Legal Market Decartelization

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American lawyers' grip on the legal market is receding. Scholars and policymakers increasingly agree that the public has little to lose and potentially much to gain from legal market decartelization — the weakening of the lawyers' monopoly over the legal services market. Harkening to deregulatory initiatives abroad and in Arizona and Utah, reformers contend that removing restrictions on the corporate delivery of legal services and unauthorized practice of law will slash costs and expand access to justice.

Drawing on economic theory and recent market developments, this Article offers a cautionary rejoinder. Understandable concerns about cartelization and lawyer rent-seeking have led critics to understate the risks of legal market deregulation in the American context. The American legal market is highly localized, with significant variations within and across states. Nevertheless, in all states, consumers are at a disadvantage vis à vis lawyers and other legal services providers because of asymmetric information. Legal market decartelization does not address asymmetric information and may exacerbate it, enabling well-capitalized entities such as private equity firms to gain dominance without offering better or lower-cost legal services. Increasing the number of providers and separating labor from capital is also likely to produce moral hazard and negative externalities, especially in litigation where contingent fee arrangements are common, but fee shifting is not. Lastly, lawyers play an integral, yet underappreciated, role in the development of law both ex-ante and ex-post that would diminish in a deregulated market and worsen regulatory and legislative capture. Policymakers must look beyond decartelization to address the maldistribution of legal services.

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INTRODUCTION

In the nineteenth and twentieth centuries, American lawyers organized to raise professional entry barriers, eliminate nonlawyer competitors, and win the right to largely regulate themselves.[1] The end result was a legal market dominated by an "imperfect cartel" that by and large served its interests rather than those of the public.[2] Court decisions chipped away at legal market cartelization by striking down advertising prohibitions and minimum fee schedules, but failed to alter the fundamental dynamic.[3]

The twenty-first century is likely to prove far more challenging for American lawyers. Buoyed by pro-deregulation scholarship and deregulation abroad, policymakers are increasingly taking aim at regulations that protect lawyers' monopoly of the legal services market, including prohibitions on nonlawyer ownership of law firms and the unauthorized practice of law.[4] Although legal scholars and social

[1] *See* RICHARD L. ABEL, AMERICAN LAWYERS 71 (1989) [hereinafter ABEL, AMERICAN LAWYERS] ("American lawyers have been extraordinarily successful in constructing and raising entry barriers during the last century and a half."); Richard L. Abel, *Lawyer Self-Regulation and the Public Interest: A Reflection*, 20 LEGAL ETHICS 115, 115-16 (2017); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1696 (2008) [hereinafter Hadfield, *Legal Barriers to Innovation*] ("Beginning with the creation of the American Bar Association in 1878, the American legal profession has woven a powerful, but perhaps untested, claim to a fundamental authority over the regulation of the entire legal system.").

[2] Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 1 (1993); *see* Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 430-31 (2001).

[3] *See* Bates v. State Bar of Ariz., 433 U.S. 350, 382-83 (1977) (striking down ban on attorney advertising); Goldfarb v. Va. State Bar, 421 U.S. 773, 791-92 (1975) (striking down minimum fee schedules as anti-competitive under the Sherman Act).

[4] Prominent works by pro-deregulation scholars include Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014) [hereinafter Hadfield, *The Cost of Law*]; Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191 (2016) [hereinafter Hadfield & Rhode, *How to Regulate*]; Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012); Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 50 (2015); Rebecca L. Sandefur, Thomas M. Clarke & James Teufel, *Seconds to Impact?:*

scientists have bemoaned lawyers' wielding of their monopoly power and the maldistribution of legal services for decades,[5] reformers have, in recent years, been singularly focused on market liberalization as the corrective. Professor Hadfield's scholarship has been at the forefront of this shift. In her conceptualization:

> The [access to justice] problem is not a problem of the ethical commitment of lawyers to help the poor. Nor is an increase in public legal aid likely to make a substantial impact. . . . The U.S. stands largely alone in the world in terms of the extraordinary extent to which the bar and judiciary wield exclusive authority for shaping the cost and market structure of legal goods and services.[6]

Hadfield and other pro-deregulation scholars have advocated for alternative business structures ("ABS") — law firms owned by nonlawyers — to enter the legal market and compete with traditional firms.[7]

The deregulatory movement has already produced policy changes in Arizona and Utah. Arizona repealed prohibitions on lawyers partnering and splitting fees with nonlawyers, whereas Utah has eased both restrictions on the corporate delivery of legal services and unauthorized

Regulatory Reform, New Kinds of Legal Services, and Increased Access to Justice, 84 LAW & CONTEMP. PROBS. 69 (2021).

[5] For examples of arguments, see ABEL, AMERICAN LAWYERS, *supra* note 1, at 20; Posner, *supra* note 2, at 1-2; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6-7 (1981); *see also* Charles E. Clark & Emma Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272, 1275 (1938) (criticizing the organized bar for failing to "meet the issue of maldistribution of legal service").

[6] Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 152 (2009) [hereinafter Hadfield, *Higher Demand*].

[7] *See* Hadfield & Rhode, *How to Regulate*, *supra* note 4, at 1208-10; Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 GEO. J. INT'L L. 665, 706 (2016); *see also* Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, 19 PRO. LAW. 1, 9 (2009) (claiming that UK-based firms would enjoy a major competitive advantage over US firms because they need not rely on lawyer capital).

practice of law under the auspices of its regulatory sandbox.[8] These states, along with Washington, Minnesota, and Oregon, also permit licensed paralegals to provide certain legal services directly to the public without attorney supervision.[9] California, New York, and other states are monitoring these innovations with an eye towards future reforms.[10]

In many respects, the case for decartelization and the dismantling of the lawyers' monopoly is compelling. The American legal market is protectionist in comparison to the markets of some other developed countries.[11] Countless studies have also found that the vast majority of Americans' legal needs go unmet.[12] Although Americans do not seek legal help for many reasons, including lack of awareness of their needs,

[8] *See* DAVID FREEMAN ENGSTROM, LUCY RICCA, GRAHAM AMBROSE & MADDIE WALSH, LEGAL INNOVATION AFTER REFORM: EVIDENCE FROM REGULATORY CHANGE 16-17 (2022), https://law.stanford.edu/publications/legal-innovation-after-reform-evidence-from-regulatory-change/ [https://perma.cc/2T64-4SDC] (describing the differing approaches of Arizona and Utah to reform); Sandefur et al., *supra* note 4, at 69.

[9] *See* Tara Hughes & Joyce Reichard, *How States Are Using Limited Licensed Legal Paraprofessionals to Address the Access to Justice Gap*, ABA (Sept. 2, 2022), https://www.americanbar.org/groups/paralegals/blog/how-states-are-using-non-lawyers-to-address-the-access-to-justice-gap/ [https://perma.cc/JQ44-53TF]. Washington's limited license legal technician program — since sunset — has received the bulk of the scholarly commentary. For sample commentary, see Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 116-18 (2013), and Perlman, *supra* note 4, at 108-12; see also JASON SOLOMON & NOELLE SMITH, THE SURPRISING SUCCESS OF WASHINGTON STATE'S LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 4 (2021) (discussing the controversial shuttering of the LLLT program).

[10] *See generally* COMM'N TO REIMAGINE THE FUTURE OF N.Y.'S CTS., REPORT AND RECOMMENDATIONS OF THE WORKING GROUP ON REGULATORY INNOVATION 36 (2020), https://www.nycourts.gov/LegacyPDFS/publications/RWGRegulatoryInnovation_Final_12.2.20.pdf [https://perma.cc/3CHA-X8KN] ("We are fortunate that other states, such as Arizona, Utah, and California, are proceeding with ABS experiments and as we reimagine the future of New York's Courts, we foresee a time when one or more of the ABSs being tried elsewhere could be adopted in New York.").

[11] *See* Hadfield, *Higher Demand*, *supra* note 6, at 153-54 (contrasting the U.S. with England and Wales and the Netherlands).

[12] The most recent estimate from the Legal Services Corporation is eighty-six percent. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/SJM3-URQH].

more providers would certainly help. [13] The scale of the access to justice problem is such that lawyers cannot possibly meet all of the demand for legal services.[14]

Under some accounts, nonlawyer involvement may also spur more technological adoption and innovation, enabling legal services to be delivered at scale and lowering costs.[15] As a recent report from Stanford Law School's Deborah L. Rhode Center on the Legal Profession ("Stanford Report") has explained: "The central premise of regulatory reform is that the existing rules governing delivery of legal services create high and often insurmountable barriers around the supply of legal services, raising prices, stymieing innovation, and yielding a dysfunctional market that cannot optimally deliver legal services to those who need them."[16]

Of course, deregulation comes in many forms. A jurisdiction could repeal restrictions on nonlawyer ownership of law firms and unauthorized practice of law.[17] In the alternative, a jurisdiction could repeal one set of regulations but not the other. Deregulation also need

[13] *See* Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 70, 72-75 (2016) [hereinafter Markovic, *Juking Access to Justice*] (summarizing research on why Americans do not seek legal assistance); *see also* Sandefur et al., *supra* note 4, at 80 ("Decades of trying to solve America's access to justice crisis with a patchwork of poorly funded legal aid, lawyer pro bono, and other philanthropy provide a clear track record of failure. . . . [R]egulatory reform offers tremendous opportunities to open up access to justice . . . .").

[14] *See* Matthew Burnett & Rebecca L. Sandefur, *Designing Just Solutions at Scale: Lawyerless Legal Services and Evidence-Based Regulation*, 19 REVISTA DEREITO REPUBLICO 104, 107-09 (2021); Hadfield, *The Cost of Law*, *supra* note 4, at 44. Scholars focus on the alleged inadequacy of civil legal aid and pro bono efforts, given the quantum of unmet needs. *See* Hadfield & Rhode, *How to Regulate*, *supra* note 4, at 1193. However, as one of us has argued, many unmet legal needs do not merit attorney involvement and ideally would be handled without it. Markovic, *Juking Access to Justice*, *supra* note 13, at 70.

[15] Hadfield, *The Cost of Law*, *supra* note 4, at 44; *see also* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 781 (2010) (arguing that traditional law firms "are not equipped to profit from the economies of scale of developing inventories of forms and other products for a mass market").

[16] ENGSTROM ET AL., *supra* note 8, at 13.

[17] This is the general approach in England, although certain activities are still reserved for qualified solicitors or barristers. *See* Lisa Webley, *Legal Professional De(Re)Regulation, Equality, and Inclusion, and the Contested Space of Professionalism Within the Legal Market in England and Wales*, 83 FORDHAM L. REV. 2349, 2360-61 (2015).

not be all-or-nothing. For example, several European countries allow ABS but require lawyers to retain majority control of these entities.[18] States that allow paralegals to deliver legal services to the public currently have exempted them from unauthorized practice of law rules rather than abolishing these rules altogether.[19]

In previous scholarship, we observed that, contrary to the claims of leading pro-deregulation scholars, the effects of deregulatory reforms in England, the European Union, and much of Asia have been modest and described the overall situation as one of "inertia."[20] The ballyhooed reforms in England and Wales in particular have not met reformers' expectations.[21] This inertia is unsurprising in our view because ordinary consumers are hampered by asymmetric information such that they cannot assess the quality of legal services or determine if they even need them.[22] Reforms that are intended to increase competition by and

[18] *See* Louise Lark Hill, *Alternative Business Structures for Lawyers and Law Firms: A View from the Global Legal Services Market*, 18 OR. REV. INT'L L. 135, 183 (2017) (discussing Spain and Denmark).

[19] *See* Keith Swisher, *Death and Ethics: Suffocating or Saving Nonlawyer Practitioners with Lawyer Ethics*, 70 UCLA L. REV. DISCOURSE 52, 62 (2022); *see also* Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1, 7-9 (2018) (discussing UPL reform in Washington).

[20] *See* Nuno Garoupa & Milan Markovic, *Deregulation and the Lawyers' Cartel*, 43 U. PA. J. INT'L L. 935, 944 (2022).

[21] As a 2020 retrospective of the UK's Legal Services Act concluded:

> [T]he general feeling among stakeholders is that the scale of the access challenge is at least as great today, if not greater, than when the Legal Services Act came into force. . . . [T]he sorts of multi-disciplinary practices that the architects of the Legal Services Act reforms envisaged have not materialised as much as expected.

LEGAL SERVS. BD., THE STATE OF LEGAL SERVICES 2020: A REFLECTION ON TEN YEARS OF REGULATION 21, 45 (2020), https://legalservicesboard.org.uk/wp-content/uploads/2020/11/The-State-of-Legal-Services-Narrative-Volume_Final.pdf [https://perma.cc/XDP4-UJ4D]; *see also* COMM'N TO REIMAGINE THE FUTURE OF N.Y.'S CTS., *supra* note 10, at 49 (reporting on conclusions of a separate study); *cf.* Gillian K. Hadfield, *Legal Markets*, 60 J. ECON. LITERATURE 1264, 1302 (2022) [hereinafter Hadfield, *Legal Markets*] ("We are still lacking careful studies of the extent of [the U.K.] innovations and their impact and comparisons with services available . . . under much more restrictive regulatory regimes.").

[22] *See* Garoupa & Markovic, *supra* note 20, at 967.

among different types of legal services providers do not address the underlying market failures in the consumer law market.[23]

Jurisdictions should not refrain from regulatory experimentation merely because deregulation has not been a panacea. Attorney rent-seeking may be rampant in certain jurisdictions without producing commensurate benefits to the public.[24] Informational asymmetries are also surmountable although not via deregulation alone.[25] Nevertheless, the unimpressive track record of deregulation abroad has led to a subtle but unmistakable shift in rhetoric: scholars no longer write of legal market "transformation" but rather emphasize that regulatory reform is unlikely to be harmful.[26] For example, the Stanford Report acknowledges that reforms in England and Wales neither increased competition nor benefited individuals of limited means[27] while nevertheless urging American states to follow suit because of the low likelihood of consumer harm.[28]

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[23] *Id.*

[24] *Id.* at 950-51. For a discussion of the role of the bar examination in limiting the supply of lawyers and the relationship to misconduct in particular, see, for example, Milan Markovic, *Protecting the Guild or Protecting the Public*?, 35 GEO. J. LEGAL ETHICS 163, 181-92 (2022) [hereinafter Markovic, *Protecting the Guild*]; Kyle Rozema, *Does the Bar Exam Protect the Public?*, 18 J. EMPIRICAL LEGAL STUDS. 801, 804 (2021); Kyle Rozema, H*ow Much Does the Bar Exam Decrease the Size of the American Legal Profession*? 17-18 (Northwestern L. & Econ., Rsch. Paper No. 23-18, Northwestern Pub. L., Rsch. Paper No. 23-54, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4475434 [https://perma.cc/CF92-CXNF].

[25] *See* Garoupa & Markovic, *supra* note 20, at 987-89 (arguing for reforms that provide the public with greater information about legal needs and leverage nonlawyer intermediaries).

[26] *Compare* Hadfield, *Legal Barriers to Innovation, supra* note 1, at 1720 ("Professional regulation effectively blocks the inventive activities that might transform legal markets . . . ."), *with* Hadfield, *Legal Markets, supra* note 21, at 1308 ("By collecting baseline data in jurisdictions that are experimenting with reform . . . empirical economists can help inform the development of appropriate regulatory policy."). *See also* Bruce A. Green, *Why State Courts Should Authorize Nonlawyers to Practice Law*, 91 FORDHAM L. REV. 1249, 1275-76 (2023) (arguing for experimentation and that the non-expert practice of law is less harmful than non-expert practice of medicine).

[27] *See* ENGSTROM ET AL., *supra* note 8, at 20-21.

[28] *See id.* at 46. The chief basis for this conclusion is that ABS and other such entities do not face more consumer complaints. *See id.* at 20. *But see* Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85

Monopolies and quasi-monopolies exist along whole swaths of the economy and can both advantage and disadvantage consumers. In assessing legal market deregulation, policymakers should be cognizant of the potential benefits as well as the unintended consequences that could undermine consumer welfare. Existing critiques of legal market deregulation are incomplete because they focus almost entirely on the threat that deregulation presents to the quality of legal services while by and large accepting that it is otherwise welfare-enhancing.[29] This Article makes a unique contribution by assuming arguendo that quality concerns can be addressed via appropriate regulation and oversight while introducing risks associated with deregulation that have heretofore been neglected.

One risk relates to the highly localized nature of the American legal market. Markets of large urban centers such as New York City and Los Angeles bear passing resemblances to those of non-metropolitan areas.[30] Laws also vary by state and sometimes even by county. The interplay between state and federal law adds additional complexity. In all regions, however, consumers are at a significant disadvantage compared to sophisticated users of legal services such as corporations because of asymmetric information.[31] Solutions that may hold promise

FORDHAM. L. REV. 2033, 2036 (2017) ("[I]njured persons may be completely unaware that the attorney has engaged in misconduct. From the outset of the representation, most inexperienced users of legal services largely lack information to judge their lawyers' conduct.").

[29] Recommended arguments include: John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 92 (2000); Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 FORDHAM L. REV. 2761, 2768 (2014); Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 YALE L.J.F. 259, 279 (2022); *see also* Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1318 (2021) ("The basic justification for the monopoly is quality control — that is, only a lawyer is qualified to render counsel and advice to a person with a legal problem.").

[30] *See generally* Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 22 (2018) (describing unique challenges facing people in rural communities).

[31] Garoupa & Markovic, *supra* note 20, at 967.

for certain communities may be counterproductive for others based on the relevant access to justice barriers.[32]

Another consideration is the unique nature of American capital markets. The American private equity and venture capital market is far more active than that of other countries.[33] Whereas English and Australian law firms have raised limited external capital,[34] private U.S. investment firms have at their disposable hundreds of billions of dollars that they can invest in the legal sector, just as they have done in the healthcare sector.[35] Existing regulations limit these entities' influence on the legal market but their influence would almost certainly grow in a deregulated market.[36] In theory, private equity firms ("PE firms") and

[32] *See* Pruitt et al., *supra* note 30, at 23-24 (focusing on challenges faced by rural markets); *see also* Webley, *supra* note 17, at 2367 ("Low-income and first-time consumers will struggle without adequate signposting of differences between the regulated and unregulated sector, even if they can find services at a price they can afford.").

[33] *See generally* Alexandros Seretakis, *A Comparative Examination of Private Equity in the United States and Europe: Accounting for the Past and Predicting the Future of European Private Equity*, 18 FORDHAM J. CORP. & FIN. L. 613, 626-28 (2013) (comparing the private equity markets of the U.S., U.K., and Europe).

[34] *See* Garoupa & Markovic, *supra* note 20, at 973-74 (describing lack of investment activity). The first Australian law firm that went public became insolvent shortly thereafter. *See* Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 WM. & MARY L. REV. 939, 976 n.149 (2022). A private equity firm subsequently took the law firm private. Christopher Niesche, *Australian Firm Slater & Gordon Set for Private Equity Takeover*, LAW.COM (Feb. 24, 2023, 4:01 AM), https://www.law.com/international-edition/2023/02/24/australian-firm-slater-gordon-set-for-private-equity-takeover/?slreturn=20230715195030 [https://perma.cc/V5V5-8ZSN].

[35] For more comprehensive discussions of private equity and healthcare, see, for example, DENISE HEARN, KRISTA BROWN, TAYLOR SEKHON & ERIK PEINERT, THE ROLL-UP ECONOMY: THE BUSINESS OF CONSOLIDATING INDUSTRIES WITH SERIAL ACQUISITIONS 5-7 (2022), https://www.economicliberties.us/our-work/the-roll-up-economy/ [https://perma.cc/8FFU-2C26]; RICHARD M. SCHEFFLER, LAURA M. ALEXANDER & JAMES R. GODWIN, SOARING PRIVATE EQUITY INVESTMENT IN THE HEALTHCARE SECTOR: CONSOLIDATION ACCELERATED, COMPETITION UNDERMINED, AND PATIENTS AT RISK 2 (2021), https://www.antitrustinstitute.org/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL-1.pdf [https://perma.cc/YV7F-WZWU].

[36] Private equity's current role in the legal market is confined to legal technology and process. *See generally* Hilary G. Escajeda, *Legal Education: A New Growth Vision Part I — The Issue: Sustainable Growth or Dead Cat Bounce? A Strategic Inflection Point Analysis*, 97 NEB. L. REV. 628, 724-26 (2019) (describing typical investments).

similar entities could innovate and discover new means of expanding access to legal services; their recent history suggests that they will instead consolidate incumbent firms, eliminate less well-financed competitors, and ultimately raise prices on consumers.[37]

The American legal system — to the extent it can be treated as a single system — also has several unique aspects, especially in terms of litigation. In Europe, contingent fee arrangements are prohibited or circumscribed, and defendants need not fear burdensome discovery. [38] Consequently, plaintiff-side work is potentially far more lucrative in the United States than it is in Europe. The American rule also assures that lawyers and their firms are rarely responsible for defendants' legal costs,[39] potentially incentivizing nuisance suits and less attorney gatekeeping in litigation.[40] An increase in competition in this important

[37] *Compare* Gillian K. Hadfield, *More Markets, More Justice*, 148 DAEDALUS 37, 45 (2019) ("A more efficient business model would be for the vast majority of these lawyers to be employed by a large-scale business that invested in developing brand identity, organizational practices, customer service protocols, and technological tools to deliver cost-effective legal help . . . ."), *with* SCHEFFLER ET AL., *supra* note 35, at 30 ("[P]rivate equity involvement has commonly involved consolidation to build and increase the value of the companies firms hold, without significant innovation or efficiencies.").

[38] *See* Winand Emons & Nuno Garoupa, *US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and the Supply of Legal Services*, 27 MANAGERIAL & DECISION ECON. 379, 379 (2006); John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMPAR. L. 617, 634 (1998) (describing European hostility to open-ended American discovery rules).

[39] For a rich comparative discussion of fee-shifting, see Werner Pfennigstorf, *The European Experience with Attorney Fee-Shifting*, 47 LAW & CONTEMP. PROBS. 37, 40, 44-49 (1984). As Professor Pfennigstorf's account indicates, whereas the American Rule is often differentiated from the English rule whereby the losing party bears the costs, England allows for more fee-shifting than other jurisdictions. *Id.* at 45.

[40] *See, e.g.*, Yannick Gabuthy, Emmanuel Peterle & Jean-Christian Tisserand, *Legal Fees, Cost-Shifting Rules and Litigation: Experimental Evidence*, 93 J. BEHAV. & EXPERIMENTAL ECON. 1, 7 (2021) (suggesting that the American rule incentivizes less care in litigation); Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1947 n.12 (2002) (collecting sources on whether the American rule promotes frivolous litigation); *see also* Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 94 (1986) (suggesting that rules that require the losing party to pay all attorneys' fees in the context of a rejected settlement "harm plaintiffs by shifting downward the relevant settlement range").

legal market segment could undermine productivity and economic growth as more claims enter the legal system.[41]

Lastly, lawyers play an underappreciated role in the production of law. Lawyers can improve the legal system either ex-ante by leveraging their expertise in advising on the codification of laws and regulations or ex-post by litigating against inefficient laws.[42] They perform these functions on behalf of clients but also sometimes via professional organizations. When pro-deregulation scholars focus on lawyers' roles in lawmaking, they tend to focus on the introduction of complexity that favors lawyers' economic interests.[43] However, lawyers are not a monolithic bloc, and there is no reason to believe that lawmakers (whether they be legislatures, regulatory agencies, or courts engaging in common law-lawmaking) systematically favor lawyers' interests over those of other constituents, many of whom have greater resources to spend on lobbying and are themselves represented by lawyers. The oft-decried complexity found in laws may in fact blunt the distributional consequences of regulatory and legislative capture.

A proper appraisal of legal market decartelization should address the foregoing complications. Once American regulators and policymakers recognize that deregulation carries some risk, they will be better situated to address the maldistribution of legal services without exacerbating other problems in the legal market.

Part II of this Article challenges legal market deregulation's pro-competitive benefits by introducing complications that scholarship has

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[41] *See* Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *The Allocation of Talent: Implications for Growth*, 106 Q.J. ECON. 503, 521 (1991); Walter Olson, *Walter Olson on Careful What You Unleash*, TRUTH ON THE MKT. (Sept. 19, 2011), https://truthonthemarket.com/2011/09/19/walter-olson-on-careful-what-you-unleash/ [https://perma.cc/R4SW-UX6S].

[42] For examples of law and economics scholarship on this general topic, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 15-16 (1987) and Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 302-03 (2004) [hereinafter Ribstein, *Lawyers as Lawmakers*].

[43] *See e.g.*, Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 808-09 (1994) (suggesting that the structure of tort law serves lawyers' interests); Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 INT'L REV. L. & ECON. 381, 393 (1992) (suggesting that lawyers benefit most from an intermediate level of complexity).

neglected. These complications relate to (i) localization; (ii) the potential involvement of private equity and similar firms in the market; and (iii) the increased risk of moral hazard and negative externalities stemming from American-style litigation. Critically, none of the foregoing complications are predicated on assumptions about the training and quality of legal providers.

In Part III, we argue that deregulating the legal market will also have upstream effects on lawmaking that could exacerbate the problems of legislative and regulatory capture. The markets for legal services and lawmaking are connected. Yet, the former is highly regulated, whereas the latter is not. Legal market decartelization will cause lawyers to have less influence in lawmaking vis à vis other interest groups, potentially leading to greater legislative and regulatory capture and more inefficient laws.

In Part IV, we describe a path forward that is both cost-effective and targets the root causes of the maldistribution of legal services. Regulators should focus on targeted interventions to reduce asymmetric information rather than more sweeping reforms that could make the legal market more inefficient. Where respondents often lack the resources to pay for assistance, no credible alternative to subsidized or pro bono services exists, necessitating "civil *Gideon*" for housing court and other contexts. Low- and middle-income consumers would also benefit more from simplified legal processes than greater for-profit involvement in the legal market. By overcoming the information costs that are endemic to the consumer legal market, new technologies such as generative artificial intelligence ("AI") have an important role to play as well.

I. LEGAL MARKET DEREGULATION: SOME COMPLICATIONS

The first wave of pro-deregulation scholarship maintained that deregulation would transform the legal market; recent work is more modest and maintains that relaxing unauthorized practice of law rules and repealing prohibitions on corporate delivery of legal services is unlikely to harm the public.[44] In this Part, we question this proposition

[44] *See* discussion *supra* Part I; *see also* Burnett & Sandefur, *supra* note 14, at 111 (describing lack of harms associated with Utah's Sandbox).

by introducing complications that have received little attention from pro-deregulation scholars: (i) spatial localization; (ii) the potential involvement of PE firms in the market; and (iii) the increased risk of moral hazard and negative externalities stemming from American-style litigation.

A. Spatial Localization

The American legal market is largely, but not exclusively, dominated by lawyers.[45] However, there is no single "American legal market" because each state is responsible for determining whom may practice law and regulating lawyers and other legal services providers within its borders.[46] When attorneys wish to practice in more than one state, they will ordinarily have to complete each state's admissions process.[47] As a result, most attorneys' practices are confined to one state and often just one part of the state.[48] The system of state by state admissions has

[45] The lawyers' monopoly is in actuality a quasi-monopoly because of competition from a range of providers across legal practice domains. *See* Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2615 (2014); Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1490 (2000).

[46] *See* Hadfield, *Legal Markets*, *supra* note 21, at 1279 ("Licensing tends to be local."); Steinberg et al., *supra* note 29, at 1318; Nancy J. Moore, *The Future of Law as a Profession*, 20 CHAP. L. REV. 255, 258 (2017) ("U.S. lawyers are primarily regulated by fifty state courts as opposed to state legislatures or the federal government."); *cf.* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1148-49 (2009) (identifying additional sources of regulation, including administrative agencies and insurers).

[47] *See* MODEL RULES OF PRO. CONDUCT r. 5.5(a) (AM. BAR ASS'N 2019). For a history of the development of exceptions to this rule, see Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 686-87 (2002); *see also* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 304, 311 (describing barriers to practicing in multiple states and localities).

[48] Recent research suggests that the bar examination requirement has historically lowered lawyer mobility by thirty to forty percent. *See* Adam Chilton, Jacob Goldin, Kyle Rozema & Sarath Sanga, *Occupational Licensing and Labor Mobility: Evidence from the Legal Profession* 22-23 (Yale Law & Economics Research Paper, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 25-05, U of Chicago, Public Law Working Paper No. 25-02, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4934569. Of course, the bar examination protects the public from some unqualified attorneys, although scholars have differed on its actual effects. *Compare* Markovic, *Protecting the Guild*, *supra* note 24, at 191-92 (suggesting that the bar

numerous critics,[49] but it does incentivize attorneys to become experts in the laws and procedures of their specific jurisdictions.[50]

Unsurprisingly, states' approaches to regulating legal services are not identical. States differ on fundamental questions such as how to define the practice of law, the scope of the lawyers' monopoly, and entry requirements for attorneys.[51] For example, some states regard real estate closings as the practice of law, but other states do not.[52] Some states permitted lay advocates to appear in state adjudicatory forums[53] long before Washington began its first-in-the-nation limited license legal technicians ("LLLT") program.[54] In terms of attorney admissions, a number of states do not require aspiring attorneys to attend an

examination has no independent effect on discipline based on Wisconsin data), *with* Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO . J. LEGAL ETHICS 307, 314 (2019) (estimating a significant effect on attorney discipline based on California data).

[49] For a trenchant criticism of entry barriers generally, see Clifford Winston & Quentin Karpilow, *Should the US Eliminate Entry Barriers to the Practice of Law? Perspectives Shaped by Industry Deregulation*, 106 AM. ECON. REV. 171, 173 (2016); *see also* Chilton et al., *supra* note 48, at 3 (suggesting that entry barriers tradeoff supply for provider quality).

[50] *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 987-88 (2000); Ribstein, *Lawyers as Lawmakers, supra* note 42, at 327; *see also* Gabriel J. Chin, *Toward National Criminal Bar Admission in U.S. District Courts*, 89 FORDHAM L. REV. 1111, 1111-12 (2021) (summarizing arguments for and against state-by-state admissions).

[51] *See* Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773, 783-84 (2002) (examining states' definitions of "practice of law").

[52] *See generally* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public?: Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2601 (2014) ("What nonlawyers can do without constituting an unauthorized real estate law practice varies by jurisdiction, and the lines drawn by some courts seem arbitrary at best.").

[53] Milan Markovic, *Book Review: Justice Triage*, 29 STAN. L. & POL'Y REV. ONLINE 1, 17 (2017) [hereinafter Markovic, *Book Review*] (reviewing BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW (2017)); Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. C.R. & C.L. 283, 289 (2020).

[54] For a discussion of the LLLT program, see sources cited *supra* note 9.

accredited law school; some do not require law school attendance at all.[55]

Indeed, contrary to the dominant narrative of a monolithic and protectionist American legal market, data recently collected by the Organization for Economic Co-operation and Development ("OECD") suggests that American lawyers are less regulated than their Canadian and European counterparts. The relevant comparisons are set out in Table 1. The OECD data also highlights significant and largely unappreciated variation among U.S. states. As set out in Table 2, Minnesota subjects attorneys to minimal entry regulations whereas states such as Louisiana and Nevada maintain much more cumbersome regulations.[56]

TABLE 1: OCCUPATIONAL ENTRY REGULATIONS INDICATOR — LAWYERS (FROM 0/LEAST REGULATED TO 6/MOST REGULATED)

	Average	Standard Deviation	Coefficient of Variation
USA (States)	**1.85**	**0.53**	**28%**
Canada (Provinces)	2.16	0.34	16%
Europe (Member states)	2.81	0.90	32%

Coefficient of Variation is SD/AVERAGE times 100 and measures variation relative to mean value.

Source: Own calculations, https://www.oecd.org/economy/growth/occupational-licensing-and-productivity/.

[55] *See* Markovic, *Book Review*, *supra* note 53, at 16.

[56] While an analysis of the OECD's methodology is beyond the scope of this paper, we note that the data capture real world differences in states. For example, Minnesota does not require experienced attorneys who have practiced for five or more years to sit for the bar exam; one cannot practice law in Nevada and Louisiana without passing these states' bar exams. *See Admission on Motion — Legal Education and Reciprocity Requirements*, NAT'L CONF. OF BAR EXAM'RS, https://reports.ncbex.org/comp-guide/charts/chart-15 (last visited Jan. 15, 2025) [https://perma.cc/2UD4-TV3A].

TABLE 2: OCCUPATIONAL ENTRY REGULATIONS INDICATOR ACROSS US STATES — LAWYERS (FROM 0/LEAST REGULATED TO 6/MOST REGULATED)

State	Indicator	State	Indicator	State	Indicator
Alaska	1.67	Kentucky	1.92	New York	1.46
Alabama	1.67	Louisiana	3.50	Ohio	1.25
Arkansas	1.25	Massachu-setts	1.25	Oklahoma	2.17
Arizona	2.83	Maryland	1.92	Oregon	1.92
California	2.33	Maine	1.92	Pennsylvania	1.25
Colorado	1.25	Michigan	1.67	Rhode Island	2.83
Connecticut	1.50	Minnesota	1.00	South Carolina	1.92
District of Columbia	1.67	Missouri	2.17	South Dakota	1.92
Delaware	1.75	Mississippi	1.92	Tennessee	1.25
Florida	2.33	Montana	2.17	Texas	2.17
Georgia	1.67	North Carolina	1.50	Utah	2.17
Hawaii	2.58	North Dakota	2.17	Virginia	2.17
Iowa	1.25	Nebraska	1.25	Vermont	1.67
Idaho	1.67	New Hampshire	1.67	Washington	1.92
Illinois	1.25	New Jersey	1.50	Wisconsin	2.17
Indiana	2.17	New Mexico	2.17	West Virginia	1.67
Kansas	1.25	Nevada	3.25	Wyoming	1.67

Source: https://www.oecd.org/economy/growth/occupational-licensing-and-productivity/.

Despite variance in attorney regulations and admission standards among states, one commonality is the very different positions of sophisticated users of legal services such as corporations and ordinary consumers who use legal services infrequently. The latter does not have the capacities to monitor their attorneys' work and often does not appreciate the need for legal assistance.[57] Small businesses and wealthier individuals arguably occupy a middle ground between large corporations and ordinary consumers inasmuch they operate with

[57] *See* Garoupa & Markovic, *supra* note 20, at 966.

asymmetric information but have some understanding of their needs.[58] Yet, this is not the only type of relevant segmentation: legal markets are segmented in terms of the clients served but also the needs of specific localities.[59] In contemplating regulatory reforms, legal service providers must consider differences between clients *and* differences between localities.

Legal markets are monopolistic to varying degrees and will function differently state by state and locality by locality. Although the mere presence of attorneys hardly assures that people will receive the legal services they need,[60] attorneys are generally concentrated in larger metropolitan areas, and legal markets are more competitive in these areas.[61] An example will illustrate the importance of this distinction from an economic perspective. Assume that in State A, due to a surfeit of legal services providers and an elastic demand curve, lawyers operate at prices equaling marginal cost. Conversely, in State B, due to a small number of providers and an inelastic demand curve, lawyers generate generous rents by charging prices above marginal cost. If both states were to deregulate their markets for legal services by loosening unauthorized practice of law rules and embracing corporate delivery of legal services, the results would not be the same in State A and State B.

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[58] *See id.*; *see also* Camille Chaserant & Sophie Harnay, *The Regulation of Quality in the Market for Legal Services: Taking the Heterogeneity of Legal Services Seriously*, 10 EUR. J. COMPAR. ECON. 267, 280-81 (2013) (comparing small businesses to ordinary consumers).

[59] *See generally* Chaserant & Harnay, *supra* note 58, at 276 (describing legal needs as "personalized and spatially localized"); Daria Fisher Page & Brian R. Farrell, *One Crisis or Two Problems? Disentangling Rural Access to Justice and the Rural Attorney Shortage*, 98 WASH. L. REV. 849, 884 (2023) ("If there is a need in rural communities, it is not necessarily a blanket need for more lawyers everywhere."). For a discussion of segmentation in legal education, see Paul Oyer & Scott Schaefer, *The Return to Elite Degrees: The Case of American Lawyers*, 72 ILR REV.: J. WORK & POL'Y 446, 449-50 (2019).

[60] Page & Farrell, *supra* note 59, at 884.

[61] Professors Pruitt and Showman observe that "just two percent of small law practices are in rural America, representing a serious mismatch for the roughly twenty percent of the populace who live there." Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 469 (2014); *see also* Luis Garciano & Thomas N. Hubbard, *Managerial Leverage Is Limited by the Extent of the Market: Hierarchies, Specialization, and the Utilization of Lawyers' Human Capital*, 50 J.L. & ECON. 1, 19 (2007) ("Lawyers in [urban] markets can better exploit increasing returns from knowledge because there are more local demanders . . . .").

Nor would the benefits, if any, be equal across these states. Indeed, we would expect consumers in State B to see far more benefits than consumers in State A. However, there could also be jurisdictions within State B that see little improvement. For example, new providers could settle in State B's urban centers, rendering these legal markets more competitive without altering economic conditions in other localities.

The standard response to the foregoing from pro-deregulation scholars is that State A and State B will both benefit because decartelization will not only increase the number of suppliers but also reach underserved populations via economies of scale.[62] Of course, this presupposes that new providers will concern themselves with latent demand rather than out-competing existing providers for available legal work.[63] But the more fundamental problem is that spatial localization hinders the deployment of technology and scaled delivery of legal services.[64]

As long as legal services are regulated state by state, a firm cannot simply deliver legal services from State A into State B.[65] Although some pro-deregulation scholars have advocated for national licensing of lawyers and other providers, [66] we are skeptical that the federal government would or could encroach on the authority of states and

[62] For versions of this argument, see sources cited *supra* note 15; John Armour & Mari Sako, *AI-Enabled Business Models in Legal Services: from Traditional Law Firms to Next-Generation Law Companies?*, 7 J. PROS. AND ORGS., 27, 30-32 (2020) (discussing the importance of scale and disaggregation); *see also* Sandefur et al., *supra* note 4, at 80 ("To meet substantial parts of latent demand, some or many of these new entities would need to offer services at larger scale and lower cost, which will require many more nonlawyer providers, whether human or software-based."); *cf.* Drew Simshaw, *Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 YALE. J.L. & TECH. 150, 169 (2022) (suggesting that artificial intelligence can "transform and expand the legal services market as a whole to include those who have been historically excluded").

[63] *See generally* Markovic, *Juking Access to Justice*, *supra* note 13, at 77 ("[R]ather than expanding access to legal services, corporations may simply compete for existing legal work.").

[64] *See generally* Armour & Sako, *supra* note 62, at 10 ("[T]he impact of AI on the work of lawyers is greatest where AI can easily facilitate the scaling of the delivery of legal services.").

[65] *See* Hadfield & Rhode, *How to Regulate*, *supra* note 4, at 1217; Ribstein, *Lawyers as Lawmakers*, supra note 42, at 311.

[66] *See* Hadfield & Rhode, *How to Regulate*, *supra* note 4, at 1217-18.

state courts to regulate legal services.[67] Whatever the case, the presence of local providers is still critical because many legal services either cannot be delivered remotely or are not as effective when they are delivered in this manner.[68] Clients may also be less likely to follow up with attorneys when they do not meet with them face to face and have negative perceptions about the advice that they received.[69]

Moreover, state laws differ. Consider estate planning, a practice area that is generally viewed as highly scalable.[70] A will that meets the requirements of a particular state's law may not meet the legal requirements of another state's law.[71] A basic will template may be perfectly adequate for much of the population of one state but not the population of another because of the prevalence of greater numbers of so-called nontraditional families.[72] Economies of scale depend on standardization that is often lacking in the legal field because of heterogeneity between clients, their needs, and disparities in potential harms from inadequate service.[73]

Jurisdictions that suffer from a dearth of attorneys also frequently face other resource constraints as well, including poverty, poor

[67] Judge Shepard has argued that national licensing would undermine state disciplinary mechanisms and lead to a "race to the bottom." Randall T. Shepard, *On Licensing Lawyers: Why Uniformity is Good and Nationalization is Bad*, 60 N.Y.U. ANN. SURV. AM. L. 453, 462 (2005). Leading pro-deregulation scholars have acknowledged that national licensing is fraught and potentially unconstitutional because of the traditional role of state courts in regulating attorneys. *See* Hadfield, *Legal Markets*, *supra* note 21, at 1307-08.

[68] *See* Nigel J. Balmer, Marisol Smith, Catrina Denvir & Ash Patel, *Just a Phone Call Away: Is Telephone Advice Enough?*, 34 J. SOC. WELFARE & FAM. L. 63, 80 (2012); Pruitt et al., *supra* note 30, at 36.

[69] *See* Balmer et al., *supra* note 68, at 78; Michele Statz, Robert Friday & Jon Bredeson, *"They Had Access, But They Didn't Get Justice": Why Prevailing Access To Justice Initiatives Fail Rural Americans*, 28 GEO. J. ON POVERTY L. & POL'Y 321, 361-62 (2021).

[70] *See* Emily S. Taylor Poppe, *The Future Is ~~Bright~~ Complicated: AI, Apps & Access to Justice*, 72 OKLA. L. REV. 185, 192-93 (2019).

[71] *See id.* at 196.

[72] *See id.* at 195-96 (suggesting pitfalls for nonmarried couples, blended families, and decedents who do not account properly for probate or non-probate property).

[73] *See* Hugh McDonald, *Assessing Access to Justice: How Much "Legal" Do People Need and How Can We Know?*, 11 U.C. IRVINE L. REV. 693, 709 (2021) ("Standard service approaches can also create access to justice barriers and increase service inefficiency, especially when they fail to take account of diverse legal need and capability.").

healthcare, lack of education, and environmental degradation.[74] These factors make underserved areas unattractive from an investment perspective.[75] Attorneys flock to population-rich urban centers for a reason, and nonlawyer providers are likely to do the same. In Washington State, the vast majority of LLLTs practice in or near large cities.[76]

Insufficient attention to localization can even cause deregulatory efforts to backfire. Consider the common view that legal technology may assist individuals living in "legal deserts."[77] The problem with this view is that legal deserts also tend to be "digital deserts" because they lack access to reliable and affordable cellphone and broadband service.[78] Few mechanisms exist to publicize existing technological resources.[79]

Even if reliable technology were available that facilitates access to basic legal advice, it is unclear that is the type of advice that underserved communities need the most.[80] The danger is that access to *some* legal assistance will be viewed as the end goal rather than better leveraging the human capital of existing providers to serve people facing potentially life-changing events.[81] Ultimately, the understandable impulse to curtail attorney rent-seeking may backfire in underserved markets because attorneys in these markets often have irreplaceable

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[74] *See* Pruitt et al., *supra* note 30, at 18.

[75] This holds true for both for-profit and not-for-profit sectors. *See generally* Statz et al., *supra* note 69, at 330-31 (summarizing empirical research on access to justice in rural areas). For a discussion of marketing to consumers, see Elizabeth Chambliss, *Marketing Legal Assistance*, 148 DAEDALUS 98, 102 (2019).

[76] *See* SOLOMON & SMITH, *supra* note 9, at 19.

[77] Legal deserts are non-metropolitan regions with few practicing lawyers or legal services providers. Pruitt et al., *supra* note 30, at 64; *see also* Statz et al., *supra* note 69, at 336-37 (noting that policymakers, scholars, and state bars have suggested that technology can facilitate access to justice in rural areas).

[78] *See* Pruitt et al., *supra* note 30, at 22; Statz et al., *supra* note 69, at 347.

[79] *See* McDonald, *supra* note 73, at 724; Statz et al., *supra* note 69, at 347-48.

[80] *See generally* Statz et al., *supra* note 69, at 375 ("[A]ttorneys work with people in crisis. . . . The main role of the attorney is not to solve the problem, but to bear the burden of the problem — the crisis — so that it may be solved in a dignified and just way.").

[81] *See* Page & Farrell, *supra* note 59, at 883 ("[S]ome interventions have the effect of making it easier and more efficient for courts to handle pro se litigants without significantly improving the experience of those litigants themselves.").

local knowledge and relational expertise.[82] As a leading access to justice research has explained: "[S]o-called 'digital first' and 'digital by default' strategies risk marginalizing, excluding, and defaulting those with elevated and complex legal needs."[83]

The legal markets of states and localities differ. Spatial localization complicates legal market decartelization and should counsel against "one-size-fits-all" deregulatory approaches. In the next section, we turn to the type of firms that could appear in a deregulated legal market.

B. Law Firms and Private Capital

One of the chief critiques of legal market cartelization is that it limits the delivery of legal services to lawyers operating in traditional firms.[84] Since the early 1900s, lawyers have been prohibited from partnering and sharing legal fees with nonlawyers,[85] and the organized bar has steadfastly resisted liberalizing these rules.[86] Only the District of Columbia and Arizona allow lawyers to partner with nonlawyers, and Utah permits these arrangements exclusively through its regulatory sandbox.[87]

The economic case for deregulating law firm structures is straightforward: deregulation is likely to facilitate access to both

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[82] *See* Statz et al., *supra* note 69, at 339.

[83] McDonald, *supra* note 73, at 726.

[84] *See* sources cited *supra* note 15.

[85] The current rule is MODEL RULES OF PRO. CONDUCT r. 5.4(a), (b) (AM. BAR ASS'N 2023); *see also* Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 4-11 (1998) (describing the evolution of these prohibitions in ethics codes and efforts to repeal them); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1118-22 (1999) (describing efforts to stamp out the corporate practice of law in New York); *cf.* Anthony J. Sebok, *Selling Attorneys' Fees*, 2018 U. ILL. L. REV. 1207, 1217 (2018) (distinguishing impermissible fee-splitting from the selling of unmatured fees).

[86] *See generally* Ted Schneyer, *"Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORDHAM URB. L.J. 76, 102-08 (2012) (describing failed effort to allow lawyers to partner with nonlawyers under the Model Rules of Professional Conduct).

[87] *See* sources cited *supra* note 8.

financial and human capital. Professors Adams and Matheson connect access to financial capital to both law firm expansion and innovation:

> The equity markets would provide law firms with necessary capital for expansion into new geographical areas, thereby better serving consumers' needs through greater access to legal services and increased competition in the local marketplace. This capital infusion would also allow investment in new technologies, again providing better legal services for the consumer.[88]

In terms of human capital, nonlawyer owners would contribute expertise in management, operations, and technology that lawyers may lack.[89]

American law firms dominate the global market for corporate legal services despite prohibitions on nonlawyer investment and ownership.[90] Nevertheless, access to capital markets would certainly enable firms to more easily raise money that could be invested in, inter alia, technology, advertising, and expansion.[91] It is also conceivable that law firms would be able to attract superior nonlawyer talent if they could offer equity to nonlawyer professionals.[92]

However, the benefits for ordinary consumers may be more theoretical than real.[93] Investors are generally profit-driven and may be uninterested in efficiencies that do not generate greater returns,

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[88] Adams & Matheson, *supra* note 85, at 30.

[89] *See* Hadfield, *Legal Markets*, *supra* note 21, at 1295-96.

[90] *See* Emilia Korkea-aho, *Legal Lobbying: The Evolving (But Hidden) Role of Lawyers and Law Firms in the EU Public Affairs Market*, 22 GERMAN L.J. 65, 71 (2021); *see also* Nuno Garoupa, *Globalization and Deregulation of Legal Services*, 38 INT'L REV. L. & ECON. 77, 84 (2014), https://doi.org/10.1016/j.irle.2013.07.002 [https://perma.cc/WE49-DD66] ("U.S. law firms have a production technology advantage in terms of process and management of clients associated with the significant prestige of American legal human capital . . . .").

[91] *See* Adams & Matheson, *supra* note 85, at 31-33; Sebok, *supra* note 85, at 1211.

[92] *See* McMorrow, *supra* note 7, at 672 ("A blanket ban on non-lawyer partners and investors denigrates the possibility of significant, equity-justifying contributions by non-lawyers, either through business or IT expertise, or as a non-lawyer specialist.").

[93] *See generally* Edward M. Iacobucci & Michael J. Trebilcock, *An Economic Analysis of Alternative Business Structures for the Practice of Law*, 92 CANADIAN BAR REV. 1, 2 (2013) (highlighting potential efficiencies).

particularly when demand is price inelastic.[94] If presented with a choice between a regular yearly dividend and subsiding risky operational changes that are unlikely to generate profits for several years, most investors choose the former.[95] Greater access to capital may in fact render legal markets *less* competitive if that capital is used for consolidation as opposed to innovation, as Professors Iacobucci and Trebilcock acknowledged in their influential study of ABS:

> [L]iberalizing the permitted structures of legal practices does not itself enhance the competitiveness of the legal services market. . . . [I]f anything, it is conceivable that traditional restrictions on the structure of legal practice, such as restrictions on equity investment by passive outsiders, tend to keep firms relatively small, and with liberalization it would be conceivable that firms that provide legal services could become much larger. If legal firms were to grow post-liberalization, it would be conceivable that liberalization could *reduce* competition.[96]

The possibility that legal market deregulation could undermine competition is buoyed by private equity's increasing dominance of the

[94] Consumers are obviously somewhat sensitive to the cost of legal services assuming they receive reliable information about costs. *See* John R. Schroeter, Scott L. Smith & Steven R. Cox, *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 36 J. INDUS. ECON. 49, 59 (1987). However, lawyers and law firms have traditionally been reluctant to advertise prices. *See* Jim Hawkins & Renee Knake, *The Behavioral Economics of Lawyer Advertising: An Empirical Assessment*, 2019 U. ILL. L. REV. 1005, 1030 (2019); Frank H. Stephen, James H. Love & Alan A. Paterson, *Deregulation of Conveyancing Markets in England and Wale*s, 15 FISCAL STUD. 102, 115 (1994). The problem is so acute that the English Legal Services Board is now requiring solicitors to post price information. *See* Garoupa & Markovic, *supra* note 20, at 987 (describing recent reforms in England and Wales). In the corporate sphere, the predominant view is that clients are price inelastic, at least with respect to critical matters. D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study*, 14 IND. J. GLOB. LEGAL STUD. 5, 26 (2007).

[95] Elisabeth de Fontenay, *The Myth of the Ideal Investor*, 41 SEATTLE U. L. REV. 425, 444 (2018).

[96] Iacobucci & Trebilcock, *supra* note 93, at 24-25 (emphasis in original).

American economy.[97] Early pro-deregulation scholarship envisioned law firms "going public" to secure outside capital,[98] but most companies seeking significant outside investment eschew the public markets and rely on private equity.[99] The reasons for this shift are manifold and are beyond this Article's scope, but they have significant implications for legal market decartelization.[100]

Private equity is far more active in the United States than in other countries and has gained a foothold in professional services already.[101] For example, PE firms were responsible for over $750 billion in healthcare transactions from 2010 to 2020.[102] Proponents claim that PE firms are more adept at managing costs and extracting value for investors; critics assail private equity for prioritizing short-term profits and engaging in anti-competitive behavior.[103] There is also a live debate

[97] *See generally* Andrew F. Tuch, *The Remaking of Wall Street*, 7 HARV. BUS. L. REV. 315, 347-48 (2017) ("Today private equity firms are frequently involved in the largest-scale corporate transactions, raising their profiles like never before."); Christina Parajon Skinner, *Nonbank Credit*, 9 HARV. BUS. L. REV. 149, 161-62 (2019) (noting that private equity funds hold over one hundred trillion dollars in assets).

[98] Adams & Matheson, *supra* note 85, at 17.

[99] *See* Michael Ewens & Joan Farre-Mensa, *The Deregulation of the Private Equity Markets and the Decline in IPOs*, 33 REV. FIN. STUD. 5463, 5464-45 (2020). Our definition of private equity is purposely broad and is intended to cover any company (privately held or publicly traded) that relies on capital from sophisticated investors to "acquire, monitor, and restructure businesses . . . ." *See* Tuch, *supra* note 97, at 338.

[100] For analyses of the reasons for this shift, see Ewens & Farre-Mensa, *supra* note 99, at 5466-67; Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 449-50 (2017); Paul Rose & Steven Davidoff Solomon, *Where Have All the IPOs Gone? The Hard Life of the Small IPO*, 6 HARV. BUS. L. REV. 83, 87 (2016).

[101] *See* Seretakis, *supra* note 33, at 616-617. The U.K. is far more active than the rest of Europe, but this is largely a result of U.S. firms' presence in the country. *See id.* at 616; *see also* Kaye Wiggins, Harriet Agnew & Daniel Thomas, *Private Equity and the Raid on Corporate Britain*, FIN. TIMES (July 11, 2021), https://www.ft.com/content/315a02d1-6606-433e-b6f4-1989f2fad27d [https://perma.cc/3NL9-SL25] (highlighting role of foreign firms in the UK market).

[102] *See* SCHEFFLER ET AL., *supra* note 35, at 9. This is a conservative estimate because PE firms tend to not report smaller deals. *See id.* at 8.

[103] *See generally* Alexander Borsa, Geronimo Bejarano, Moriah Ellen & Joseph Dov Bruch, *Evaluating Trends in Private Equity Ownership and Impacts on Health Outcomes, Costs, and Quality: Systematic Review*, 382 BMJ 1, 13 (2023) ("Proponents of PE in healthcare have argued that PE firms use their managerial expertise to implement

as to whether private equity involvement has jeopardized patient care.[104] One need not hold a strong position on these issues to question the assumption — ubiquitous in pro-deregulation scholarship — that nonlawyer equity will be channeled into technology and other forward-looking investments.[105] There is little in private equity's track record to support such a view. [106]

If PE firms were to enter the consumer legal market, a realistic scenario would be that they will aggressively consolidate through serial acquisitions of small law firms.[107] This strategy of "roll-ups" has been deployed in industries ranging from medicine and dentistry to advertising and journalism.[108] Indeed, healthcare was once much like law in that care was provided predominately by physicians working alone or in small practices.[109] The influx of private equity capital does not appear

operational and financial changes and improve the acquired company's value after an acquisition."); De Fontenay, *supra* note 95, at 442-43 (summarizing arguments for and against private equity management).

[104] Professors Brown and Hall have claimed in a recent article that private equity "financializes health care, using health care entities as a means to extract wealth for investors, thereby prioritizing quick profits at the expense of patient care." Erin C. Fuse Brown & Mark A. Hall, *Private Equity and the Corporatization of Health Care*, 76 STAN. L. REV. 527, 531 (2024). Some empirical research supports the view that private equity firms are jeopardizing care. *See* Borsa et al., *supra* note 103, at 11-12; Atul Gupta, Sabrina T. Howell, Constantine Yannelis & Abhinav Gupta, *Owner Incentives and Performance in Healthcare: Private Equity Investment in Nursing Homes* 30-31 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28474, 2023), https://www.nber.org/system/files/working_papers/w28474/w28474.pdf [https://perma.cc/V4Q8-EW6B] (comparing nursing homes operated by private equity firms to other nursing homes).

[105] *See* Jonathan T. Molot, *What's Wrong with Law Firms? A Corporate Finance Solution to Law Firm Short-Termism*, 88 S. CAL. L. REV. 1, 5 (2014) ("Due to law firms' lack of permanent equity, they are ill-equipped to make long-term investment decisions . . . ."); Sebok, *supra* note 85, at 1211.

[106] *See* Borsa et al., *supra* note 103, at 13 (questioning efficiency of private equity firms); De Fontenay, *supra* note 95, at 443; *see also* SCHEFFLER ET AL., *supra* note 35, at 4 ("[P]rivate equity firms' increasing involvement in healthcare markets is exacerbating existing competition concerns in healthcare and creating new ones.").

[107] For a thorough discussion of this strategy that is common in the industry, see Hearn et al., *supra* note 35, at 14-19. Because each individual acquisition is small in scope, consolidation does not trigger scrutiny from antitrust regulators. *See id.* at 33.

[108] *See id.*

[109] *See* RICHARD M. SCHEFFLER, LAURA ALEXANDER, BRENT D. FULTON, DANIEL R. ARNOLD & OLA A. ABDELHADI, MONETIZING MEDICINE: PRIVATE EQUITY AND COMPETITION IN

to have made physicians' practices more efficient.[110] As Professor Scheffler and his co-authors have explained:

> [I]t is not clear that many, or even most, private equity acquisitions in [healthcare] are motivated by potential economies of scale and scope versus financial engineering. Moreover, even where there are potential cost savings from economies of scale and scope from larger physician practices, they often are not passed on to patients or payors in the form of lower prices and higher quality. Several studies . . . have found that hospital-physician integration led to higher physician prices and total expenditures without a consistent association with improved quality.[111]

What scholars have dubbed "people law"[112] — legal services such as criminal defense, family law, and estate planning that are predominately provided to individuals — is ripe for consolidation because of the intense competition between small firms.[113] One can easily envision well-financed PE firms acquiring most of the family law practices in a given jurisdiction and using advertising and branding to outcompete traditional firms.[114] Once these firms establish market dominance, they

PHYSICIAN PRACTICE MARKETS 7 (2023), https://www.antitrustinstitute.org/wp-content/uploads/2023/07/AAI-UCB-EG_Private-Equity-I-Physician-Practice-Report_FINAL.pdf [https://perma.cc/6BV7-UNJ3].

[110] *See id.* at 6-7.

[111] *Id.* at 8.

[112] Professor Henderson popularized the term "people law," *see* WILLIAM D. HENDERSON, LEGAL MARKET LANDSCAPE REPORT 14-17 (2018), https://board.calbar.ca.gov/Agenda.aspx?id=14807&tid=0&show=100018904&s=true#10026438 [https://perma.cc/AB3N-UJH7], but it was coined earlier. *See* Roderick A. Macdonald, *Access to Justice and Law Reform*, 10 WINDSOR Y.B. ACCESS TO JUST. 287, 327 (1990).

[113] *See, e.g.*, BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 66-67 (2017) (observing high levels of competition in the consumer legal market); HENDERSON, *supra* note 112, at 23 ("[I]t is becoming increasingly difficult for lawyers to attract a sufficient and steady stream of paying clients.")

[114] *See* Hadfield, *Legal Markets*, *supra* note 21, at 1298-99.

can, consistent with antitrust laws, sets prices across localities.[115] High barriers to entry in the legal field will deter new entrants, especially ones without PE-backed law firms' deep pockets.[116]

It is not a foregone conclusion that deregulation will lead to a private equity-dominated legal market or that PE firms will have the same impact on law as they have in medicine, but consideration of what nonlawyer investment in the legal services industry will look like is overdue. Law firms have only recently become investment vehicles, and nascent reforms in Arizona and abroad should not provide policymakers with false assurance that ABS will remain relatively small and controlled by lawyers.[117]

C. American-Style Litigation

Another complication that pro-deregulation scholars have overlooked is decartelization's impact on American-style litigation. Scholars have long debated whether the United States is an uncommonly litigious

[115] For an excellent discussion of antitrust law's lax treatment of intrafirm pricing versus interfirm pricing, see Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 401-02 (2020).

[116] In addition to entry barriers imposed by regulators relating to lawyer licensing, dominant, well-capitalized firms can increase advertising and lower rates on a temporary basis to make it more difficult for new entrants to gain a foothold in each market. *See* Eliot G. Disner, *Barrier Analysis in Antitrust Law*, 58 CORNELL L. REV. 862, 877, 880 (1973).

[117] Arizona approved its first ABS only in January 2022. *See* Dylan Jackson, *Arizona Approves First Ever 'Alternative Business Structure*,' LAW.COM (Jan. 13, 2022, 2:18 PM), https://www.law.com/international-edition/2022/01/13/arizona-green-lights-combined-elevate-entity-as-its-first-nonlawyer-owned-law-firm-378-186515/ [https://perma.cc/NPK7-8UR7]. There are fewer than sixty ABS registered as of the date of this Article. *See Alternative Business Structures Program*, AZCOURTS.GOV, https://www.azcourts.gov/Portals/26/ABS%20Directory%20-%207-5-2023.pdf (last updated July 5, 2023) [https://perma.cc/6DDW-UTF4]. None focus predominately on the needs of low-income people. With respect to England and Wales, the consensus is that the reforms have had minimal effects on competition (positive or negative), with many firms struggling to obtain outside investments. *See* ENGSTROM ET AL., *supra* note 8, at 19-20; *see also* Garoupa & Markovic, *supra* note 20, at 975 ("There is scant evidence that ABS firms charge less than traditional firms, and the cost of legal services in England and Wales has inched up steadily.").

country.[118] What is not in doubt is that the litigation culture of the United States differs from that of other common law countries because of the rarity of fee-shifting and the popularity of contingent fee arrangements.

A substantial amount of literature examines the effects of fee-shifting rules on litigation, including whether the absence of fee-shifting might incentivize frivolous claims.[119] Unfortunately, neither theorists[120] nor empirical researchers offer definitive answers.[121] From a theoretical perspective, one would expect fee-shifting's impact to depend on a plaintiff's degree of risk aversion or optimism bias. Under the so-called English rule, the losing party bears the costs, including attorney fees.[122] Optimistic plaintiffs will be more likely to bring suit under this rule because they assume that the other side will be responsible for litigation costs.[123] However, the American rule better fits risk-adverse plaintiffs

[118] The received wisdom is that the United States is very litigious, but there is comparatively little data to substantiate this claim. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know* (*and Think We Know*) *About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 8-10 (1983); *see also* DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE 2 (John M. Conley & Lynn Mather eds., 2016) (noting that most Americans do not assert their rights when injured or even consult with attorneys). *But see* Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369, 375-77 (1991) (suggesting that Americans pay far more in attorneys' fees and insurance costs than other peoples).

[119] See, for a general overview, THOMAS J. MICELI, THE ECONOMIC APPROACH TO LAW 288-94 (3d ed. 2017) and, more recently, Bruce Kobayashi, *Economics of Litigation*, *in* 3 OXFORD HANDBOOK OF LAW AND ECONOMICS: PUBLIC LAW AND LEGAL INSTITUTIONS 201, 201 (Francesco Parisi ed., 2017). On the same vein, consider Kritzer, *supra* note 40, at 1947 (collecting sources on fee-shifting and frivolous suits).

[120] *See* Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1078 (1989).

[121] For recent overviews of available empirical and experimental evidence, see Paul Fenn, Veronica Grembi & Neil Rickman, *'No Win, No Fee,' Cost-Shifting and the Costs of Civil Litigation: A Natural Experiment*, 127 ECON. J. F142, F142 (2017); Gabuthy et al., *supra* note 40, at 4. The classical article is James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. ECON. 225, 225 (1995).

[122] *See* Kritzer, *supra* note 40, at 1946; Pfennigstorf, *supra* note 39, at 44-45.

[123] *See* Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1078 (1993); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982).

because there is a low likelihood that they will bear the defendant's costs if they should lose.[124] Furthermore, if one considers endogenous rather than exogenous litigation costs (that is, parties decide on their expenditures as a function of the rule in place rather than a mere shifting of predetermined costs), different results are possible depending on the specific assumptions.[125] Parties can also adjust their postures vis à vis settlement value depending on the fee-shifting rule in place.[126]

Although the vast literature on cost-shifting rules does not provide conclusive evidence about their impact on litigation, these rules unquestionably impact litigants' behavior. For example, cost-shifting rules can be designed to promote settlements.[127] They also influence the demand for litigation in terms of generating mechanisms to finance access to justice, including taxpayer subsidies and third-party financing of claims, often referred to as "litigation finance."[128]

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[124] *See* Gabuthy et al., *supra* note 40, at 23; *see also* Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 153 (1984) ("[G]iven risk aversion and the diminishing marginal utility of income and wealth, the threat of having to pay the other side's fee can loom so large in the mind of a person without considerable disposable assets that it deters the pursuit of even a fairly promising and substantial claim . . . .").

[125] For the appropriate mathematical modeling, see John J. Donohue, III, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 LAW & CONTEMP. PROBS. 195, 197, 200-04, 209-10, 212-21(1991); Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. ECON. & ORG. 143, 148-52, 161-64 (1987); Miller, *supra* note 40, at 96; A. Mitchell Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 519, 523-32 (1998); Shavell, *supra* note 123, at 58-62.

[126] A Coasian argument would say that plaintiff and demand will negotiate around cost-shifting rules, thus the rate of settlement should be unchanged. *See* John J. Donohue III, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1109 (1991).

[127] A leading work is Tai-Yeong Chung, *Settlement of Litigation under Rule 68: An Economic Analysis*, 25 J. LEGAL STUD. 261, 264 (1996).

[128] For excellent introductions to litigation finance, see Bruno Deffains & Claudine Desrieux, *To Litigate or Not to Litigate? The Impacts of Third-Party Financing on Litigation*, 43 INT'L REV. L. & ECON. 178, 188 (2015); Maya Steinitz, W*hose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1270-71 (2011).

One particularly important factor in assessing cost-shifting rules is if lawyers are compensated via contingent fees.[129] Contingent fees are relevant in three discrete ways. First, contingent fees align the interests of lawyers and clients better than alternative fee arrangements such as hourly billing.[130] Second, contingent fees force risk-sharing between lawyer and client, but the efficiency of risk-sharing depends on the assumptions about risk behavior among the different parties.[131] Finally, contingent fees shape case selection, discovery, and the size of settlements and verdicts.[132] For purposes of this Article, what is most relevant is that contingent fees are a fixture of American litigation and

[129] Scholars have expressed varying views on the merits of contingent fees. Recommended analyses include: James D. Dana & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349, 364-66 (1993); Winand Emons, *Expertise, Contingent Fees, and Insufficient Attorney Effort*, 20 INT'L REV. L. & ECON. 21, 30-32 (2000); Winand Emons & Claude Fluet, *Why Plaintiffs' Attorneys Use Contingent and Defense Attorneys Fixed Fee Contracts*, 47 INT'L REV. L. & ECON. 16, 22 (2016); Nuno Garoupa & Fernando Gómez-Pomar, *Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees Over Contingent Fees*, 24 J.L. ECON. & ORG. 458, 472-73 (2008); Neil Rickman, *The Economics of Contingency Fees in Personal Injury Litigation*, 10 OXFORD REV. ECON. POL'Y 34, 47-48 (1994); Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. ECON. 343, 355 (1993).

[130] *See* Patricia Munch Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213, 214-18 (1983); Emons & Garoupa, *supra* note 38, at 380; Hugh Gravelle & Michael Waterson, *No Win, No Fee: Some Economics of Contingent Legal Fees*, 103 ECON. J. 1205, 1218-19 (1993); P.J. Halpern & S.M. Turnbull, *Legal Fees Contracts and Alternative Cost Rules: An Economic Analysis*, 3 INT'L REV. L. & ECON. 3, 5 (1983); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 165-66 (2003).

[131] *See* Winand Emons, *Playing It Safe with Low Conditional Fees Versus Being Insured by High Contingent Fees*, 8 AM. L. & ECON. REV. 20, 22-24 (2006) [hereinafter Emons, *Playing It Safe*]; *see also* Winand Emons, *Conditional Versus Contingent Fees*, 59 OXFORD ECON. PAPERS 89, 90-92 (2007).

[132] *See, e.g.*, MICELI, *supra* note 119, at 294-99 (examining effects on frivolous filings); Florian Baumann & Tim Friehe, *Contingent Fees with Legal Discovery*, 18 AM. L. & ECON. REV. 155, 156 (2016) (exploring effects on discovery); Shmuel Leshem, *Contingent Fees, Signaling and Settlement Authority*, 5 REV. L. & ECON. 435, 436-437 (2009) (examining effects on settlement).

enable lawyers, firms, and litigation financiers to obtain awards that far exceed their investments in specific cases.[133]

Despite the depth and complexity of the contingent fee literature, it is safe to assume that greater competition for claims — caused by an increase in both number and types of providers — could easily induce more frivolous litigation. As the supply side expands, the pool of contingent fees cases will have to expand as well to maintain the new providers. That decartelization will allow plaintiffs to press riskier claims is a feature and not a bug for some leading pro-deregulation scholars.[134] Even so, the impact will be unequal between the legal market's corporate and consumer segments.

Corporations usually have the resources to press potentially lucrative claims and are more than capable of discerning the strengths of their claims.[135] Thus, they are less dependent on contingent fee arrangements and less susceptible to attorney overreaching.[136] Conversely, consumers often need contingent fee arrangements [137] and rely on their attorneys to assess their claims' merit.[138] This raises the specter of moral hazard

[133] *See, e.g.*, Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 79 (2003) ("[A] tort lawyer will obtain a million dollar or multi-million dollar fee irrespective of the effort anticipated to be required and the value, if any, that the lawyer adds to the value of the claim as existed when he was retained."); Emons, *Playing It Safe*, *supra* note 131, at 29-30 (highlighting attorney incentives to settle quickly).

[134] *See* Adams & Matheson, *supra* note 85 at 34-35; Iacobucci & Trebilcock, *supra* note 93, at 85 ("A sole proprietor who accepts a contingency fee arrangement bears the risk of the investment in the lawsuit herself; this is not desirable, all things equal, for a risk-averse individual.").

[135] For further discussion of such resources, see Iacobucci & Trebilcock, *supra* note 93, at 77 ("[A]ll else equal, clients would not want to deal with a firm that has a structure that is not good for clients."); Garoupa & Markovic, *supra* note 20, at 965 (discussing monitoring provided by in-house counsel).

[136] *See* John C. Moorhouse, Andrew P. Morriss & Robert Whaples, *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 692 n.141 (1998) (noting that corporations rarely pay contingent fees).

[137] *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 270 (1996); Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 814 (1989).

[138] *See* Emons, *Playing It Safe*, *supra* note 131, at 22-23 (discussing the client's inability to distinguish between cases that do and do not need development); Jay, *supra* note 137, at 815 ("[T]he great majority of consumers of legal services who agree to contingent fee

inasmuch as attorneys litigate (and settle) when it is in their interests and not necessarily those of their clients.[139]

Of particular concern is that ABS may be in a better position to take on frivolous cases on a contingent fee basis than traditional firms. The risks inherent in contingent fee litigation — namely that the attorney will receive nothing from his or her investment in a case — is no longer wholly borne by the attorney that selected and litigates the case; rather it is passed on, in whole or in part, to the ABS's nonlawyer investors.[140] When neither lawyers nor their clients have much stake in the underlying litigation, the costs of any frivolous litigation are externalized to defendants and the legal system as a whole.[141] In this regard, legal market decartelization exacerbates the fundamental divergence between the social and the private reasons to litigate, potentially distorting the civil justice system as a whole.[142] Consumers with meritorious claims are arguably disadvantaged most of all by any surge in frivolous litigation.[143]

Note that the above dynamic exists to a lesser extent with respect to litigation finance. However, investing in a specific contingent fee claim is inherently less risky than investing in law firms that depend on contingent fee work. In the former situation, litigation funders work directly with the nominal client and acquire all relevant information

arrangements lack the ability to gauge accurately whether a projected recovery will exceed litigation expenses.").

[139] Polinsky & Rubinfeld, *supra* note 125, at 166.

[140] A similar argument is made in the corporate governance literature when assessing risk taking by different types of corporate actors. *See* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1438-40 (2006).

[141] One solution to this problem would be enforcement of ethical and procedural rules that prohibit frivolous litigation. However, these rules have historically been underenforced and are rarely applied in connection with out-of-court settlements. *See generally* David Luban, *Ethics and Malpractice*, 12 MISS. COLL. L. REV. 151, 153 (1992) ("[E]thical rules against frivolous litigation will lie unenforced unless an adversary attorney — not a layperson — can gain advantage by invoking the rule in court.").

[142] For a full theoretical analysis of the externalization effect, see generally Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

[143] *See* Giuseppe Dari-Mattiacci & Margherita Saraceno, *Fee Shifting and Accuracy in Adjudication*, 63 INT'L REV. L. & ECON. 1, 2 (2020).

about the case.[144] Conversely, when investing in a firm, the investor is generally barred from access to client-specific materials on account of confidentiality rules.[145] This lack of access creates a new moral hazard: law firms are incentivized to show more and more assets on their balance sheets to encourage additional outside investment.[146] In these regards, plaintiff-side law firms are potentially akin to issuers of other difficult-to-value asset-backed securities when they are structured as ABS.[147]

We do not deny that access to nonlawyer capital can advantage law firms and their clients in many respects. Yet, this capital can transform litigation for the worse because of the lack of fee-shifting, common use of contingent fees, and increased risk of moral hazard caused by separating attorney labor and capital. In the next Part, we turn to the potential for decartelization to affect not only the supply of legal services but the law itself.

II. LAWYERS AND LAWMAKING

In the previous Part, we questioned whether legal market decartelization would benefit consumers and make legal markets more competitive. In this Part, we develop a novel and more comprehensive economic critique based on the relationship between lawyering and lawmaking. We then illustrate how this relationship might deteriorate in a deregulated market.

Any economic analysis is simplistic by method — it is based on parsimonious models that supposedly capture the relevant trade-offs. The starting point in the context of the market for legal services is that

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[144] *See generally* Steinitz, *supra* note 128, at 1276 ("Importantly, the client contracts directly with the funder in these [litigation financing] agreements.").

[145] *See* Robert F. Weber, *The Securities Law Disclosure Conundrum for Publicly Traded Litigation Finance Companies*, 56 U. MICH. J.L. REFORM 699, 703-04 (2023).

[146] *See id.* at 724 (questioning accounting of litigation claims by prominent litigation funders).

[147] For a general discussion of the skewed incentivizes in asset-backed securities markets, see John C. Coffee, Jr., *What Went Wrong? A Tragedy in Three Acts*, 6 U. ST. THOMAS L.J. 403, 405-08 (2009). *See also* Garoupa & Markovic, *supra* note 20, at 984-85 (likening case selection for the purposes of comparison to the origination of mortgages used for mortgage-backed securities).

licensed lawyers operate in two stylized markets, lawyering and lawmaking.[148] In many cases, these two markets are blurred. When a lawyer engages in public interest litigation or challenges a regulation in court on behalf of a corporate client, this is both lawyering (in the sense of representing the interests of a client) and lawmaking (since the prevailing law could change because of these cases).[149]

For purposes of this Article, we consider lawmaking to be the set of activities engaged by licensed lawyers outside of their representation of individual clients and related to their direct engagement with legislatures and regulatory agencies.[150] We have in mind actions such as drafting legislation and regulations, participating in policy and regulatory debates, providing human capital to assist politicians and regulators, and interacting with business interests and general members of the public who may or may not have legal training.[151] Although lawyers are charged to seek improvements of the law and engage in law reform work,[152] pro-deregulation scholars either neglect lawyers' activities in this regard or take a dim view.[153] One common criticism is that lawyers

[148] *See generally* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 328 ("Lawyers clearly see their individual, nonrepresentative participation in lawmaking as part of their self-identification as a profession.").

[149] *See generally* Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733, 734 (2004) ("While judges and legislators nominally make the law, private lawyers provide significant input as participants in both legislative and judicial lawmaking.").

[150] *See* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 328.

[151] For legal scholarship concentrating on corporate lawyers' impact on lawmaking, see Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423, 423 (1993) and Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 931, 946-47 (2021). For analyses of lawyers' application of human capital to provide non-legal services on equal terms with other business professionals, see, for example, M. Todd Henderson, Irena Hutton, Danling Jiang & Matthew Pierson, *Lawyer CEOs*, J. FIN & QUANTITATIVE ANALYSIS 1, 3-5 (2023); M. Todd Henderson, *Do Lawyers Make Better CEOs than MBAs?*, HARV. BUS. REV., https://hbr.org/2017/08/do-lawyers-make-better-ceos-than-mbas (last updated Oct. 30, 2017) [https://perma.cc/P7AH-Q7BJ].

[152] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2023).

[153] *See, e.g.*, Hadfield, *Legal Markets*, *supra* note 21, at 1268 (noting that her analysis of legal markets does not address lawyers' contributions to legal infrastructure); Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 347 (summarizing views on why lawyers may make laws less efficient).

introduce unnecessary complexity.[154] Of course, as Professors Ruhl and Katz have cautioned, describing a legal system as "complex" does not mean that the system is normatively undesirable or fails to produce good outcomes.[155] *Some* level of complexity may be efficient.[156]

In our view, lawmaking and lawyering are best understood as two sequential markets. Lawmaking is the upstream market where political preferences and regulatory priorities are transformed into applicable law.[157] The downstream market consists of executing and litigating laws and regulations, that is, representing the interests of the different parties affected by them.[158] These markets are vertically integrated because lawyers are central to both markets although they face more competition in the upstream market than they do in the downstream market.[159] Vertical integration between lawmaking and lawyering generates important questions about how each market is affected by behavior in the other market.

Part II, above, addresses the market for lawyering that differs significantly from the market for lawmaking. In the United States, the former is highly regulated whereas the latter is not. When engaging in lawmaking, lawyers compete with other professionals and business

[154] *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD, at x-xi (1994); *see also* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 26 (1992) ("[T]he main producers, rationalizers, and administrators of law — legislators and their staff, bureaucrats, litigants, lawyers, judges, and legal scholars — generally benefit from legal complexity while bearing few of its costs."); White, *supra* note 43, at 388 (suggesting that lawyers benefit most from an intermediate level of complexity).

[155] J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191, 207-10 (2015).

[156] White, *supra* note 43, at 394.

[157] *See* Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 842 (2010).

[158] This is captured by the notion of lawyers as counselors and problem-solvers. *See, e.g.*, Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 8 (1995) ("In counseling a client about a strategic decision, negotiating or drafting an agreement, or dealing with an organizational problem, the lawyer's work may be constrained, facilitated, or even driven, by the law; but it often calls for judgment and even expertise not of a strictly legal nature.").

[159] We define vertical integration broadly to mean only the "the coordination of successive stages of production or distribution." Friedrich Kessler & Richard H. Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 1 (1959).

interests that are not subject to the same ethical and regulatory constraints.[160]

Consider lobbyists. Lobbying is regulated at the state and federal levels, but lobbyists do not have mandatory licensing requirements and do not self-regulate.[161] Current state and federal regulations fail to address, inter alia, effective limitations on campaign donations, conflicts of interest, and disclosure requirements.[162] Since lawyers must comply with onerous ethical rules in addition to general lobbying regulations, they operate at a disadvantage when competing with nonlawyer lobbyists in the upstream market while retaining their hold on the downstream market.[163]

Vertical integration has long preoccupied antitrust law scholarship. Under the traditional view, vertical integration enhances market power, generating a loss of efficiency.[164] The eponymous Chicago school challenged this paradigm, arguing that vertical integration addresses significant problems, such as asymmetric information and transaction costs, thereby promoting efficiency and benefitting consumers.[165]

Vertical integration by lawyers could conceivably be anticompetitive. Market power in the downstream market of lawyering could generate rents that are used to undermine competition and achieve dominance in

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[160] *See* Moshe Cohen-Eliya & Yoav Hammer, *Nontransparent Lobbying as a Democratic Failure*, 2 WM. & MARY POL'Y REV. 265, 284-85 (2011); *see also* Kate M. Conlow, *Financial Conflicts of Interest and Academic Economists in Law and Policymaking*, 56 ARIZ. ST. L.J. 621, 673-74 (2024) (contrasting lawyers with economists).

[161] *See* Geoffrey W. Rapoport, *Licensing and Self-Regulation of Lobbyists*, 23 GEO. J. LEGAL ETHICS 749, 749, 755-60 (2010).

[162] *See id.* at 758-60.

[163] *See id.* at 759-60; *see also* Conlow, *supra* note 160, at 668-69 (focusing on lax conflict of interest rules pertaining to economists and their effects on policy).

[164] *See generally* Michael H. Riordan, *Anticompetitive Vertical Integration by a Dominant Firm*, 88 AM. ECON. REV. 1232, 1232 (1998) (describing vertical foreclosure theory).

[165] Leading works include Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157, 194-201 (1954), and Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347, 351-52 (1950). For a general overview of the debate between the Chicago school and its critics, see Michael H. Riordan, *Competitive Effects of Vertical Integration*, *in* HANDBOOK OF ANTITRUST ECONOMICS 145, 145 (P. Buccirossi ed., 2008).

the upstream market of lawmaking. [166] If lawyers do wield their market power in this way, decartelization could be a means to reduce their ability to generate rents, capture lawmaking, and introduce needless complexity.[167]

What the foregoing argument neglects is that the upstream market is largely unregulated. Lawyers inevitably compete with lobbyists, corporations, and public interest groups that can also bring pressure to bear on lawmakers and administrative agencies. When lawyers engage in rent-seeking or otherwise undermine public welfare, competing interests, which are often also represented by lawyers, can intercede.[168] For example, state bar associations have in the past sought to undermine competition in the consumer legal market by prohibiting individuals and companies from selling legal forms and other self-help resources.[169] These efforts by and large failed because other constituencies pressured legislatures to pass laws to clarify that such resources do not constitute the unauthorized practice of law.[170] More recently, to forestall interventions from the Securities and Exchange Commission and the U.S. Treasury Department, the Bar has been forced to amend professional regulations that favor corporate lawyers and their clients at the public's expense.[171] Lawyers' dominance of the

[166] *See* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 354 (suggesting that state law is reflective of the power of a state's practicing bar).

[167] For a variation of this argument, see Hadfield, *supra* note 50, at 995-96.

[168] *See* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 348; *see also* Leslie C. Levin & Lynn Mather, *Beyond the Guild: Lawyer Organizations and Law Making*, 18 WASH. U. GLOB. STUDS. L. REV. 589, 604 (2019) ("Lawyers' identification with client interests can reduce the ability of a lawyer organization to engage in meaningful collective action due to the diversity of clients that the organization's membership represents.").

[169] For a history of the bar's efforts in this regard, see Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 822-24 (2002).

[170] *See id.* at 839 (describing backlash to the decision to ban Quicken Family Lawyer in Texas).

[171] *See* Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 729-35 (2004) (detailing amendments to lawyers' whistleblowing duties in the aftermath of high-profile accounting scandals such as Enron); David L. Hudson Jr., *Attorney Complicity in Money Laundering: Should the Model Rules Have a Due Diligence Standard?*, 108 ABA J. 22, 23 (2022) (discussing proposals to require lawyers to report suspicions of money laundering).

downstream market does not guarantee dominance of the upstream market.

Nevertheless, lawyers have natural advantages in lawmaking because of their legal expertise. They have the conceptual and theoretical human capital to write laws that codify legislatures and administrative agencies' policy directives.[172] They also have sense of how these laws and regulations are likely to impact individuals, business organizations, and judicial administration because lawyers understand "distinctions between law in the books and law in action."[173] The relationship between legal expertise and lawmaking has implications for vertical integration across several different dimensions.

A. Human Capital

Empirical evidence suggests that vertical integration is beneficial when an industry is shaped by sunk costs and transaction-specific assets.[174] Legal human capital broadly fits this description. Legal education, human capital accumulation, and institutional know-how in legal practice are sunk costs; they are also highly specific within the legal world, that is, to lawmaking and lawyering.[175] Lawyers add value by bringing this capital on bear on behalf of their clients.[176]

In a counterfactual world where licensed lawyers could not lobby or otherwise engage in lawmaking, lawyers could still collect rents in the downstream market, but they would not be able to translate their

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[172] *See* Hadfield, *supra* note 50, at 982-83; *see also* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 491 n.84 (1987) (arguing that Delaware's dominance in corporate law is due to the capital investments of its lawyers).

[173] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

[174] For an example of empirical evidence, see Marvin B. Lieberman, *Determinants of Vertical Integration: An Empirical Test*, 39 J. INDUS. ECON. 451, 461-63 (1991).

[175] For the relationship between sunk costs and vertical integration, see the seminal article by Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & Econ. 297, 306-07 (1978).

[176] Consider the case of patent attorneys. *See* Dimitris Andriosopoulos, Pawel Czarnowski & Andrew Marshall, *Do Corporate Lawyers Matter? Evidence from Patents*, 83 J. CORP. FIN. 1, 20 (2023) (providing empirical evidence that patents' market valuation and citations are positively correlated with patent attorney capability).

experience into legislation directly. Costly and protracted litigation ex-post would be the exclusive means of influencing laws.[177] As a result, lawyers' human capital would be less valuable, reducing incentives for acquisition, innovation, and best use of legal knowledge.[178] Lawyers would also have fewer opportunities to coordinate amongst themselves to further their interests and those of their clients.[179] Weakening lawyers' power in the upstream market inevitably affects its power in the downstream market and vice versa.

B. Transaction Costs

Vertical integration generally decreases transaction costs.[180] Given the nature of legal human capital, lawyers have specific and residual rights in both upstream and downstream markets. In terms of specific rights, lawyers hold a privileged position in both advising on the impact of laws as well as litigating laws, incentivizing them to maximize the value of their licenses.[181] In terms of residual rights, lawyers bear most of the risk from inefficient laws because the value of their licenses decreases as inefficiency increases inasmuch as clients can turn away from the formal legal system or relocate to jurisdictions with more favorable laws.[182] When lawyers are heavily involved in both lawmaking and lawyering, these specific and residual rights are vertically integrated. Cartelization in the downstream market certainly enhances market power but also reduces transaction costs between lawmaking

[177] Besides cost, it is unclear that inefficient laws are litigated more than efficient laws. *See* Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 142 n.8 (1980).

[178] *See* Macey & Miller, *supra* note 172, at 473 (discussing comparative advantages of lawyers in Delaware in connection with legislation); Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 329 (suggesting that lawyers receive an "aura" from lawmaking).

[179] *See* Levin & Mather, *supra* note 168, at 637; *see also* Macey & Miller, *supra* note 172, at 478 (discussing benefits of coordination among attorneys).

[180] *See* Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 692-93 (1986).

[181] *See* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 346.

[182] *See* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 275 (1985); *see also* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 302 ("[T]he value of a licensed lawyer's special rights to represent clients residing in a state or to appear in a state's court will depend on the licensing state's law.").

and lawyering, leading to better laws than would be produced in the absence of integration.

C. Uncertainty

Uncertainty plagues rulemaking and lawmaking. This uncertainty increases transaction costs while creating externalities that lawmakers and administrative agencies often fail to internalize.[183] Vertical integration is one way to address this uncertainty.[184] For example, when nonlawyers dominate lawmaking, they may be less attuned to whether legislation accords with due process and hinders the administration of justice.[185] Moreover while lawyers and nonlawyers may be equally sensitive to the prospect of ex-post litigation, lawyers' human capital can be brought to bear ex-ante.[186]

Similarly, lawyers are in a better position to address legal complexity because they have experience in determining how imprecise language and procedural deficiencies can be exploited.[187] If one assumes that complexity is endogenous to lawmaking, then integration between lawmaking and lawyering helps to address the problem.[188] As noted, complexity in law is neither inherently good nor bad; complex policy proposals multiply opportunities for inter-institutional bargaining and invite longer, more extensive legislative and administrative deliberation.[189]

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[183] *See* Dennis W. Carlton, *Vertical Integration in Competitive Markets Under Uncertainty*, 27 J. INDUS. ECON. 189, 190 (1979).

[184] *See* Lieberman, *supra* note 174, at 461-463 (providing an example of empirical testing); *cf.* Laureen Regan, *Vertical Integration in the Property-Liability Insurance Industry: A Transaction Cost Approach*, 64 J. RISK & INS. 41, 42 (1997) ("[W]hen uncertainty or complexity are higher, it might be more important to preserve the profit maximizing incentives that prevail in the less integrated firm.").

[185] *See* Levin & Maher, *supra* note 168, at 657-58.

[186] *See* Macey & Miller, *supra* note 172, at 473; White, *supra* note 43, at 394.

[187] *See* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 329; White, *supra* note 43 at 382.

[188] As Chief Justice Rehnquist expressed: "[A] [s]tate has a substantial interest in creating its own set of laws responsive to its own local interests, and . . . those people who have been trained to analyze law and policy are better equipped to write those state laws . . . ." Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 292 (1985) (Rehnquist, J., dissenting).

[189] Steffen Hurka & Maximilian Haag, *Policy Complexity and Legislative Duration in the European Union*, 21 EUR. UNION POL. 87, 92 (2020).

D. Limited Supply

The antitrust literature also suggests that vertical integration can mitigate the problem of limited supply.[190] Pro-deregulation scholars often criticize legal market cartelization's effects on access to justice and the maldistribution of legal services.[191] Yet, limited supply is also a problem for lawmaking insofar as laws and regulations fail to address pressing societal problems or create negative externalities that undermine legal systems and the rule of law.[192] Since lawmaking and lawyering are connected, supply constraints in one market can be redressed via the other market. For example, where legal market cartelization creates a dearth of providers, lawmakers can respond in any number of ways, from loosening unauthorized practice of law rules to enacting laws that can be interpreted and executed without the aid of attorneys.[193] Similarly, a highly competitive lawyering market means that lawyers will be incentivized to challenge laws that are inefficient or otherwise undermine public welfare.[194]

E. Strategic Considerations

A final consideration to explain why the consequences of vertical integration can be beneficial relates to possible strategic considerations, including moral hazard, spillover effects, multiple tasks, and strategic delegation.[195] All these possibilities increase agency costs in a standard principal-agent framework. Vertical integration mitigates them by

[190] The seminal article is Patrick Bolton & Michael D. Whinston, *Incomplete Contracts, Vertical Integration, and Supply Assurance*, 60 REV. ECON. STUD. 121 (1993).

[191] *See* sources cited *supra* note 14.

[192] *See generally* Richard A. Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 23, 26-27 (2003) (suggesting that many state and local legislatures suffer from a lack of expertise because of term limits and their part-time nature); Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 1051 (2019) (suggesting that smaller municipalities with part-time city councils may be less cognizant of negative externalities).

[193] For an in-depth discussion, see *infra* Part IV.

[194] Even proponents of deregulation concede that competition between lawyers is intense. *See* Iacobucci & Trebilcock, *supra* note 93, at 103 (describing the market as "highly competitive").

[195] *See* Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629, 630, 677-80 (2007).

facilitating coordination between attorneys and their clients while minimizing the effects of asymmetric information.[196]

Economic research indicates that biased intermediation can be especially helpful when supply and demand payoffs are congruent.[197] When lawyers participate in lawmaking, they can more readily address and reduce possible agency costs in the downstream market. Taking this viewpoint to the extreme, lawyers might aim at capturing lawmaking to better serve their clients.[198] This capture reduces agency costs and addresses moral hazard, spillover effects, multiple tasks, or strategic delegation by virtually merging both markets.

Of course, extreme capture is unlikely because lawyers face competition upstream, including from other attorneys who represent clients with differing goals.[199] While competition in the upstream market is essential to limit the ability to exercise full capture, deregulation of the downstream market will inevitably impact lawyers' ability to compete with other participants in the upstream market who are subject to lesser regulatory burdens and may not share lawyers' commitments to transparency and due process.[200]

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When considering the deregulation of the legal market, policymakers should consider not only the considerations identified above in Part II, but also the value that lawyers add to lawmaking. Although this Article does not purport to calculate whether lawyers' contributions to

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[196] *See* Levin & Mather, *supra* note 168, at 635; *see also* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 348 (suggesting that lawyers have an incentive to improve state law, notwithstanding that they may be able to convince clients to make poor incorporation decisions).

[197] *See generally* Alexandre de Cornière & Greg Taylor, *A Model of Biased Intermediation*, 50 RAND J. ECON. 854, 857 (2019) ("[T]he implications of bias and the efficacy of various policy responses are quite different, depending on whether the environment is one of congruence or conflict.").

[198] *See generally* White, *supra* note 43, at 395 (describing "sales cause legislation").

[199] Since lawyers represent different clients, they do not all internalize the same clients' interests. *See* Levin & Mather, *supra* note 168, at 637.

[200] *See* Conlow, *supra* note 160, at 674 (connecting economists' lack of ethics rules to "corrupted policy outcomes"); *see* also Rapoport, *supra* note 161, at 759-60 (contending that lobbyists should be committed to the public good).

lawmaking outweigh the costs of legal market cartelization, lawyers can improve the quality and supply of law. For example, lawyer-dominated groups such as the National Conference of Commissioners on Uniform State Laws ("NCCUSL") draft model laws that state legislatures, and part-time legislatures in particular, rely upon.[201] In addition, bar associations contribute mightily to judicial selection and court administration and defend the courts' legitimacy from political attacks.[202] We are dubious that these positive impacts can be achieved without a high degree of legal market cartelization.

This claim does not presuppose that NCCUSL, the American Bar Association, and other professional groups are "apolitical expert altruists." [203] Rather, the combination of self-interest and professional socialization leads to investments in improving the law as well as its administration.[204] Decartelization raises coordination costs among attorneys generally, thereby sapping some of their collective influence vis à vis more insular and monolithic groups.

In sum, any assessment of legal market decartelization should consider both the market for legal services and the market for lawmaking. [205] Legal market decartelization will diminish the legal profession's ability to use their expertise to shape the law at the expense of other interest groups.[206] Scholars could be correct about cartelization's pernicious effects in downstream market (notwithstanding the complications raised in Part II, *supra*). However, if — as empirical research suggests — lawyers contribute to the betterment of the law and judicial administration, then policymakers should heed the trade-off in the upstream market.[207]

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[201] Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 144, 187 (1996). Legislatures are more apt to adopt uniform laws that receive the full weight of the NCCUSL and where uniformity is desirable as opposed self-serving. *See id.* at 187.

[202] Levin & Mather, *supra* note 168, at 639.

[203] David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 383 (2003).

[204] Levin & Mather, *supra* note 168, at 657 ("[M]utual ideals — rooted in institutional culture — and not only self-interest, may explain the actions of lawyer organizations.").

[205] *See* Ribstein, *Lawyers as Lawmakers*, *supra* note 42, at 332.

[206] *See* Cohen-Eliya & Hammer, *supra* note 160, at 271.

[207] In addition to Ribstein & Kobayashi, *supra* note 201, at 144, leading empirical works include: Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of*

III. BEYOND LAWYER REGULATION

The predominant view in the United States is that legal markets are overregulated, and the public has little to lose and potentially much to gain from legal market decartelization. While we have questioned this narrative, many Americans lack access to legal services and are ill-served by the status quo. As noted, the lawyers' monopoly is more entrenched in states such as Louisiana and Nevada than in states such as Minnesota that have low entry requirements for attorneys and active nonlawyer involvement.[208] Nor do we claim that the risks of decartelization will manifest immediately or are inevitable. For example, loosening restrictions on unauthorized practice of law could be salutary when there is a dearth of attorneys or minimal competition among attorneys in a particular locality. Rules regarding nonlawyer ownership could also be eased for certain law firms (such as not-for-profits) but not for others to ensure that reforms make legal markets more competitive and not less. To reduce the risk of moral hazard and negative externalities in litigation, jurisdictions could embrace fee-shifting or increase investments in disciplinary mechanisms. Decartelization also would not imperil the quality of lawmaking if the upstream market of lobbying were subject to greater oversight and incorporated legal expertise.

The tendency to treat lack of access to legal services as primarily a function of overregulation detracts from other promising approaches. Deregulatory discourse emerged as governments were seeking to reduce their investments in legal aid and social welfare.[209] Yet, in many situations, governments may have no realistic option other than to

Nonprofit State Law, 41 GA. L. REV. 1113, 1178-79 (2007) (finding that the non-for-profit law sector benefited from private lawmaking of lawyer-dominated groups); Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678, 2681-82 (2000) (finding support for modest reforms proposed by NCCUSL in connection with U.C.C. Article 2). *But see* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 650-51 (1995) (suggesting that ALI and NCCUSL are as subject to capture and status quo bias much in the same way that legislatures are).

[208] *See supra* Table 2.

[209] *See generally* Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 129 (2019) ("The executive and legislative branches have aggressively pared back social safety net programs, and the judicial branch is required to hear the cases that result."); *see also* Webley, *supra* note 17, at 2352-56 (tracking the shift from welfarism to market policies in the United Kingdom).

subsidize legal assistance. American pro-deregulation scholars have resigned themselves to federal underinvestment in legal services[210] while overlooking important and cost-effective state and local investments, including applications of "civil *Gideon*."[211]

Consider the dire situation in American housing courts. Although almost all landlords are represented in eviction proceedings, upwards of ninety-eight percent of tenants represent themselves.[212] Market-based reforms are unlikely to ameliorate this state of affairs because most respondents in housing courts cannot afford rent, let alone pay for legal assistance.[213] We are skeptical that increased competition in the consumer legal market will lower the price of legal services because of asymmetric information, [214] but, even if it were to have that effect, the impact on cases involving personal plight would be minimal.[215]

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[210] *See* McDonald, *supra* note 73, at 710 (describing the consensus view that legal aid schemes are inadequate); *see also* Hadfield, *Higher Demand*, *supra* note 6, at 152 ("[M]ore legal aid funding would be welcome and is clearly called for, but it cannot make a serious dent in the nature of the problem.").

[211] Civil *Gideon* refers to efforts to extend the right to counsel in criminal cases to the civil realm. *See generally* Tonya L. Brito, David J. Pate Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil* Gideon, 67 S.C. L. REV. 223, 224 (2016) ("The 'Civil Gideon' movement aims to address the justice gap by advocating for an expanded right to counsel for pro se low-income civil litigants in cases implicating basic human needs."); Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503 (1998) ("[W]e need a civil *Gideon* — that is, an expanded constitutional right to counsel in civil matters."). *But see* Benjamin H. Barton, *Against Civil* Gideon (*and for Pro Se Court Reform*), 62 FLA. L. REV. 1227, 1230 (2010) (describing the promise of civil Gideon as "illusory").

[212] *See* Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1064 (2017); *see also* Ingrid Gould Ellen, Katherine O'Regan, Sophia House & Ryan Brenner, *Do Lawyers Matter? Early Evidence on Eviction Patterns After the Rollout of Universal Access to Counsel in New York City*, 31 HOUS. POL'Y DEBATE 540, 543 (2021) (reporting that one percent of tenants and ninety-five percent of landlords were represented by attorneys in New York housing courts in 2013).

[213] *See* Markovic, *Juking Access to Justice*, *supra* note 13, at 80-82; *see also* Shanahan & Carpenter, *supra* note 209, at 129 (describing extensive socioeconomic needs of unrepresented litigants).

[214] *See* Garoupa & Markovic, *supra* note 20, at 970-76 (analyzing the effects of reforms in the United Kingdom).

[215] *See* Markovic, *Juking Access to Justice*, *supra* note 13, at 82; *see also* Shanahan & Carpenter, *supra* note 209, at 129 (observing that many legal needs are experienced by

Jurisdictions have begun to recognize the inadequacy of market-based reforms in housing courts. For example, New York City and other large cities have instituted universal access to counsel programs, whereby they provide low-income tenants with counsel throughout eviction proceedings.[216] These programs are effective in aiding historically underserved populations. Professors Cassidy and Currie estimate that New York City's program reduced evictions by nearly fifty-two percent and the amount of back rent owed by nearly eighty-two percent.[217] The return on these investments is also high. According to one study, universal access saves New York City three hundred million dollars in social spending a year.[218]

Of course, every locality is not in a financial position to fund civil *Gideon*, and there may be a dearth of attorneys willing and able to provide these services. In such jurisdictions, it may be possible to rely on trained nonlawyers instead. Prior to the universal access program, New York City utilized "court navigators" — unpaid lawyer assistants — to aid respondents in housing and consumer debt cases. [219] According to research by Professors Sandefur and Clark, individuals assisted by navigators felt far more positively about the process, and courts were more likely to address their defenses.[220] There is also some evidence that navigators reduce the rate of evictions.[221] Navigator programs have since spread across the country and can be found in sixteen jurisdictions.[222]

people in deep poverty); Younger, *supra* note 29, at 278-79 (suggesting that nonlawyers are unlikely to focus on personal plight work).

[216] For a general discussion of the New York program, see Jennifer S. Prusak, *Expanding the Right to Counsel in Eviction Cases: Arguments for and Limitations of "Civil* Gideon*" Laws in a Post-COVID-19 World*, 36 J.C.R. & ECON. DEV. 235, 253-56 (2022); Gould et al., *supra* note 212, at 540-41.

[217] Mike Cassidy & Janet Currie, *The Effects of Legal Representation on Tenant Outcomes in Housing Court: Evidence from New York City's Universal Access Program*, 222 J. PUB. ECON. 1, 15 (2023).

[218] *See* Prusak, *supra* note 216, at 251.

[219] REBECCA L. SANDEFUR & THOMAS M. CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 3-4 (2016).

[220] *See id.* at 4.

[221] *See id.* at 5.

[222] *See* MARY E. MCCLYMONT, NONLAWYER NAVIGATORS IN STATE COURTS: AN EMERGING CONSENSUS 41-43 (2019). Navigators are not dissimilar to so-called "McKenzie friends"

Civil *Gideon* and navigator programs require public funding, but lawmakers who have historically been unsympathetic to the moral case for legal aid may be more open to the economic case.

Another promising avenue for reform is to reconsider civil and criminal processes that disproportionately burden individuals with limited means. In recent years, researchers have identified several low-cost mechanisms to facilitate access to the legal system. For instance, missed court dates are a perennial problem in the criminal and civil justice systems.[223] Several studies intimate that simple text message reminders increase the likelihood that defendants will appear, thereby reducing default judgments and incarceration rates.[224] In a similar vein, Professors Hoffman and Strezhnev demonstrate a strong relationship between eviction and a respondent's distance from the courthouse, suggesting that remote hearings and other alternatives could end the "pathologic practice" in which a plurality of eviction proceedings end in default judgments.[225] The aforementioned reforms do not substitute for legal assistance, but they would reduce the overall incidence of legal needs because people who are incarcerated or evicted from their homes are less able to support themselves and their families.[226]

Other process-based reforms may obviate the need for legal assistance entirely. A significant amount of literature documents that individuals whose criminal records are expunged are less likely to re-offend, experience lower rates of unemployment, and earn higher wages

who have operated in the United Kingdom for decades, and "provide moral support," "take notes," and "help with case papers." Sandefur, *supra* note 53, at 294. A minority of McKenzie friends receive compensation. *See id.* at 294-95.

[223] *See generally* J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 1995 (2017) ("[I]n the context of today's thousands of state courts . . . the inability to access justice is rooted in something more physical, more mundane: the many and varied costs of getting to and physically using a brick-and-mortar courthouse.").

[224] *See, e.g.*, Oren Bar-Gill & Alma Cohen, *How to Communicate the Nudge: A Real-World Policy Experiment*, 65 J.L. & ECON. 607, 628-29 (2022) (reporting text messages' effects in consumer debt cases); Emily Owens & Carly Will Sloan, *Can Text Messages Reduce Incarceration in Rural and Vulnerable Populations?*, 42 J. POL'Y ANALYSIS & MGMT. 992, 993 (2023) (summarizing criminal justice research).

[225] *See* David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions*, 120 PNAS 1, 10 (2022).

[226] *See* Owens & Sloan, *supra* note 224, at 992; Prusak, *supra* note 216, at 237.

than their similarly situated peers. [227] Most states have a process by which individuals can seek to seal or expunge their criminal records, but the process is often abstruse and requires attorney assistance, dissuading individuals who qualify.[228] According to Professors Prescott and Starr's Michigan study of expungements, only nine percent of individuals apply for expungement within five years of eligibility.[229]

To address this oft-observed problem, states have passed "clean slate" reforms, including automatic expungement laws.[230] Pennsylvania enacted the first law to automatically erase nonviolent misdemeanors in 2018, and other states have since followed suit.[231] These reforms' impacts cannot be overstated. In Pennsylvania alone, 1.15 million people saw their criminal records cleared under the new law in its first year, at a cost to the Commonwealth of $2.96 per person.[232] This small investment has likely saved the Commonwealth hundreds of millions of dollars because people whose records are expunged boost their employability and earnings significantly.[233] These types of process-based reforms can complement legal aid, civil *Gideon*, and other forms of subsidized legal assistance.

Lastly, as we have maintained, one of the chief impediments to expanding access to legal services is high information costs.[234] According to Professor Sandefur's research, consumers are only aware that they have legal problems in nine percent of situations.[235] When they are aware of their legal needs, they often do not know where to turn for help or are

[227] *See* Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH L. REV. 519, 533-34 (2020); J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2463, 2466 (2020); Sonja B. Starr, *Expungement Reform in Arizona: The Empirical Case for a Clean Slate*, 52 ARIZ ST. L.J. 1059, 1060-62 (2020).

[228] *See* Prescott & Starr, *supra* note 227, at 2472, 2502.

[229] *Id.* at 2489.

[230] *See id.* at 2473.

[231] *Id.* at 2464.

[232] *See* Chien, *supra* note 227, at 575.

[233] *See id.* at 538-39.

[234] For analyses of the centrality of information costs, see Garoupa & Markovic, *supra* note 20, at 968-89; Hadfield, *Cost of Law*, *supra* note 4, at 49.

[235] REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 14 (2014).

distrustful of potential providers.[236] Unsurprisingly, socioeconomic status is predictive of how people respond to legal problems.[237] Professor Chambliss has summarized the problem thusly:

> Many people with civil justice problems do not recognize their problems as "legal," even when those problems raise clear legal issues and have legal remedies. Most people with civil legal problems never consider using a lawyer, but rather rely on their own understanding and support networks to deal with the problem, or do nothing, even when the potential stakes are high. Many people forgo available legal assistance even when it is free.[238]

These phenomena are ubiquitous in expungement, eviction, and many other contexts.[239]

Lowering information costs is not simply a matter of liberalizing the legal market. Advertising — particularly mass-market advertising — is expensive and, in the legal context, is not especially useful to consumers.[240] Professors Hawkins and Knake's empirical study of attorney advertising in three large urban markets indicates that advertising exploits cognitive biases rather than providing useful

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[236] *See* Markovic, *Juking Access to Justice*, *supra* note 13, at 73 (summarizing state studies of legal needs).

[237] *See* McDonald, *supra* note 73, at 717-18; Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 486-87 (2017); *see also* Ji Li, Lawyer Screening at the Entry Point of the Legal Service Market 2-3 (2024) (unpublished manuscript) (on file with author) (suggesting that socioeconomic status is predictive of reactions to attorney advertising).

[238] Chambliss, *supra* note 75, at 100.

[239] For example, criminal offenders are often unaware of criminal expungement entirely or misunderstand their eligibility or the basics of the process. Prescott & Starr, *supra* note 227, at 2505. There is also evidence that people abandon even basic petitions for divorce because of the perceived complexity of the process. *See* D. James Greiner, Ellen Lee Degnan, Thomas Ferriss & Roseanna Sommers, *Using Random Assignment to Measure Court Accessibility for Low-Income Divorce Seekers*, 118 PNAS 1, 6 (2021).

[240] *See, e.g.*, Garoupa & Markovic, *supra* note 20, at 987 ("[I]ndividual lawyers and firms have no incentiv[e] to educate the public about the importance and availability of legal services when they could instead tout their own services and prices."); Hawkins & Knake, *supra* note 94, at 1023 (noting that "[attorney] attributes that are commonly advertised would not appeal to rational actors").

information to underserved populations.[241] They also find that few lawyers advertise the cost of their legal services, notwithstanding that consumers would benefit from price transparency.[242]

Currently, providers face a collective action in educating the public about legal needs.[243] Legal market decartelization may increase information costs if consumers have difficulty differentiating between different types of providers in a deregulated market and are uncertain when to use them.[244] As Professor Sandefur and her co-authors have observed, "[T]he adoption of new types of legal services by the public must overcome the barrier of consumers recognizing that they might benefit from such services *at all*, regardless of whether services are traditional or innovative."[245]

To address market failures related to high information costs in the consumer legal market, governments and professional groups should invest in civics training and the dissemination of authoritative information about the law and the availability of legal services.[246] Partnering with trusted community organizations is also likely to increase awareness of the importance of legal assistance and sow trust in providers.[247]

We are also cautiously optimistic that generative AI can play an integral role in breaking down barriers to accessing the legal system. Historically, a consumer confronting a problem with a legal dimension

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[241] *See* Hawkins & Knake, *supra* note 94, at 1037.

[242] *See id.* at 1030; *see also* Garoupa & Markovic, *supra* note 20, at 961 ("[Q]uality advertising appears to be far more common than price advertising, notwithstanding that it is likely less useful to consumers.").

[243] Garoupa & Markovic, *supra* note 20, at 987.

[244] Sandefur et al., *supra* note 4, at 76-77.

[245] *Id.* at 76.

[246] For full versions of this argument, see, for example, Hawkins & Knake, *supra* note 94, at 1037; Markovic, *Juking Access to Justice*, *supra* note 13, at 89-90.

[247] *See, e.g.*, Garoupa & Markovic, *supra* note 20, at 988 (discussing the importance of community organizations in England and the Canadian province of Ontario); Pruitt et al., *supra* note 30, at 136 ("One way to connect lawyers to clients is to meet potential clients where they are, both geographically and in terms of the existing structure of their lives."); *see also* Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 729 (2015) (suggesting that legal advice is more effective when service providers offer it "in trusted locations").

would have to contact an attorney.[248] The advent of the internet greatly increased access to legal information but did not necessarily increase access to legal advice, information that is geared towards a particular individual's specific circumstances.[249] While there are internet fora where lawyers and nonlawyers will answer legal questions, such off-the-cuff advice is unlikely to be especially useful or reliable.[250] Many lawyers refuse to provide legal advice over the internet for fear of inadvertently creating attorney-client relationships and exposing themselves to liability.[251]

Generative AI alters this landscape. Advanced AI systems are unlikely to substitute for attorneys entirely and do not obviate the need for the reforms described above.[252] But GPT-4 and other new technologies are important innovations that, if widely deployed, can reduce transaction costs for consumers and facilitate access to both legal information and legal advice.[253] As Professors Dahan & Liang have observed:

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[248] *See generally* Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1171 (2011) ("When people or firms need information about the law related to their transactions or litigation, they traditionally get it by going to a lawyer who gives them personalized legal advice or designs legal instruments tailored to their needs.").

[249] *See id.* at 1188 (suggesting a shift from individualized legal advice towards legal information); *see also* Catrina Denvir, *Online and in the Know? Public Legal Education, Young People and the Internet*, 92-93 COMPUTS. & EDUC. 204, 204-05 (2016) (examining barriers faced by young people in finding legal advice on the internet).

[250] *See* Catherine J. Lanctot, *Regulating Legal Advice in Cyberspace*, 16 SAINT JOHN'S J. LEGAL COMMENT. 569, 571-72 (2002) (describing online fora for legal advice); *see also* Denvir, *supra* note 249, at 218 ("Although the Internet may promote the obtainment of rights-based information . . . there is still a gap in the market for information designed to help individuals translate knowledge into action.").

[251] *See* Lanctot, *supra* note 250, at 572-73; *see also* Grace M. Giesel, *The Attorney-Client Relationship in the Age of Technology*, 32 MISS. COLL. L. REV. 319, 323-24 (2013) (describing the inadvertent creation of prospective attorney-client relationships).

[252] *See generally* Milan Markovic, *Rise of the Robot Lawyers?*, 61 ARIZ. L. REV. 325, 333 (2019) (suggesting that "[t]he fact-intensive nature of most legal disputes, the constant promulgation of new laws and regulations, and the presence of substantial legal indeterminacy" complicate automation).

[253] For examples of works that assess the effects of AI on access to justice, see, for example, Samuel Dahan & David Liang, *The Case for AI-Powered Legal Aid*, 46 QUEEN'S L.J. 415, 423 (2021); Katherine L.W. Norton, *The Middle Ground: A Meaningful Balance*

> While AI technology alone is not a panacea, a computational approach to law will be instrumental in the democratization of legal services and access to justice in at least two ways. First, legal technologies — when employed responsibly — can lower the barriers that people face in accessing the legal system, including financial, psychological, informational, and even physical barriers. Second, by harnessing advanced AI capabilities, open access legal aid tools can help self-represented litigants . . . build their case and guide parties in negotiations, or at least determine whether they have a case at all and should consider hiring a lawyer.[254]

To prevent misuse, regulators should certify AI-based legal tools[255] and ensure that these tools' limitations, such as the possibility of "hallucinations," are disclosed conspicuously.[256]

The singular focus on legal market decartelization to expand access to legal services is unjustifiable. Cost-effective investments in legal aid, process-based reforms, public educational initiatives, and deployment of AI and other modern technologies are all promising approaches that do not presuppose a specific regulatory framework. Regulatory reform should target information costs and other barriers that prevent ordinary consumers from accessing legal services as opposed to more broad-based reforms that might unwittingly introduce more negative externalities, moral hazard, and rent-seeking in the legal market.

Between the Benefits and Limitations of Artificial Intelligence to Assist with the Justice Gap, 75 U. MIAMI L. REV. 190, 240 (2020); and Simshaw, *supra* note 62, at 154-55.

[254] Dahan & Liang, *supra* note 253, at 423.

[255] For scholarship advocating for certification and licensing regimes, see, for example, Susan Saab Fortney, *Online Legal Document Providers and the Public Interest: Using a Certification Approach to Balance Access to Justice and Public Protection*, 72 OKLA. L. REV. 91, 94-95 (2019); Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 HARV. J.L. & TECH. 354, 393-98 (2016); and Simshaw, *supra* note 62, at 218.

[256] *See generally* Jinzhe Tan, Hannes Westermann & Karim Benyekhlef, *ChatGPT as an Artificial Lawyer?*, WORKSHOP ON A.I. ACCESS TO JUST. 1, 5 (2023) ("The biggest shortcoming of using ChatGPT to directly provide legal information is the lack of accuracy of those answers. It frequently 'hallucinates' answers to legal questions, generating false legal provisions and false cases.").

CONCLUSION

Scholars have understandably taken a dim view of legal market cartelization and its impact on access to legal services. Nevertheless, deregulatory reforms embraced by states such as Arizona and Utah are unlikely to solve this problem and could have unintended consequences for consumers. This Article has sought to highlight nuances and potential complications relating to spatial localization, the introduction of nonlawyer capital, potential externalities in litigation, and distortions in lawmaking that have received minimal attention in scholarship. Legal markets are not akin to other markets, and the singular focus on decartelization and deregulation has distracted from other approaches, including successful applications of civil *Gideon* and process-based reforms that obviate the need for legal assistance.

Jurisdictions can and should experiment with reforms to make the legal market more efficient. Yet, because of high information costs, a market with more and different providers could prove just as inaccessible while creating new challenges. Legal market decartelization is no substitute for investing in programs and processes that empower consumers, vindicate rights, and ensure that the law works for all.