely fail as a defense.

B. Protected Speech

1. Are Statements Made by Lawyer-Legislators Protected Political Speech?

If legislative immunity is not available, surely statements made by a politician are subject to some sort of First Amendment protection for political speech. The First Amendment protects our right to free speech,[133] yet even free speech has its limitations.[134] The United States Supreme Court, while having ruled in a number of high profile free speech cases, has yet to address directly whether dishonest statements, made by sitting members of Congress, constitute protected speech. Therefore, instead of relying on existing

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127. *See In re* Olson, 300 N.W. 398, 400 (Minn. 1941); State *ex rel.* Neb. State Bar Ass'n v. Douglas, 416 N.W.2d 515, at 529–30 (Neb. 1987).
128. Hopkins, *supra* note 85, at 931.
129. Law related services can be defined as: "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." MODEL RULES OF PROF'L CONDUCT r. 5.7(b) (AM. BAR ASS'N 1983).
130. *See* State v. Russell, 610 P.2d 1122 (Kan. 1980) *cert denied*, 449 U.S. 983 (1980).
131. *See In re* Richard M. Nixon, an Attorney, 385 N.Y.S.2d 305 (N.Y. App. Div. 1976).
132. *In re* Wilson, 391 S.W.2d 914, 920 (Mo. 1965).
133. U.S. CONST. amend. I.
134. *See generally* Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733 (1998).

precedent, we must glean what we can from the existing case law and hope to arrive at some result that provides a satisfactory answer to our inquiry.

The United States Supreme Court has stated that there is no value in false statements of fact.[135] Much of the case law related to false statements has found that liability does exist in certain circumstances; in turn giving support to the existence of libel and slander laws.[136] However, libel and slander laws do not suit the purposes of inquiring into dishonest statements by lawyer-legislators. This means one must look elsewhere to find restrictions on free speech that limit what a lawyer-legislator may say.

Further Supreme Court precedent has found negligently false statements, presented as statements of fact, can be grounds for civil liability.[137] So too, with the Supreme Court's conclusion that implicit statements of fact with a false factual connotation are not protected.[138] Counter this with the fact that in the past the Supreme Court has found that false statements of fact made against the government may be completely free from sanction.[139] Once again, however, the scenario is factually distinguishable from the current grounds of inquiry as to offer little more than persuasive authority.

After wading through the morass, what are we to make of this confusing batch of tenuously connected precedent? There is little here to support the argument that false statements by lawyer-legislators fall within an exception to Constitutionally protected free speech. On the other hand, there is a handful of marginally persuasive U.S. Supreme Court precedent chipping away at the protections for false statements made in a variety of scenarios. Given the uncertain Constitutional legal footing, it is likely up to the state courts and ethics boards to tip the balance.

C. Political Speech Protections Do Not Apply

Despite the frustrating lack of definitive Supreme Court precedent, the argument that sanctions on lawyer-legislators for statements, which are untrue, may violate First Amendment protections is weak at best. It is well settled that "neither the right to associate nor the right to participate in political activity is 'absolute.'"[140] Restrictions may be sustained, so long as the state demonstrates a sufficiently important interest, and employs means

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135. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
136. *See generally* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650 (2009); Jessica R. Friedman, *Defamation*, 64 FORDHAM L. REV. 794 (1995).
137. *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).
138. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
139. *See* N.Y. Times v. Sullivan, 376 U.S. 254 (1964).
140. Buckeley v. Valeo, 424 U.S. 1, 25 (1976).

closely drawn, to avoid unnecessary abridgement of First Amendment protected freedoms.[141] Indeed, state courts have a long history of finding that state regulation of attorney conduct, including political activities, does not infringe on the right to free speech.[142]

Some courts have been anything but subtle in finding that speech did not violate the First Amendment. For example, the court in *In re Woodward*[143] held:

> [a] layman may, perhaps, pursue his theories of free speech of political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics; and if he wishes to remain a member of the bar he will conduct himself therewith.[144]

Clearly the Missouri Supreme Court desires to limit attorney speech it perceives to fall outside of acceptable boundaries. Additionally, there is no challenge to their ability to do so.

And why would the courts and state ethics boards not exercise their right to limit speech? As Robert Housman has noted, "candidate after candidate, scholar after scholar, leader after leader, and commentator after commentator agree that the discourse of political debate is fundamentally broken."[145] These sentiments can be heard on the radio or the television during any given day, echoed by voices from all walks of life. The effects of dishonesty in the political process serve merely to deepen the partisan divide and push Americans further apart on sensitive issues.

Mr. Housman, in fact, has argued that not only is the discourse of political debate fundamentally broken, but that the true threats to democracy are the "unethical and misleading" claims that distort and misrepresent the statements and actions of other candidates.[146] The voting public has a right to the truth, a right rendered moot when those engaging in the debate are not required to deal in truth; ergo it is imperative that the right to that truth be protected, even if that means cutting back on some of the political speech protections lawyer-legislators may have previously enjoyed.[147]

Ultimately, given that the licensing of attorneys falls within the purview of the individual states, it seems justified that saying that the regulation of lawyer-legislators in regards to professional ethics, ought to be within the

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141. *Id*.
142. *See* State v. Russell, 610 P.2d 1122 (Kan. 1980) *cert denied*, 449 U.S. 983 (1980); Ky. State Bar Ass'n v. Lewis, 282 S.W.2d 321 (Ky. Ct. App. 1955).
143. *In re* Woodward, 330 S.W.2d 385 (Mo. 1957).
144. *Id*. at 393–94.
145. Housman, *supra* note 57, at 80.
146. *Id*.
147. *Id*.

powers of the state courts and ethics boards. If this is true, then it is clear that lawyer-legislators may claim to be engaging in protected speech when they are intentionally dishonest with their clients. That being the case, the only question remaining is: what would be the effects of increased enforcement of the Dishonesty Rule against lawyer-legislators?

V. WHY ENFORCING THE DISHONESTY RULE AGAINST LAWYER-LEGISLATORS IS GOOD FOR DEMOCRACY

Charles Pierce, the founder of Pragmatism once wrote that "To ascertain the meaning of an intellectual conception one should consider what practical consequences might result from the truth of that conception—and the sum of these consequences constitute the entire meaning of the conception."[148] To assume that a proposal is good and ought to be adopted merely because justifications have been provided and counter-arguments defeated is insufficient. Indeed, it is intellectually negligent to support a proposal without first giving consideration to its consequences.

A. Lawyer-Legislators May Feel Disadvantaged While Holding Public Office

1. Increased Enforcement of Ethics Rules Against Lawyer-Legislators May Dissuade Lawyers From Seeking Legislative Office

Several scholars have argued the possibility that increased enforcement of ethical rules will place lawyers at a disadvantage compared to non-lawyers.[149] The idea seems to be that because lawyer-legislators would be subject to sanctions for violating the Dishonesty Rule, they would find themselves unable to contend with non-lawyer-legislators who do not face such potential sanctions. As a result of this weakened position, fewer lawyers would be drawn to public service as legislators.[150]

This argument initially seems much worse than it really is. First, conceptually it relies on the premise that lawyer-legislators cannot fulfill their duties and succeed against political opponents without the opportunity

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148. CHARLES SANDERS PIERCE, 5 COLLECTED PAPERS OF CHARLES SANDERS PIERCE § 9 (1905).

149. *See* Housman, *supra* note 57, at 80; Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 645 (1981) ("Indeed, lawyers reject the rigors of a higher morality: they resent ethical restrictions on dealing with legislative and administrative bodies for 'fear that [they] will thus be put at a competitive disadvantage with nonlawyers)."

150. Anna Swanson, *How the Most Disliked—and Elected—Profession is Disappearing from Politics*, THE WASHINGTON POST (Oct. 24, 2017, 1:12 PM), https://www.washingtonpost.com/news/wonk/wp/2016/01/19/how-the-most-disliked-and-elected-profession-is-disappearing-from-politics/?utm_term=.f182a53940cc.

to be dishonest. If this is true, then nothing speaks louder in support of the need for increased ethical rule enforcement.

Second, there are more practical reasons for increasing enforcement against lawyer-legislators, namely that the enforcement would ultimately lead to beneficial consequences. First, the prospect of fewer lawyers holding legislative office is not such a terrifying idea, as the number of lawyers in Congress seems to be trending downwards. Second, while slippery slope arguments generally are not convincing, it is entirely likely that lawyers, who still represent a powerful voting block in both houses of Congress, would find a way, either procedural or rules based, to level the playing field. After all, that is a lawyer's job.

2. Fewer Lawyers Holding Public Office is Not Necessarily a Bad Thing

It has been suggested that an increase in enforcement of ethical rules against lawyer-legislators would result in fewer lawyers seeking legislative office. It is hard to picture Congress without lawyer-legislators, yet the 114th Congress featured a membership in which law was listed (self-reported) as the third most common occupation, behind public service/politics and business.[151] It is safe to say that lawyers no longer enjoy the dominance they once held in the halls of Congress based on sheer weight of numbers.

But the reason for this decrease in number of lawyer-legislators could be attributed to a number of things. First, the increase of staff jobs available in Congress for people with law degrees.[152] Second, think tanks and in-house positions offer the opportunity to be directly involved in creating policy with better pay and without the responsibility of answering to constituents.[153]

Additionally, if lawyers stop running for legislative office, then someone else must fill those positions. That means more doctors, business people, or other fields stepping up. This potentially means more doctors creating health care policy, more farmers with direct input on the farm bill, more small business owners creating protection for small businesses. None of these potential consequences are of a sort to indicate that it would be better not to increase enforcement of ethics rules against lawyer-legislators. Rather, they seem to indicate that a potential drop in the number of lawyer-legislators could have a positive impact on the occupational diversity of Congress. Is that not for the best?

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151. Jennifer E. Manning, *Membership of the 114th Congress: A Profile*, CONG. RES SERV. (May 24, 2017, 8:08 AM), https://fas.org/sgp/crs/misc/R43869.pdf.

152. Marc Luber, *Legislative Careers—Work on Capitol Hill as a Law Grad*, JD CAREERS OUT THERE (Oct. 26, 2017), https://jdcareersoutthere.com/capitol-hill-jobs-for-lawyers.

153. Arin Greenwood, *So You Want to Make Policy? Think Tank Jobs for Lawyers*, BEFORE THE BAR BLOG (Oct. 26, 2017 1:29 PM), https://abaforlawstudents.com/2010/10/01/think-tank-jobs-lawyers/.

B. Increased Sanctions on Lawyer-Legislators are Likely to Result in Ethics Rule Changes Encompassing all Legislators

Assume that state ethics boards have begun suspending law licenses of lawyer-legislators for violating the Dishonesty Rule. Further, assume that other professions are not being disciplined for misrepresentations or outright lies that get told in the process of trying to convince constituents to support or reject legislation. What can the lawyer-legislators do when confronted by this scenario?

Lawyers are, first and foremost, trained to solve problems. The House of Representatives has its own ethical rules office called the Office of Congressional Ethics.[154] The Senate has its own ethics rules as well.[155] It is astounding how little either have to say about honesty. When faced with a legislative system in which lawyer-legislators alone are held to a standard requiring honesty in their dealings with their constituents, the most obvious choice is for lawyer-legislators to force change in the House and Senate ethics rules. While law is no longer the largest occupation represented, lawyers still form a powerful voting block able to create meaningful change, should it be in their interest. It goes without saying, lawyers are as self-interested as any politician.

On another level, it is in the best interest of non-lawyer-legislators to ensure members of their party are not placed in a position of weakness. Given that discipline of attorneys is beyond the scope of Congress, this may mean that the easiest way to maintain balance is to accept more stringent ethics rules for all members of Congress. The only other alternative is to prevent lawyers from running on the party ticket, which is simply not going to happen.

C. There May be a Chilling Effect on Political Discourse

1. Possible Chilling Effect on Political Speech

A second possible consequence of increased ethical regulation of lawyer-legislators is the possibility that those members of Congress who are lawyers may feel that they may no longer communicate freely with the press and with the media regarding pending or proposed legislation. Instead they may simply show up and vote, or communicate through press releases,

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154. Office of Congressional Ethics, https://oce.house.gov/; *See also*, House Committee on Ethics, *Code of Official Conduct* (2011), https://ethics.house.gov/*publication*/code-official-conduct.

155. Sen. Comm. On Ethics, *The Senate Code of Official Conduct* (2015), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=efa7bf74-4a50-46a5-bb6f-b8d26b9755bf.

carefully worded and vetted to avoid punishment for an off-the-cuff remark that may result in harsh consequences. While such fears probably seem legitimate in the eyes of some lawyer-legislators, it is a drastic and misguided step to undertake, when the easiest course of action is to simply be honest with constituents.

2. Reducing Political Speech Might be for the Best for the Time Being

At first glance, it seems that chilled speech is something that should be avoided at all costs. The idea that lawyer-legislators would feel forced to refrain from discussing legislation with their constituents, for fear of discipline for speaking an untruth, is admittedly disturbing. Such a state of affairs is something we should seek to avoid.

At the same time, it is equally disturbing how low political discourse has sunk in this country. We have managed to dispense with intelligent debate about real issues, and supplant conversation with cynicism and media-ready catch phrases. "Even when some semblance of an issue does manage to creep into political discourse, the real issue is almost certain to be distorted, and the facts manipulated, if not wholly re-fabricated, in order to create a catchy, viable political message."[156] Further, political debate has descended to the point where a seemingly legitimate response to questions about a candidate's policy views is to refer to that candidate's sexual history or previous indiscretions.[157]

In an era in which ever increasing amounts of money are being raised in order to fund political campaigns[158] and public trust in the media is at an all-time low,[159] it may be for the best to take a step back and re-consider where we are going. If this can only be brought about by ethical regulations being enforced against lawyer-legislators, then we have an accurate picture of where the problem comes from, how to deal with it, and what steps should be taken to address it. Furthermore, self-imposed restraint may help revive public trust in a Congress that has perpetually low approval ratings.[160]

Simply put, the public has a right to hear from both sides of any issue being considered from the legislature. Any such issue or measure ought to be the subject of debate and discussion before being enacted into law. Yet at the same time, all of that debate and discussion is meaningless if it cannot be

156. Housman, *supra* note 57, at 76 (listing instances where real campaign issues were clouded or distorted by false statements made to drum up political support).
157. *Id*. at 75.
158. *Id*. at 80.
159. Anna Nicolaou & Chris Giles, *Public Trust in Media at All Time Low, Research Shows*, FIN. TIMES (Jan. 15, 2017), https://www.ft.com/content/fa332f58-d9bf-11e6-944b-e7eb37a6aa8e.
160. RJ Reinhart, *Americans' Approval of Congress Unchanged in May*, GALLUP NEWS (May 10, 2017), http://news.gallup.com/poll/210104/americans-approval-congress-unchanged-may.aspx.

based on truth and facts.[161] If that is too difficult, a chilling of political speech may very well be in order.

VI. CONCLUSION

Lawyer-legislators hold a unique, two-fold position of public trust in our system: first we trust their advice because they are well educated and rigorously trained; second, we have elected them to represent our interests in either the state or federal legislature and trust them to act in our best interests. When they lie, our trust is the system is shaken to its very core.

Devices exist, however, to ensure that lawyer-legislators deal honestly with their constituents. Chief amongst those devices are the Model Rules of Professional Conduct, specifically model rule 8.4(c), otherwise known as the Dishonesty Rule. The Dishonesty Rule prevents lawyers from engaging in dishonest conduct regardless of whether or not they are acting in their capacity as a lawyer.

As we have seen, the decision to enforce the Dishonesty Rule would likely make great strides in improving the relationship between lawyer-legislators and their constituents by rebuilding trust. Even the unintended consequences of increased enforcement seem to weigh in favor of taking action. If the path to restoring trust between lawyer-legislators and constituents through honest communications requires that we simply enforce ethics rules that already exist, how can we justify never having tried? The answer is simple: we cannot afford not to try.

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161. Housman, *supra* note 57, at 80.