

DEREGULATION AND THE LAWYERS' CARTEL

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ABSTRACT

At one time, the legal profession largely regulated itself. However, based on the economic notion that increased competition would benefit consumers, jurisdictions have deregulated their legal markets by easing rules relating to attorney advertising, fees, and, most recently, nonlawyer ownership of law firms. Yet, despite reformers' high expectations, legal markets today resemble those of previous decades, and most legal services continue to be delivered by traditional law firms. How to account for this seeming inertia?

We argue that the competition paradigm is theoretically flawed because it fails to fully account for market failures relating to asymmetric information, imperfect information, and negative externalities. In addition, the regulatory costs imposed on sophisticated consumers such as corporate purchasers of legal services differ radically from those imposed on ordinary consumers who use legal services infrequently. Merely increasing the number and types of legal services providers cannot make legal markets more efficient. We illustrate our theoretical account with evidence from the United Kingdom, Europe, and Asia.

For legal markets to better serve the public, regulators must tailor solutions by segment. Regulators should seek to minimize negative externalities associated with the delivery of legal services to the corporate segment and confront information asymmetries that lead to the maldistribution of legal services in the consumer

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segment. Deregulation alone is insufficient and may in fact exacerbate existing market failures.

TABLE OF CONTENTS

I. Introduction.....	938
II. Theories of Legal Market Regulation	945
<i>a. The Case for Legal Market Regulation</i>	945
<i>i. Asymmetry of Information</i>	947
<i>ii. Negative Externalities</i>	949
<i>iii. Positive Externalities</i>	950
<i>iv. Lack of Competition</i>	951
III. Professional Self-Regulation and Its Critics.....	954
<i>a. Arguments for and Against Self-Regulation</i>	954
<i>b. The Deregulatory Turn</i>	958
<i>i. Entry Barriers</i>	959
<i>ii. Advertising</i>	960
<i>iii. Fees</i>	961
<i>iv. Organizational Structures</i>	962
<i>v. Professional Standards</i>	963
<i>c. Deregulatory Discourse and the Problem of Segmentation</i>	964
<i>d. Deregulation and Inertia</i>	967
IV. Deregulation and the Legal Profession: Experiences	
Abroad.....	970
<i>a. The United Kingdom Legal Services Act</i>	970
<i>b. The European Union</i>	976
<i>c. Asia</i>	980
V. Reregulation: A Path Forward	983
<i>a. The Corporate Segment</i>	983
<i>b. The Consumer Segment</i>	986
VI. Conclusion.....	989

I. INTRODUCTION

In recent decades, regulators have internalized the tenet that lawyers conspire against the laity.¹ Across North America, Europe, and Asia, they have loosened rules regarding attorney advertising, fees, and nonlawyer involvement in the legal market. Although approaches differ, with some states pursuing more deregulation than others, the proclaimed aim has been to increase competition to better serve consumers at both the high and low ends of the legal market.²

These decisions culminate over three decades of sociological and economic critiques of professional self-regulation. Until the 1970s, social theorists largely accepted that lawyers and other professionals do not adhere to market logic.³ Instead of pursuing economic gain, lawyers purportedly serve their clients and the public interest.⁴ They do so by “negotiat[ing] the interests of individuals with the

¹ “[All professions are] conspiracies against the laity.” BERNARD SHAW, *THE DOCTOR’S DILEMMA, GETTING MARRIED, AND THE SHEWING-UP OF BLANCO POSNET* xv (1906).

² See discussion *infra* Part III. For a general survey, see Gillian K. Hadfield, *Legal Markets*, J. ECON. LITERATURE (forthcoming 2021); see also Edward Shinnick et al., *Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands*, 10 INT’L J. LEGAL PRO. 237, 241 (2003) (“In recent times, regulatory reform has attempted to diminish the power of the professions.”).

³ Eliot Freidson, *Theory and the Professions*, 64 IND. L. J. 423, 423–24, 429 (1989); Mike Saks, *A Review of Theories of Professions, Organizations and Society: The Case for Neo-Weberianism, Neo-Institutionalism and Eclecticism*, 3 J. PROS. ORGS. 170, 172 (2016) (examining traditional, “deferential” views of the professions); see also Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 666 (2016) (noting increasing dominance of claims that professionals “were monopolies or cabals disguised as something else”).

⁴ See Saks, *supra* note 3, at 172 (outlining the functionalist view that “professions acquire high socio-economic privileges in exchange for employing in a non-exploitative way esoteric knowledge of great importance to society”). See generally Talcott Parsons, *The Professions and Social Structure*, 17 SOC. FORCES 457, 463 (1939) (“The dominance of a business economy has seemed to justify the view that ours was an ‘acquisitive society’ Professional men, on the other hand, have been thought of as standing above these sordid considerations, devoting their lives to ‘service’ of their fellow men.”).

demands of the state.”⁵ Lawyers are “collectivity-oriented”⁶ and inculcate shared societal values and check “unbridled capitalism.”⁷

Under this traditional view of the legal profession, self-regulation affords lawyers the autonomy to fulfill their public duties.⁸ Moreover, since lawyers’ esoteric and specialized knowledge is generally inaccessible to nonlawyers,⁹ self-regulation enables the profession to vouch-safe for its members and establish a baseline of quality,¹⁰ obviating the eponymous “lemon problem” whereby unqualified providers of legal services crowd out qualified ones via adverse selection.¹¹ As sociologist Everett Hughes has suggested, “[a] central feature . . . of all professions, is the motto . . . , *credat emptor*. Thus is the professional relation distinguished from that of those markets in which the rule is *caveat emptor*.”¹²

A large body of scholarship has challenged the traditional understanding of the legal profession. Sociologists, while not necessarily opposed to self-regulation, allege that lawyers have been more concerned with maintaining status and market control than serving the public.¹³ Economists, influenced by public choice theory,

⁵ Roiphe, *supra* note 3, at 652 (citing EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 23–24 (1957)).

⁶ TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* 2, 370, 375 (1964).

⁷ See Roiphe, *supra* note 3, at 653–54; Parsons, *supra* note 4, at 467.

⁸ See Everett C. Hughes, *Professions*, 92 *DAEDALUS* 655, 656–657 (1963).

⁹ See *id.* at 656–57 (“The client is not a true judge of the value of the services he receives Only the professional can say when his colleague makes a mistake.”).

¹⁰ Nuno Garoupa, *Providing a Framework for Reforming the Legal Profession: Insights from the European Experience*, 9 *EUR. BUS. ORG. L. REV.* 463, 468 (2008); Shinnick et al., *supra* note 2, at 238.

¹¹ Garoupa, *supra* note 10, at 468. See generally George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 *Q.J. ECON.* 488 (1970) (describing the effect information asymmetry between buyers and sellers has on the quality of goods in the market).

¹² Hughes, *supra* note 8, at 657.

¹³ See W. Wesley Pue, *Trajectories of Professionalism?: Legal Professionalism After Abel*, 19 *MAN. L.J.* 384, 390 (1990) (summarizing critiques); see also Hilary Sommerlad, *Managerialism and the Legal Profession: A New Professional Paradigm*, 2 *INT’L J. LEGAL PRO.* 159, 162 (1995) (“The Weberian account of the rise of the professions is therefore concerned to demonstrate how these occupational groups achieved status and privilege not through intrinsic merit . . . but by first constituting

predominately conceive of self-regulation in terms of cartelization and rent-seeking.¹⁴ In the words of Posner:

[T]he history of the legal profession is to a great extent . . . the history of efforts by all branches of the legal profession . . . to secure a lustrous place in the financial and social status sun. And until sometime in the 1960's, the legal profession in the United States, as in most other wealthy countries, was succeeding triumphantly in this endeavor. The profession was an intricately and ingeniously reticulated, though imperfect, cartel.¹⁵

Despite differences in approach and emphasis, both accounts are in accord that legal market regulations have predominately served the legal profession's interests and that reforms should focus on diminishing the profession's power over the market.¹⁶ At their core, these reform agendas are deregulatory because they associate market liberalization and increased competition with better outcomes for consumers.¹⁷ Although not all jurisdictions have deregulated their legal markets, the trend is undeniably away from professional self-regulation.¹⁸

and then controlling a market.”). However, even the traditional view's most eminent Neo-Weberian critic has recognized that “[s]elf-regulation is Janus-faced, serving the interests of both the public and the profession.” Richard L. Abel, *Lawyer Self-Regulation and the Public Interest: A Reflection*, 20 *LEGAL ETHICS* 115, 121 (2017).

¹⁴ See, e.g., Hadfield, *supra* note 2, at 35; Anthony Ogus, *Rethinking Self-Regulation*, 15 *OXFORD J. LEGAL. STUD.* 97, 98-99 (1995); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 *INDIANA L.J.* 1, 1 (1993).

¹⁵ Posner, *supra* note 14, at 1.

¹⁶ See generally Roiphe, *supra* note 3, at 667 (“The Marxist-Weberian critique of professionals was oddly consistent with its conservative counterpart. While entirely distinct in both its tone and conclusions, it shared many of the same assumptions.”); see also Shinnick et al., *supra* note 2, at 240 (“When it comes to proposing alternatives to the status quo, reformers tend to focus on economic market controls.”).

¹⁷ Garoupa, *supra* note 10, at 464; see also John Flood, *The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation*, 59 *CURRENT SOCIO. MONOGRAPH* 507, 520 (2011) (noting that the “neoliberal deregulatory agenda . . . is often at odds with the ethos of professionalism”).

¹⁸ See Laura Bugatti, *Towards a New Era for the Legal Profession*, 1 *EUR. REV. PRIV. L.* 83, 92-93 (2019); see also Nuno Garoupa, *Globalization and Deregulation of Legal Services*, 38 *INT'L REV. L. & ECON.* 1-2 (2013) (contrasting the EU and UK to individual countries such as Spain).

Early clashes focused on advertising. In the United States and England, lawyers could not advertise until the 1970s and 80s.¹⁹ The legal profession regarded attorney advertising as inherently misleading because of the individualized nature of legal services and consumers' lack of understanding of legal needs.²⁰ However, deregulation advocates argued that advertising would increase competition, lower prices, and facilitate access to legal services.²¹

These arguments carried the day in the United States and England. Under pressure from courts and regulators, the American and English legal professions liberalized their advertising rules.²² Other European countries have since followed suit.²³ Yet, decades later, the evidence is still mixed as to whether the loosening of advertising rules affected the cost and accessibility of legal services.²⁴

Contemporary debates over attorney regulation focus largely on nonlawyer involvement in the legal market. Several European and Asian countries allow alternative business structures ("ABS")—

¹⁹ See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371–72 (1970) (noting that prohibition against advertising was originally a "rule of etiquette"). See generally John B. Attanasio, *Lawyer Advertising in England and the United States*, 32 AM. J. COMPAR. L. 493, 502–03 (1984) (tracing informal bans to the 1700s and formal ones to the early 1900s).

²⁰ *Bates*, 433 U.S. at 372–73; see also Bugatti, *supra* note 18, at 101 (noting that restrictions among EU member states "have usually been justified by recalling the information asymmetry between lawyers and clients (the latter possessing not enough information to assess legal services' claims)").

²¹ Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 776–77 (1988); Geoffrey C. Hazard Jr. et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1107–08 (1983); see also Attanasio, *supra* note 19, at 499 (noting that the advertising ban in the United Kingdom "deprived the public and potential entrants of information about solicitors and deterred competition, efficiency, and innovation").

²² *Bates*, 433 U.S. at 376; Attanasio, *supra* note 19, at 500–02.

²³ See Bugatti, *supra* note 18, at 100–01 (noting a recent deregulatory trend in European Union member states such as Italy, France, and Spain).

²⁴ See 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, 277 (2013); see also Michael P. Stone & Thomas J. Miceli, *Optimal Attorney Advertising*, 32 INT'L REV. L. & ECON. 329, 333 (2012) (summarizing research in the field). One of the chief difficulties is that some segments of the profession advertise far more than others. For example, in the United States, much attorney advertising is from personal injury attorneys. See Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 638–40 (2013) (finding that attorney advertising does not drive down contingent fees).

economic entities not wholly-owned and operated by lawyers that provide legal services.²⁵ The American legal profession has on numerous occasions rejected ABS.²⁶ In the vast majority of states, lawyers cannot share fees with nonlawyers or form business associations with them.²⁷

However, opposition to ABS may be receding. The District of Columbia allows a limited form of nonlawyer ownership, and Utah and Arizona recently amended attorney regulations to allow for nonlawyer ownership of law firms as well.²⁸ The latter two jurisdictions were greatly influenced by the work of pro-deregulation scholars who extolled the benefits of ABS in the UK context especially.²⁹ These scholars have been forthright in that they see the legal services market as no different than other markets. As

²⁵ Richard Devlin & Ora Morison, *Access to Justice and the Ethics and Politics of Alternative Business Structures*, 91 CAN. BAR REV. 483, 485 (2012); Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 GEO. J. INT'L L. 665, 667 (2016); Edward M. Iacobucci & Michael J. Trebilcock, *An Economic Analysis of Alternative Business Structures for the Practice of Law*, 92 CAN. BAR REV. 57, 58 (2013).

²⁶ For a history of the American debate on nonlawyer ownership, see Jayne R. Reardon, *Alternative Business Structures: Good for the Public, Good for the Lawyers*, 7 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 304, 309-13 (2017); Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2193 (2010) (noting that proposed reforms were rejected "with a vengeance" in 2000).

²⁷ See MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2020).

²⁸ Dan Packel, *Arizona's Ownership Rules Have Major Implications for Consumer Law, the Big Four, Lit Funders and More*, LAW.COM (Sept. 1, 2020, 4:05 PM), <https://www.law.com/americanlawyer/2020/09/01/arizonas-ownership-rules-have-major-implications-for-consumer-law-the-big-four-lit-funders-and-more/>; Debra Cassens Weiss, *DC Bar Considers Relaxing Its Already-Lenient Rules to Allow Nonlawyer Ownership of Law Firms*, ABA J. (Jan. 27, 2020, 10:40 AM), <https://www.abajournal.com/news/article/dc-bar-considers-relaxing-its-already-lenient-rules-to-allow-nonlawyer-ownership-of-law-firms> [<https://perma.cc/Q6MS-QMQV>].

²⁹ Gillian K. Hadfield, *More Markets, More Justice*, 148 DAEDALUS 37, 42 (2019) [hereinafter Hadfield, *More Markets*]; 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, 1212 (2016); Thomas D. Morgan, *The Rise of Institutional Law Practice*, 40 HOFSTRA L. REV. 1005, 1023-24 (2012); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760-71 (2010). For Professor Hadfield's influence in particular, see Lyle Moran, *How Utah's Judicial and State Bar Officials Worked Together for Regulatory Reform*, ABA J. (Nov. 5, 2020, 9:05 AM), <https://www.abajournal.com/web/article/how-utahs-judicial-and-state-bar-officials-worked-together-for-regulatory-reform> [<https://perma.cc/XQC3-9VYM>].

Hadfield has written, “[a] more efficient market for legal services requires changing the rules of professional practice to allow businesses that—like all other service businesses in our economy—are owned, managed, and financed by people other than the specialists who are providing services to clients to compete.”³⁰

On the consumer end of the legal market, ABS, through branding and economies of scale, are supposed to make legal services more accessible;³¹ on the corporate side of the legal market, ABS are allegedly more efficient and innovative than traditional firms because they can leverage nonlawyer expertise.³²

We take no position on whether the United States and other holdout jurisdictions *should* embrace ABS and other deregulatory reforms. Indeed, even among jurisdictions that allow for ABS, approaches vary. Whereas England does not place limits on ABS nonlawyer ownership, many other jurisdictions do place limits to safeguard attorney independence.³³ For example, Spain allows twenty-five percent nonlawyer ownership whereas countries such as Belgium, Denmark, and Sweden allow only ten percent.³⁴ Jurisdictions also vary widely in the insularity of their legal markets

³⁰ Hadfield, *More Markets*, *supra* note 29, at 46.

³¹ See 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, 43 (2014); Ribstein, *supra* note 29, at 799–800 (“An established retailer can leverage its brand by extending the firm’s scope to embrace a different type of service.”).

³² One noted commentator claimed that “the ability of law firms in London to structure arrangements and ventures with non-lawyers will give those firms individually, and the English legal profession collectively, a hitherto unimaginable competitive advantage.” 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); see also Ribstein, *supra* note 29, at 797 (“[T]he stand-alone law firm ignores potential synergies between legal advice and other activities which might not be fully realized by arm’s-length contracts among clients, lawyers, and other service-providers. Thus, it may be more efficient for firms to combine legal services with other activities under common ownership.”).

³³ See generally Bugatti, *supra* note 18, at 104–05 (“Even in those jurisdictions where ABSs have received full legal recognition, it is not surprising to find some restriction (e.g. concerning the percentage of non-lawyer ownership interest), in order to ensure that lawyers’ professional obligations are met.”).

³⁴ *Id.* at 103; Louise Lark Hill, *Alternative Business Structures for Lawyers and Law Firms: A View from the Global Legal Services Market*, 18 OR. INT’L L. REV. 135, 183 (2017).

as well as the likelihood that incumbent firms will be able to draw substantial nonlawyer investment.³⁵

We view the push for ABS as only the latest outgrowth of a deregulatory legal market discourse, whose own theoretical and empirical premises have heretofore received minimal scrutiny. Although arguments against professional self-regulation have proven persuasive to many regulatory bodies, we contend that prevailing economic approaches to the legal market are theoretically incomplete because they fail to account fully for segmentation and the different positions of clients in the corporate and consumer spheres of the markets.³⁶ Pro-deregulation scholars have also overestimated the impact of ABS and other deregulatory reforms in select jurisdictions while overlooking other jurisdictions' experiences. In our view, the lesson from decades of deregulation is ultimately one of inertia: despite various top-down reforms, little has fundamentally changed. To make legal markets more efficient, regulators should instead consider targeted interventions that do not necessarily fit within the competition paradigm.

Part II of this Article sets out the bases for regulating legal markets, focusing on information asymmetries, negative externalities, positive externalities, and the promotion of competition. Part III focuses on deregulation scholars' critique of professional self-regulation. This critique, grounded in public choice theory, has led to deregulation in the areas of entry barriers, fees, advertising, professional standards, and most recently organizational forms. Nevertheless, the deregulatory critique accepts many of the premises of professional self-regulation and does not fully address the problem of market segmentation. Clients at the high end of the legal market have long been able to dictate terms to law firms and ignore or contract around regulations that they view as overly costly and burdensome. Conversely, information asymmetries prevent ordinary consumers from

³⁵ Iacobucci & Trebilcock, *supra* note 25, at 81–82.

³⁶ Legal profession scholarship has divided legal practice into two hemispheres since the iconic Chicago Lawyers Study. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 10–13 (1982). We follow this general path by dividing the legal market into two segments, 1) a corporate segment characterized by repeat players and sophisticated users of legal services and 2) a consumer segment that features less sophisticated clients and infrequent purchasers of legal services who need personal assistance. See *id.* at 319.

appreciating the need for legal assistance and utilizing low-cost services even where available. Altering the pool of available legal service providers does not fundamentally alter these dynamics and may exacerbate negative externalities from legal assistance. Part IV supports this theoretical account with evidence from the United States, United Kingdom, and European Union. The effects of regulatory reforms have been modest in most jurisdictions, and greater efficiencies in legal markets have been driven largely by technological developments that appear in heavily regulated and less regulated markets alike. The pro-competitive effects of ABS in particular are lacking in most jurisdictions. Part V suggests that regulatory reforms would be more effective if they focused on negative externalities at the high end of the market and overcoming information asymmetries at the low end of the market. We conclude by proposing reforms that could facilitate ordinary consumers' interactions with the legal system.

II. THEORIES OF LEGAL MARKET REGULATION

a. The Case for Legal Market Regulation

The classical economics view is that regulation pursues the public interest when regulation corrects for market failures.³⁷ The main market failure that applies to professional legal markets is information asymmetry.³⁸ Specifically, for most clients or

³⁷ George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 6 (1971); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 808 (1975); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976); P. Göran T. Hägg, *Theories on the Economics of Regulation: A Survey of the Literature from a European Perspective*, 4 EUR. J.L. & ECON. 337, 339 (1997).

³⁸ Robert Dingwall & Paul Fenn, "A Respectable Profession"? *Sociological and Economic Perspectives on the Regulation of Professional Services*, 7 INT'L REV. L. & ECON. 51, 52 (1987); Frank H. Stephen & James H. Love, *Regulation of the Legal Profession*, in ENCYCLOPEDIA OF LAW & ECONOMICS 989 (1999).

consumers, professional legal services are credence goods.³⁹ The explanation is typically the following: a standard consumer is less informed about the nature and quality of the service and must rely on the expertise of the professional lawyer both to assess (the so-called “agency function”) and implement the adequate strategy (known as the “service function”).⁴⁰ Because of the dependence of the consumer on the lawyer, the market for professional legal services will fail to produce the socially optimal quantity and quality of legal services. Some protection for the standard consumer of professional legal services is necessary to guarantee quality and mitigate inefficiencies. Protection of legal consumers frequently takes the form of regulation of the legal profession, which is specifically the supply side of the professional legal services market.

However, asymmetry of information between demand and supply sides is not the only market failure that economists see in the legal services market. The overall quality of the legal system is positively related to the quality of lawyers.⁴¹ The consequences of poor representation, for instance, go beyond the direct client and generate serious negative externalities to the public. For example, a poorly drafted will may have to be litigated, consuming scarce judicial resources.⁴² Regulation is justified because the regulatory body will have more information and expertise at judging quality, thereby reducing the negative externality caused by bad lawyering. The converse is also true—regulation can create positive externalities by improving the quality of the justice system via the lawyers that staff and represent that system.⁴³

³⁹ Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 69 (1973); Uwe Dulleck & Rudolf Kerschbamer, *On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods*, 44 J. ECON. LITERATURE 5, 7 (2006); see also Garoupa, *supra* note 10, at 468.

⁴⁰ Winand Emons, *Credence Goods and Fraudulent Experts*, 28 RAND J. ECON. 107, 107 (1997).

⁴¹ See generally Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUDIES 807, 807-809 (1994) (“[T]he law is driven by the preferences of attorneys.”).

⁴² See, e.g., Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J.L. ECON. & ORG. 517 (2003).

⁴³ See generally William B. Rubenstein, *Why Enable Litigation: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 712 (2006) (“[L]itigation can be conceptualized as a public good, its pursuit produces positive externalities.”).

The regulation of legal services can also limit competition in the professional legal services market. Consequently, alongside asymmetry of information and negative externality, there is another source of potential deadweight loss—lack of perfect competition. Lack of perfect competition is a market failure that is either intrinsic to the market for legal services or a regulation failure, a loss imposed by regulation. The public choice literature generally refers to the latter as “government failure[.]”⁴⁴

In the next four subsections, we discuss in detail each of these issues— asymmetry of information, negative externality, positive externality, and lack of perfect competition.

i. Asymmetry of Information

The market failure created by asymmetry of information can take different forms. The most immediate is supplier-induced demand, which is the suboptimal consumption of professional legal services due to opportunism by lawyers.⁴⁵ For example, lawyers may use advertising to “stir up” frivolous litigation.⁴⁶ This is one of the main types of moral hazard associated with legal markets.⁴⁷ In addition, because consumers cannot judge the quality of lawyers, the eponymous “lemons problem” may arise and create the need for some kind of licensing or an equivalent mechanism to protect the public.⁴⁸ Increased competition among lawyers does not solve the lemons problem because bad lawyers drive good lawyers out of the

⁴⁴ Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUDIES 101, 102 (1987).

⁴⁵ The classical example is excessive litigation induced by lawyers. See Juan S. Mora-Sanguinetti & Nuno Garoupa, *Do Lawyers Induce Litigation? Evidence from Spain, 2001-2010*, 44 INT'L REV. L. & ECON. 29, 38-39 (2015); Samantha Bielen & Wim Marneffe, *Testing the Lawyer-Induced Litigation Hypothesis in Europe*, 50 APPLIED ECON. 1837, 1837 (2018).

⁴⁶ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1970).

⁴⁷ For a general discussion of moral hazard and the legal profession, see Stephen & Love, *supra* note 38, at 990-91.

⁴⁸ Hayne E. Leland, *Quack, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1329 (1979).

market via adverse selection since the market fails to respond to quality.⁴⁹

Under this line of reasoning, professional regulation can improve the market equilibrium. Asymmetric information causes moral hazard and adverse selection, precluding an efficient level of services in the market; therefore, regulation should focus on decreasing search costs, improving service quality, and ensuring that the public can differentiate between high- and low-quality providers.⁵⁰

There are, to be sure, possible arguments against regulating lawyers with respect to asymmetric information. For example, one argument is that the costs generated by asymmetry of information must be balanced against the benefits of labor specialization (i.e., lawyers tendency to concentrate on certain areas of the law).⁵¹ A reduction in information asymmetry might not be efficient if there is less labor specialization in the legal services market.⁵² Another argument is that asymmetry of information could be addressed by malpractice insurance.⁵³ If insurance is available and adequate, the costs generated by asymmetry of information are much less relevant than argued and do not justify regulation.⁵⁴ Finally, there is the question of heterogeneity of legal services. The degree of asymmetric information varies across specific tasks and is likely to be most acute in settings involving low-information clients. Therefore, there may be tasks performed by the legal profession that do not beg for any type of regulation since market discipline will be

⁴⁹ Possibly there is asymmetric information about facts that goes in the opposite direction: the client (as injured party) knows more about the events than the attorney. This could explain certain doctrines in the common law (such as the maintenance and champerty doctrines) precluding lawyers from acquiring the right to award from their client. At the same time, lawyers can diversify their portfolio of cases to minimize the impact of asymmetric information about facts. Therefore, bilateral moral hazard or bilateral adverse selection have not been a major concern.

⁵⁰ Garoupa, *supra* note 10, at 469.

⁵¹ *Id.*

⁵² *Id.* at 468.

⁵³ Richard O. Zerbe, Jr. & Nicole Urban, *Including Public Interest in Theories of Regulation*, 11 RSCH. L. & ECON. 1, 4-5 (1988).

⁵⁴ *Id.* at 5. For a comparative analysis of jurisdictions' approaches to malpractice insurance, see Herbert M. Kritzer, *Lawyers' Professional Liability: Comparative Perspectives*, 24 INT'L J. LEGAL PROF. 73, 79-82 (2017).

enough to achieve an efficient outcome in the presence of localized asymmetric information.⁵⁵

ii. *Negative Externalities*

Bad lawyering decreases the overall quality of the legal system.⁵⁶ However, regulators should be concerned with negative externalities for other reasons as well. For example, consumers in the market for professional legal services are characterized by bounded rationality or rational ignorance.⁵⁷ Clients sometimes use simplified rules to process information rather than engage in complex analysis. They may also lack the education or sophistication to be able to understand all available information on legal services and could make choices that can interfere with the legal system's operations.

In this context, one can consider the public good nature of information about professional legal services. Information concerning the quality of professional legal services satisfies the conditions of non-rivalry and non-exclusivity in consumption.⁵⁸ Therefore, there is the possibility that private provision by unregulated legal professionals of information is not efficient, creating negative externalities.⁵⁹ A prominent example from the legal ethics literature is the provision of legal advice by *notarios*, unlicensed providers on whom some immigrants rely with

⁵⁵ Chaserant & Harnay, *supra* note 24, at 267.

⁵⁶ See David McGowan, *Some Realism about Parochialism: The Economic Analysis of Legal Ethics* 120-122 (Univ. San Diego L. Sch., Working Paper No. 07-20, 2005) (“[T]he negative consequences of a lawyer’s actions are not confined to the costs imposed on the lawyer’s direct victims. When a lawyer violates the code of ethics, every member of the public suffers harm—even those who have no contact with the unethical lawyer in question.” (quoting RANDAL N. GRAHAM, *LEGAL ETHICS: THEORIES, CASES, AND PROFESSIONAL REGULATION* 205-06 (2004))).

⁵⁷ Garoupa, *supra* note 10, at 469.

⁵⁸ *Id.* Consuming information concerning the quality of professional legal services does not exclude other people from consuming the same information (non-rivalry in consumption) and may be difficult to impose prices to access such information (non-exclusivity), for example, because information is freely available on the internet.

⁵⁹ Randall G. Holcombe, *A Theory of the Theory of Public Goods*, 10 *REV. AUSTRIAN ECON.* 1, 1 (1997).

devastating consequences.⁶⁰ Mandatory disclosure of information with respect to professional quality (such as date of admission) should help to avoid this problem. Mandatory disclosure of ethical discipline also serves the same purpose and warns the public of unscrupulous providers who may provide deficient services or provide services under circumstances that undermines public welfare.⁶¹

iii. Positive Externalities

So far, we have considered the possibility of negative externalities. However, it is possible that legal market regulation fulfills other goals apart from efficiency. These goals are usually communitarian in nature.⁶² They are largely independent of market considerations but are still relevant from an economic perspective.

Consider a lawyer in a small community. He or she may have a socially valuable role or function that goes beyond the professional service he or she provides. Redistribution from the client to the lawyer rewards the lawyer for these beneficial social services. Confidence, honesty, and trust might be values pursued by the government through individual attorneys, which in turn may promote greater social welfare.⁶³ The social willingness to pay for

⁶⁰ See, e.g., Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8 (2008) (“[N]otarios’ charge immigrants for their services in filing documents and preparing applicants for relief and benefits, but often lead the immigrants astray with incorrect information and terrible advice with lasting, damaging consequences that can fatally prejudice what otherwise would be a proper claim to entry.”); Anne E. Langford, *What’s in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 116 (2004).

⁶¹ See generally Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PRO. 209, 212 (2011) (describing the public nature of attorney discipline in the United States).

⁶² ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 218-19 (1994).

⁶³ See generally Bruce A. Green & Russell G. Pearce, “Public Service Must Begin at Home”: *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1212 (2009) (“[L]awyer’s civic obligation is expressed in the manner in which the lawyer conducts everyday private practice and includes an obligation to convey to clients the lawyer’s understanding of proper civic conduct. We call this the idea of the lawyer as ‘civics teacher.’”).

these values may be above its market or economic value, justifying governmental intervention. The objection to this sort of non-market failure argument is that regulation benefits lawyers who do not provide such socially valuable roles. A lawyer in a larger community where he or she does not provide such social services enjoys the same extra profits due to regulation as a lawyer in a small town, maybe even more.⁶⁴

Another example is lawmaking. Since lawyers are regulated strictly, they are incentivized to participate in lawmaking and law reform to maximize the value of their law licenses.⁶⁵ State competition also gives lawyers an incentive to favor welfare-maximizing state laws that make their states attractive as a location for businesses and as a forum for litigation.⁶⁶ The objection to this specific example is that not all legal demand is homogenous and movable, meaning that jurisdictional competition for lawyers can be easily distorted by local transaction costs.

iv. Lack of Competition

Thus far, we have focused predominately on traditional rationales for legal market regulation. Increasingly, regulators have also become concerned with private interest, capture, and collusion in the legal market and have sought to deregulate the market to promote greater competition.⁶⁷ From this perspective, legal market regulations have largely served the interests of the members of the legal profession and have allowed for cartel-like behavior.⁶⁸ The capture theory predicts that professional regulation decreases the

⁶⁴ There is, of course, a more substantive objection—it is hard to see why consumers of professional legal services should abstain from revealing their willingness to pay for those social services in a more competitive market.

⁶⁵ See generally Larry E. Ribstein, *Lawyers As Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 301 (2004) (describing how the law firm business model affects lawyers' role in society).

⁶⁶ *Id.*

⁶⁷ Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. 335, 335 (1974); Garoupa, *supra* note 18, at 80; Hadfield, *supra* note 2, at 34.

⁶⁸ Lee Benham & Alexandra Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & ECON. 421, 423 (1975); Posner, *supra* note 14, at 1.

supply of lawyers below social optimum, increases the prices charged by lawyers, and ensures that incumbent lawyers' incomes are beyond marginal productivity, thereby generating rents and quasi-rents.⁶⁹ The fact that rent-seeking behavior is intrinsically difficult to identify—particularly when there are plausible public interest arguments for regulatory intervention—makes rent-seeking and regulatory capture more likely.

Of course, lack of competition could be a function of the nature of legal services market as opposed to capture. The often-overlooked distinction between asymmetric information and imperfect information is salient here. The problems of adverse selection and moral hazard presuppose that the set of information about the law that a reasonable client possesses is smaller than that of a lawyer because, *inter alia*, a lawyer is familiar with the law while a standard client is not; in economic terms, the client is a principal and the lawyer is an agent.⁷⁰ The economic literature on lawyering is, thus, only part of a vast literature on the principal-agent model.⁷¹

In this context, the emphasis by economists on the asymmetric information between principal (client) and agent (lawyer) has underplayed the role of imperfect information, which creates a different kind of deadweight loss. Asymmetric and imperfect information are distinct concepts that characterize the market for legal services.⁷² Imperfect information exists when an individual

⁶⁹ Capture theory “describes actors in the regulatory process as having narrow, self-interested goals—principally job retention or the pursuit of reelection, self-gratification from the exercise of power, or perhaps post-officeholding personal wealth.” Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L., ECON. & ORGS. 167, 169 (1990); see also Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 982-83 (2000) (describing various types of rent-seeking by lawyers).

⁷⁰ See generally Stephen & Love, *supra* note 38, at 989-90 (“The particular market failure that applies to professional markets in general, and the markets for legal services in particular, is that of information asymmetry . . . Thus there is a potentially severe principal-agent problem . . .”).

⁷¹ See generally Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 58-59 (1989) (“[A]gency theory (a) offers unique insight into information systems, outcome uncertainty, incentives, and risk and (b) is an empirically valid perspective . . .”).

⁷² George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 220 (1961); see also Chaserant & Hernay, *supra* note 24, at 278 (“Inefficient regulation may result from imperfect information.”).

does not have all the information necessary to make the most informed decision.⁷³ In other words, the agent (lawyer) has more information than the principal (client) but not all the information necessary to make the most informed decision. However, the implications in terms of deadweight loss are different.

For the sake of argument, let us assume that asymmetric information can be addressed at zero cost and therefore disappears. The standard public interest theory collapses for obvious reasons – if there is no asymmetric information, the legal profession cannot take advantage of clients and there is no clear reason to regulate the market for legal services. In fact, absent any additional negative externalities, existing regulation would be purely justified by capture, hence the need for deregulatory policies to address excessive pricing and curtail monopoly threats. Once asymmetric information and negative externality are put aside, the traditional economic concern is purely driven by market structure, that is, the extent to which the supply side (lawyers) can exercise market power to enhance producer surplus at the expense of consumer surplus (clients).⁷⁴

However, the elimination of asymmetric information does not address the possibility of imperfect information. Both client and lawyer can have the same information about the law, but that information may not correspond to reality because legislators, regulators, and courts are not fully transparent and are not entirely

⁷³ In a systematic way, there are three possible characterizations. A world of perfect (and necessarily symmetric) information where all individuals have the same information set which includes all relevant information necessary to make the most informed decision. This is the traditional neoclassical model in economics. See E. Roy Weintraub, *Neoclassical Economics*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <https://www.econlib.org/library/Enc1/NeoclassicalEconomics.html> (last visited May 24, 2021) [<https://perma.cc/25CV-MUAR>]. Then we can have a world of imperfect but symmetric information where all individuals have the same information set but this information set does not include all relevant information necessary to make the most informed decision. This is the scenario we want to explore in this subsection aiming at highlighting the role of imperfect information *per se*. Finally, we have a world of imperfect and asymmetric information where individuals have different information sets and these sets, at least for most individuals, do not include all relevant information necessary to make the most informed decision. This is the traditional context of principal-agent models explored in previous subsections. See Eisenhardt, *supra* note 71, at 58.

⁷⁴ KEITH HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 1 (2003).

bound by their precedents.⁷⁵ Under imperfect information, client and lawyer can jointly err and make decisions that are suboptimal. They would make better decisions if they had perfect information. The economic question is no longer primarily about incentives and expropriation of rents as in a principal-agent setting, but allocation of losses from suboptimal behavior. Imperfect information leads to inefficient decisions and deadweight loss. The only remaining issue is the allocation of loss between lawyer and client. Therefore, imperfect information is an alternative explanation for a less competitive market structure. As Schwartz and Wilde have observed, "the relevant market structure with imperfect information is not perfect competition but rather monopolistic competition."⁷⁶

III. PROFESSIONAL SELF-REGULATION AND ITS CRITICS

a. Arguments for and Against Self-Regulation

The case for regulating lawyers from a public interest perspective primarily stems from asymmetric information, externality, and the possible lack of appropriate competition caused by the nature of legal services. The case for deregulation rests on the capture theory that predicts that cartel-like behavior will hinder market competition through excessive regulation. While these theories oppose one another, they share certain assumptions about professional regulation.

Let us start with the traditional argument for regulation. Regulation could simply mean quality regulation, certification, and

⁷⁵ This is explained by the principal-agent model of lawmaking developed in the Public Choice literature. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Frank B. Cross, *The Judiciary and Public Choice*, 50 *HASTINGS L. J.* 355, 356-57 (1999). Critical theorists describe the problem as one of indeterminacy. See generally Joseph McCahery, *Modernist and Postmodernist Perspectives on Public Law in British Critical Legal Studies*, 2 *SOC. & LEGAL STUD.* 397, 399 (1993) ("[Critical] theorists concentrate on legal doctrine and its indeterminacy in order to reveal the imperfect foundations of the decision-making sphere of the welfare state and government's authority generally.").

⁷⁶ Alan Schwartz & Louis L. Wilde, *Imperfect Information, Monopolistic Competition, and Public Policy*, 72 *AM. ECON. REV.* 18, 18 (1982) (quoting Steve Salop, *Information and Monopolistic Competition*, 66 *AM. ECON. REV.* 240, 240 (1976)).

licensing to address adverse selection and moral hazard. The government could subsidize high-quality lawyers to ensure that they remain in the market even if adverse selection persists.⁷⁷ Unfortunately, this does not guarantee a supply of high quality legal services because of moral hazard on the part of attorneys.⁷⁸ Alternatively, jurisdictions could impose penalties on low quality lawyers and greatly restrict their entry and re-entry in the market. These regulations, however, require a regulatory agency that must avoid capture and be able to do what consumers allegedly cannot: assess quality and signal it to potential clients.⁷⁹

More generally, under both certification and licensing, a state bestows a document (e.g., a certificate or license) to an individual who satisfies certain conditions. These conditions may be mandatory education or training that addresses adverse selection *ex ante* and moral hazard *ex post*. The government as well as private agencies may certify or license professionals, and impose educational and training requirements.

There are key differences between licensing and self-regulation. Public authorities issue rules in both scenarios since the professional body is entrusted with public authority. However, the state regulates entry and performance in the first case or delegates these functions to a private agency independent from the profession whereas the legal profession self-regulates in the second case. The consequence is that self-regulation promotes strong professional legal associations and socialization among members whereas licensing does not.⁸⁰

The three standard economic arguments against licensing and for self-regulation are the following: 1) Licensing does not solve the problem of asymmetric information because neither the government nor a private agency independent from the legal profession can

⁷⁷ See Boyan Jovanovic, *Favorable Selection with Asymmetric Information*, 97 Q.J. ECON. 535, 538 (1982) (describing subsidies and taxes as solutions to adverse selection).

⁷⁸ For a powerful demonstration in the context of public defense, see Amanda Agan et al., *Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense*, 103 REV. ECON & STATS. 294 (2021).

⁷⁹ Stephen & Love, *supra* note 38, at 990.

⁸⁰ See generally Elizabeth H. Gorman, *Professional Self-Regulation in North America: The Cases of Law and Accounting*, 8 SOCIO. COMPASS 491, 492 (2014) (describing relationship between professional self-regulation and socialization and control of members).

better assess the quality of the services than the legal profession itself (though they might have better knowledge than the average consumer);⁸¹ 2) licensing does not generate the incentives for the legal profession to invest in collective reputation that sustains high quality legal services;⁸² and 3) licensing is less flexible, which is problematic in dynamic markets where innovation generates costs that burden the government rather than the legal profession itself.⁸³

The competition paradigm concedes that lawyers have the necessary information to produce quality signals in markets for credence goods while suggesting that the problem of regulatory capture cannot be avoided because of the desire for rent-seeking.⁸⁴ Specifically, lawyers may not pass their better information and expertise to the clients or consumers, increasing search costs for the consumers.⁸⁵ Control and enforcement of quality standards will be ineffective due to collusion within the profession and with regulators, and fees will be set above marginal productivity and with a considerable premium.⁸⁶

There are important and immediate rejoinders to the deregulation argument. First, one can develop safeguards to ensure

⁸¹ Chaserant & Harnay, *supra* note 24 at 278.

⁸² *Id.*

⁸³ The third argument nevertheless has serious limitations. First, lawyers can easily regulate fees to cover these costs; hence, they will be borne by taxpayers or consumers in both cases anyway. Second, rents created by the exercise of regulatory powers by the professional body can undermine flexibility too. For example, rents may be used to successfully resist competition from other (international) regulatory bodies offering more efficient rules. See, e.g., James C. Miller III, *The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation*, 4 CATO J., 897, 899 (1985); Christopher Curran, *The American Experience with Self-Regulation in the Medical and Legal Professions*, in MICHAEL FAURE ET AL., REGULATION OF PROFESSIONS 52, 52-53 (1993). For an alternative view, see Peter Grajzl & Peter Murrell, *Lawyers and Politicians: The Impact of Organized Legal Professions on Institutional Reforms*, 17 CONST. POL. ECON. 251, 253 (2006); Peter Grajzl & Peter Murrell, *Allocating Lawmaking Powers: Self-Regulation vs. Government Regulation*, 35 J. COMPAR. ECON. 520, 520 (2007).

⁸⁴ See Javier Núñez, *A Model of Self-Regulation*, 74 ECON. LETTERS 91, 92 (2001); see also McGowan, *supra* note 56, at 120 ("No doubt some consumers avoid some losses from [attorneys] and we can count the avoided losses as consumer gains. But economic analysis demands more than that.").

⁸⁵ McGowan, *supra* note 56, at 126.

⁸⁶ See McGowan, *supra* note 56, at 120 ("To justify on consumer protection grounds a barrier to entry such as licensing, one would want to know whether protection could be achieved through less expensive means, and whether the consumer gains from licensing are larger than the increased fees.").

that the legal profession does not operate as a cartel by designating various watchdogs.⁸⁷ Second, self-regulation lowers information costs and may more than compensate for potential losses from cartel-like behavior.⁸⁸ In fact, there are ways to mitigate potential losses caused by cartel-like behavior, such as by having professional bodies compete with one another as part of a large and heterogeneous profession and establishing and investing in efficient licensing systems for these bodies.⁸⁹ Pro-deregulation scholars have generally downplayed these possibilities.⁹⁰

Nevertheless, the economic deregulation literature has proven persuasive to regulators since the early 2000s.⁹¹ The available literature has convinced regulators that competition can generate quality signals and remove informational barriers in legal markets, thereby addressing public interest concerns without risking capture.⁹² According to this view, appropriate liability rules can substitute for professional self-regulation and avoid the problem of cartelization such that the legal market will be more efficient and better serve the public.⁹³ We assess the main deregulatory initiatives below.

⁸⁷ In jurisdictions like the United States, courts primarily serve this function whereas law societies serve this function in Canada. See Gorman, *supra* note 80, at 499.

⁸⁸ Ogus, *supra* note 14, at 97–98.

⁸⁹ Avner Shaked & John Sutton, *Imperfect Information, Perceived Quality, and the Formation of Professional Groups*, 27 J. ECON. THEORY 170, 178 (1982).

⁹⁰ Garoupa, *supra* note 10, at 473.

⁹¹ See Garoupa, *supra* note 10, at 465–66 (discussing legal scholarship and regulatory developments among the EU-15 countries in the last twenty years).

⁹² See, e.g., Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON., 615, 616 (1981); Jack L. Carr & G. Frank Mathewson, *Unlimited Liability as a Barrier to Entry*, 96 J. POL. ECON. 766, 776 (1988); Roger Van den Bergh & Michael Faure, *Self-Regulation of the Professions in Belgium*, 11 INT'L REV. L. ECON. 165, 181 (1991); Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1108 (1995).

⁹³ Obviously, there are important objections to the use of litigation as a way to stimulate effective professional regulation: 1) Consumers do not have the appropriate information to make a comprehensive analysis as to whether or not negligent behavior, reckless attitudes, or professional malpractices were exercised; 2) consumers may be opportunistic when making decisions with respect to filing lawsuits and settling out of court (e.g., nuisance litigation), thus generating too

b. *The Deregulatory Turn*

Policymakers sought to deregulate professions in the 2000s and 2010s with the explicit goal of promoting more competition and better services after a long period of perceived capture by incumbent professional interests.⁹⁴ Most recently, in late 2021, the Organisation for Economic Co-operation and Development (“OECD”) identified competition in professional services (with an important emphasis on legal professions) as an important priority in setting economic growth-friendly policies.⁹⁵

Unlike other services and industries, the regulation of the legal profession had not been traditionally associated with governmental intervention, but rather with strong and influential professional associations.⁹⁶ The dynamic changed in the 2000s when the theory of private capture began to prevail over concerns about asymmetric information and negative externalities.⁹⁷ Moreover, due to the prevalence of capture, the implicit assumption was that jurisdictions can enhance competition in the market for professional legal

much litigation; 3) litigation may not create the adequate incentives for efficient levels of professional services since it usually aims at providing compensation; and 4) litigation may fail in achieving efficient risk-sharing.

⁹⁴ Simon Domberger & Avrom Sherr, *The Impact of Competition on Pricing and Quality of Legal Services*, 9 INT'L REV. L. ECON. 41, 41 (1989); Mario Pagliero, *What Is the Objective of Professional Licensing? Evidence from the U.S. Market for Lawyers*, 29 INT'L J. INDUS. ORG. 473, 474 (2011).

⁹⁵ See *Workshop on Regulatory Barriers to Competition in Professional Services*, OECD, <https://www.oecd.org/economy/reform/workshop-regulatory-barriers/> [https://perma.cc/9MWP-38KV].

⁹⁶ Gorman, *supra* note 80, at 492; Hadfield, *supra* note 2, at 3.

⁹⁷ For example, the European Commission, in particular the Directorate-General for Competition, has shown interest in promoting competition in the market for professional services, thus opening a general discussion on the regulatory frameworks in the early 2000s. See *Stocktaking Exercise on Regulation of Professional Services, Overview of Regulation in the EU Member States*, COM (2003) https://ec.europa.eu/competition/sectors/professional_services/studies/overview_of_regulation_in_the_eu_professions.pdf [https://perma.cc/4E74-GN5S]; see also *Conveyancing Services Market*, COM (2007), https://ec.europa.eu/competition/sectors/professional_services/studies/studies.html [https://perma.cc/L6XY-KMGW]; Iain Paterson et al., *Regulation of Professional Services in EU Member States: Classification, Measurement and Evaluation*, SERVICEGAP (2012), https://irihs.ihs.ac.at/id/eprint/3255/1/dp19_regulation_professional%20service_s_paterson_brandl_sellner.pdf [https://perma.cc/UAD2-Q8DS].

services without generating more asymmetric information or negative externalities.⁹⁸ To promote greater market liberalization, regulators have focused on entry barriers, advertising, fees, organizational structures, and professional standards.

i. Entry Barriers

Entry restrictions exist to assure quality of professional services but also undermine competition by creating professional monopoly rights.⁹⁹ These restrictions, as we have seen, are at the heart of the deregulation debate.

From the perspective of the public interest, some level of education and training is necessary because the relationship between human capital and high-quality services is expected to be positive; moreover, reliance on self-regulation may increase the specificity of human capital investments and individual commitments to the profession.¹⁰⁰

However, the entry of low-quality lawyers could also be welfare improving in certain respects.¹⁰¹ High entry barriers lower the overall number of legal services providers, increasing costs and forcing some consumers to go without legal assistance.¹⁰² This line of reasoning explains why competition concerns have taken precedence over concerns relating to asymmetric information (particularly adverse selection and moral hazard issues) and negative externalities in the policy reforms of the 2000s. Additional considerations have highlighted the need to promote competition (or less restrictive entry barriers) given the unequal geographic

⁹⁸ See *supra* Part II.

⁹⁹ Reed Olsen et al., *Why Do States Regulate Admission to the Bar? Economic Theories and Empirical Evidence*, 14 GEO. MASON UNIV. L. REV. 253, 254 (1991); Mario Pagliero, *Licensing Exam Difficulty and Entry Salaries in the U.S. Market for Lawyers*, 48 BRIT. J. INDUS. RELS. 726, 726 (2010).

¹⁰⁰ Bairj Donabedian, *Self-Regulation and the Enforcement of Professional Codes*, PUB. CHOICE 85, 107-18 (1995).

¹⁰¹ Avner Shaked & John Sutton, *The Self-Regulating Profession*, 48 REV. ECON. STUD. 217, 231 (1981).

¹⁰² Thomas Gehrig & Peter J. Jost, *Quacks, Lemons, and Self-Regulation: A Welfare Analysis*, 7 J. REGUL. ECON. 309, 322-23 (1995).

distribution of legal services.¹⁰³ For example, legal markets tend to be spatially localized, with most attorneys located in and around large cities.¹⁰⁴ Regulation can create local monopolies if lawyers can only appear before courts in the local area corresponding to the bar into which they have been admitted.¹⁰⁵

ii. Advertising

Broadly speaking, restricting attorney advertising can be justified on the same basis as restrictions on advertising generally. Advertising is a common method to disseminate information and, from a social welfare perspective, should be allowed when it is productive; that is, the advertisement conveys important and relevant information to consumers concerning legal services.¹⁰⁶ There is no specific reason to suppose that advertising of legal services should be regulated differently than other experience and credence goods and services. The traditional counterargument—that advertising threatens the integrity and ethics of the profession by commercializing it—is unconvincing.¹⁰⁷

However, there are economic arguments against advertising that rely on the distinction between price and quality advertising.¹⁰⁸ When information about price is easier to obtain than information about quality (which is true for experience and credence goods such as legal services but not for search goods), increasing the availability

¹⁰³ In the American context, this critique is often phrased in terms of increasing legal access in rural and/or underserved areas. *See generally* Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 21-22 (2018).

¹⁰⁴ *See generally id.* at 22 (“Despite the immense need for lawyers in rural America, the number of attorneys practicing in rural areas falls painfully short. While about 20% of [the United States’] population lives in rural America, only 2% of our nation’s small law practices are located there.”).

¹⁰⁵ *See* B. Peter Pashigian, *Occupational Licensing and the Interstate Mobility of Professionals*, 22 J.L. ECON. 1, 20 (1979); Stephen & Love, *supra* note 38, at 987.

¹⁰⁶ Andrew Stivers & Victor J. Tremblay, *Advertising, Search Costs, and Social Welfare*, 17 INFO. ECON. & POL'Y 317, 319 (2005).

¹⁰⁷ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372-73 (1970).

¹⁰⁸ Stone & Miceli, *supra* note 24, at 330; Yannick Gabuthy & Eve-Angéline Lambert, *Legal Advertising and Frivolous Lawsuits*, 174 J. INST. & THEORETICAL ECON. 570, 572 (2018).

of price advertising might discourage quality competition and encourage price competition, leading to a degradation of the average quality in the market.¹⁰⁹ Thus some restrictions on advertising may be justified, although probably not outright bans.

The general position of the deregulation movement is that restrictions on advertising increase the price of legal services and that the more advertising exists, the lower the price is.¹¹⁰ However, several studies challenge this contention.¹¹¹ For example, in the context of personal injury cases, Engstrom has found that personal injury lawyers who advertise in the United States do not charge less than their non-advertising counterparts and that fees have not dropped since the Supreme Court's revocation of the advertising ban.¹¹² Stephen, Love, and Paterson come to a similar conclusion regarding the removal of advertising prohibitions on conveyancing fees in England.¹¹³ Moreover, quality advertising appears to be far more common than price advertising, notwithstanding that it is likely less useful to consumers.¹¹⁴

iii. Fees

At one time, lawyers in most jurisdictions were required to adhere to minimum fee schedules.¹¹⁵ Restrictions on fees are one way to ensure a confidence premium to professionals, but such fee

¹⁰⁹ Martin Cave, *Market Models and Consumer Protection*, 8 J. CONSUMER POL'Y, 335, 339 (1985).

¹¹⁰ See generally James H. Love & Frank H. Stephen, *Advertising, Price and Quality in Self-Regulating Professions: A Survey*, 3 INT'L J. ECON. BUS. 227, 243 (1996) (arguing that there is "evidence to suggest that advertising does increase consumer information and can reduce fees as a result").

¹¹¹ See, e.g., John R. Schroeter et al., *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 36 J. INDUS. ECON. 49 (1987); John A. Rizzo & Richard J. Zeckhauser, *Advertising and the Price, Quantity, and Quality of Primary Physician Services*, 27 J. HUM. RES. 381 (1992).

¹¹² Engstrom, *supra* note 24, at 667.

¹¹³ Frank H. Stephen et al., *Deregulation of Conveyancing Markets in England and Wales*, 15 FISCAL STUD. 102, 115-16 (1994).

¹¹⁴ Engstrom, *supra* note 24, at 682; see also Stephen et al., *supra* note 113, at 115 ("[P]rice advertising has remained very much an exception.").

¹¹⁵ Garoupa, *supra* note 10, at 480.

restrictions could also undermine price competition.¹¹⁶ Quite obviously, recommended fees reflect cartel-like behavior and redistribute from the public to lawyers. Restrictions on fees could also undermine quality.¹¹⁷

As few jurisdictions continue to maintain recommended fees, most of the recent deregulation literature has focused on the allowance of contingency fees, conditional fees, and other means of shifting risk from the state to lawyers.¹¹⁸ Such fees are also meant to enable the provision of legal services to clients who lack the means to pay for lawyers directly.¹¹⁹

iv. Organizational Structures

Legal markets commonly include some restrictions on organizational forms. For example, some jurisdictions prohibit legal service providers from incorporating.¹²⁰ Even where incorporation is permitted, jurisdictions might maintain restrictions on incorporation as well as who may own and operate law firms.¹²¹ The

¹¹⁶ Dean Lueck et al., *Market and Regulatory Forces in the Pricing of Legal Services*, 7 J. REG. ECON. 63, 80 (1995); see also Edward Shinnick & Frank H. Stephen, *Professional Cartels and Scale Fees: Chiseling on the Celtic Fringe?*, 20 INT'L REV. L. & ECON. 407, 417-18 (2000).

¹¹⁷ See J.A.H. Maks & N.J. Philipsen, *An Economic Analysis of the Regulation of Professions*, in REGULATION OF ARCHITECTS IN BELGIUM AND THE NETHERLANDS 11, 26-28 (Cralls & Vereeck eds., 2005).

¹¹⁸ See, e.g., A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 167 (2003); Hugh Gravelle & Michael Waterson, *No Win, No Fee: Some Economics of Contingent Legal Fees*, 103 ECON. J. 1205, 1205 (1993); see also 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, 2355 (2015) (explaining justification for conditional fees).

¹¹⁹ See generally Winand Emons, *Playing It Safe with Low Conditional Fees versus Being Insured by High Contingent Fees*, 8 AM. L. & ECON. REV. 20, 22 ("Contingent fees may be seen as a mechanism to finance cases when the plaintiff is liquidity-constrained[.]").

¹²⁰ Garoupa, *supra* note 10, at 483.

¹²¹ Bugatti, *supra* note 18, at 103.

usual justification for these restrictions is agency costs.¹²² Since production and quality in the legal services market cannot be judged by nonlawyers, legal services can be delivered most efficiently by lawyer specialists operating as solo practitioners or in traditional partnerships.¹²³

However, it is also possible that banning other organizational forms denies the legal market the benefits of nonlawyer expertise and economies of scale and scope.¹²⁴ For example, removing all restrictions on organizational forms would allow consumers to “one stop shop” for legal services alongside other needed services.¹²⁵ The deregulation argument is simply that organizational forms should respond to market needs and not professional restrictions.¹²⁶

v. Professional Standards

The introduction of professional standards and ethics generates a number of costs, including administrative costs (defining, monitoring, and enforcing quality), compliance costs (from fulfilling professional obligations), and opportunity costs (since opportunistic behavior is restricted).¹²⁷

Under the capture theory, lawyers are expected to seek to minimize these costs.¹²⁸ The maintenance of professional standards are an effective mechanism to protect insiders from competitors by

¹²² Garoupa, *supra* note 10, at 483; *see also id.* at 104–05 (noting that “[e]ven in jurisdictions where ABSs have received full recognition, it is not surprising to find some restriction . . . in order to ensure that lawyers’ professional obligations are met”).

¹²³ Jack Carr & Frank Mathewson, *The Economics of Law Firms: A Study in the Legal Organization of Firms*, 33 J. L. ECON. 307, 307 (1990); R.C.O. Matthews, *The Economics of Professional Ethics: Should the Professions Be More Like Business?*, 101 ECON. J. 737, 740 (1991).

¹²⁴ Hadfield, *supra* note 31, at 44.

¹²⁵ *See* Frank H. Stephen, *The European Single Market and the Regulation of the Legal Profession: An Economic Analysis*, 23 MANAGERIAL & DECISION ECON. 115, 117 (2002).

¹²⁶ Garoupa, *supra* note 10, at 483–485.

¹²⁷ Ogus, *supra* note 14, at 98.

¹²⁸ Harald Hau & Marcel Thum, *Lawyers, Legislation and Social Welfare*, 9 EURO. J.L. & ECON. 231, 231 (2000).

imposing their own quality standards.¹²⁹ Rather than controlling exits (for failure to comply with quality standards), they are mainly used to control entry. There are few substitutes to enforce professional standards since the alternative mechanisms such as litigation in court still rely heavily on the legal profession.¹³⁰ Defenders of professional self-regulation highlight that prevailing professional standards inculcate shared values as well as impose heightened duties on lawyers while prohibiting the waiver of warranties.¹³¹

c. Deregulatory Discourse and the Problem of Segmentation

As discussed above, both defenders of professional self-regulation and deregulation scholars acknowledge market failures in the provision of legal services, namely asymmetric information between consumers/clients and lawyers. Both sides also agree that self-regulation could address this market failure but at the risk of capture. The key point of contention is whether legal market regulation stems from the concern over market failure or is the product of capture.¹³²

Those who favor public interest explanations would argue that addressing market failures should be prioritized over capture concerns, which can be minimized in various ways, including via heightened enforcement of professional standards.¹³³ Those who favor deregulation suggest that capture and rent appropriation are too prevalent and if asymmetric information is to exist anyway,

¹²⁹ *Id.*

¹³⁰ McGowan, *supra* note 56, at 126; *see also* Hadfield, *supra* note 2, at 5 (“In Anglo-American jurisdictions, almost all publicly-appointed judges began their careers as private practitioners and hence have accumulated experience shaped by their years in private practice.”).

¹³¹ *See* MODEL RULES OF PRO. CONDUCT preamble ¶12; MODEL RULES OF PRO. CONDUCT r. 1.8, cmt. 17 (“Agreements prospectively limiting a lawyer’s liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation”); *see also* Milan Markovic, *Book Review: Justice Triage*, 29 STAN. L. & POL’Y REV. ONLINE 1, 10 (2017) (describing waivers of warranties by legal technology companies that compete with attorneys).

¹³² *See infra* Part II.a.

¹³³ Garoupa, *supra* note 10, at 471.

competition approaches are, at least, second-best and should be pursued by regulators.¹³⁴

Although pro-deregulation scholars, many of them economists, maintain that competition will make the legal market efficient, economic theory does not necessarily support that conclusion. First, more competition does not eliminate opportunism by lawyers because there will still be asymmetric information in the market. Additional competition does not eliminate existing market failures. Second, more competition does not reduce imperfect information which is a function of lack of transparency on the part of legislators, administrative agencies, and courts, not the nature of the relationship between client and attorney. Imperfect information is not generated by a specific market structure, but from the nature of lawmaking; more competition simply reallocates the losses between client and attorney without changing the underlying problem. In this context, deregulation potentially redistributes consumer and producer surplus without improving market efficiency since the inefficiencies are not generated only by asymmetric information, but also by imperfect information.

More generally, the economic literature has recognized that market failure arguments do not apply to all consumers equally.¹³⁵ Repeat purchasers in the market for professional legal services such as corporate clients are able to acquire experience and knowledge of the market, reducing informational asymmetries.¹³⁶ Furthermore, when the service function is provided separately from the agency function, there is scope for revelation of information that limits opportunism.¹³⁷ In the corporate segment, informational asymmetries are near zero because corporations are repeat players, and in-house counsels monitor and assess the work of their outside counsel.¹³⁸ Therefore, as a client's sophistication increases, the better able the client is to pay a confidence premium, rewarding

¹³⁴ *Id.*

¹³⁵ *Id.* at 470.

¹³⁶ Hadfield, *supra* note 69, at 953-1006.

¹³⁷ See generally Emons, *supra* note 40 (comparing conditional and contingent fees in a principal-agent framework where the lawyer chooses unobservable effort after she has observed the amount at stake).

¹³⁸ 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, 462 (2008).

professionals above marginal productivity without the need for special regulations.

Even when dealing with unsophisticated clients such as ordinary consumers, a lawyer who handles cases with care and arranges affairs with success may create a trust relationship with his or her clients.¹³⁹ However, most of these clients are not repeat purchasers, and even if they were, the costs of mistakes in the initial rounds could be very high. Smaller businesses and wealthier individuals arguably occupy a middle ground, having some experience with legal services and understanding of their utility but limited capacities to monitor and assess quality.¹⁴⁰

One solution could be independent rating agencies designed by repeat purchasers to perform the agency function on behalf of infrequent consumers.¹⁴¹ Nevertheless, even assuming that such a rating agency could be established without jeopardizing other values such as client confidentiality,¹⁴² the independent rating agency may be captured by the legal profession, thus shifting payoffs from infrequent consumers to frequent consumers.

Of equal importance with respect to the consumer segment specifically is that informational asymmetries are not limited to the quality of legal services. A large social science literature documents that consumers largely do not know that they have legal needs.¹⁴³ According to Sandefur, Americans are able to assess their civil legal needs as legal in only nine percent of situations.¹⁴⁴ Increasing the number of suppliers will not lead to an uptick in the use of legal

¹³⁹ See generally Stephen & Love, *supra* note 38, at 990 (discussing the “social institution of trust” and how it “mitigates the moral hazard problem arising from the information asymmetry [between society and the profession]”).

¹⁴⁰ Michael J. Trebilcock, *Regulating the Market for Legal Services*, 45 ALTA. L. REV. 215, 218 (2008) (describing informational asymmetries and quality assurance problems in the legal market’s small client sector).

¹⁴¹ Stephen & Love, *supra* note 38, at 991.

¹⁴² *Id.*

¹⁴³ See generally Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 72–73 (2016) (summarizing field studies).

¹⁴⁴ REBECCA L. SANDEFUR, A.B.A., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 14 (2014), https://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf [<https://perma.cc/Q33J-8K6R>].

services if demand does not also increase.¹⁴⁵ Indeed, multiplying the number of providers may be counterproductive inasmuch as it sows confusion among consumers about where to turn.¹⁴⁶

From an economic perspective, there is a clear distinction between the corporate segment characterized by frequent users of legal services and the consumer segment characterized by infrequent users. The corporate segment is not as susceptible to asymmetric information whereas the consumer segment cannot assess quality or when legal assistance is needed or valuable. When these differences are considered, we theorize that the most likely result from deregulatory reforms is inertia and not transformation. As to the corporate segment, market failures are less intense and changes in competition are unlikely to impact attorney-client relationships. With respect to infrequent consumers, market failures are likely to be pervasive. Therefore, additional competition will have a limited impact given that other relevant factors such as asymmetric information and imperfect information undermine clients' access to legal services.

d. Deregulation and Inertia

When regulation exists because of capture by private interests and not the need to address potential market failures, deregulation is expected to improve consumer welfare.¹⁴⁷ However, when regulation exists because there are true market failures, deregulation harms the welfare of consumers and fails to improve market performance.¹⁴⁸ In the latter case, additional competition can only generate visible gains in the absence of market failures (or, at least,

¹⁴⁵ See Markovic, *supra* note 143, at 71–72 (questioning conflation of unmet legal needs with demand for legal services); Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 787 (2015) (“[A]ccess to justice advocates have ping-ponged for over a decade between the illusive pursuit of a fully funded right to counsel and the dilution of attorney resources to the point of limited efficacy.”).

¹⁴⁶ See generally Webley, *supra* note 118, at 2360 (“The dazzling array of options open to consumers, the huge knowledge asymmetry in a messy professional arena, and the lack of consistent regulation make [law] a difficult environment to navigate successfully for consumers.”).

¹⁴⁷ Garoupa, *supra* note 10, at 473.

¹⁴⁸ *Id.*

when these market failures are minimized) and if it counteracts private capture effectively.¹⁴⁹

As we have argued, the corporate segment is generally less exposed to asymmetric information and other market failures. Therefore, the corporate segment is unlikely to be taken advantage of by anti-competitive practices, especially in a globalized legal market. The converse is true—corporate clients and elite law firms have leverage to negotiate around regulations that they view as inefficient.¹⁵⁰ For example, they can exploit weaknesses in current regulations or innovate with new legal instruments that address efficiency concerns. Therefore, enhancing competition in the market for legal services is unlikely to impact this segment significantly.¹⁵¹

For regulators, the main focus should be market failures that plague the consumer segment which is characterized by non-repeat players. These are the consumers more exposed to asymmetric information and more likely to suffer from anti-competitive practices and other consequences from capture. However, as shown by economists, the effects of increased competition are limited when asymmetric information is pervasive and may in fact exacerbate the problems of adverse selection and moral hazard.¹⁵² Therefore, unless deregulation (with additional competition in the market for legal services) is coupled with a reduction in asymmetric information, the impact will be minimal or deleterious. As one of us has written, “the complex educational, cultural, and psychological barriers that prevent individuals from accessing legal services cannot be overcome merely by increasing the number of low-cost providers.”¹⁵³

Deregulation and additional competition is neither good nor bad from an economic perspective. In fact, in the absence of further

¹⁴⁹ *Id.* at 470–73.

¹⁵⁰ See *infra* Part IV. Interestingly, some deregulation scholars concede this point while still maintain that regulation inhibits innovation in the corporate segment. See Hadfield, *supra* note 2, at 30, 45 (noting abundant regulatory workarounds in the corporate segment).

¹⁵¹ Because smaller businesses are less likely to operate in a globalized market and to extract discounts from attorneys, it is possible that they may reap greater benefits from deregulation than larger ones.

¹⁵² Akerlof, *supra* note 11, at 493–94; Chaserant & Harnay, *supra* note 24, at 278 (“Deregulation provides no remedy against market failures, nor prevents opportunism in an asymmetric information setting.”).

¹⁵³ Markovic, *supra* note 131, at 73.

reforms, inertia is the most likely outcome. With respect to the corporate segment, both sides of the market for legal services can overcome efficiency shortcomings. With respect to the consumer segment, market failures are not reduced or mitigated by additional competition. Deregulation and additional competition must be coupled with policies to address market failures (e.g., information asymmetry) to produce substantive or visible change.

Consider imperfect information.¹⁵⁴ It constrains the relationship between client and attorney regardless of client sophistication. Additional competition does not address the underlying problem—opacity.¹⁵⁵ As described above, imperfect information is not caused by market disadvantages, but rather because legislators, regulators, and courts are not always transparent and not entirely bound by their precedents. Enhancing competition does not address the problem directly and therefore we can only expect that additional competition matters to reduce imperfect information in a very marginal way.¹⁵⁶ Thus, while we do not deny that some deregulation could be beneficial in markets with limited competition, the market for corporate legal services is highly competitive in most jurisdictions, the deregulation paradigm does little to address the information asymmetries that plague the consumer segment, and the problem of imperfect information further complicates reform efforts. Part IV tests our theory by examining deregulatory reforms undertaken outside of the United States.

¹⁵⁴ See generally Schwartz, *supra* note 76 (discussing the economic theory that imperfect information results in markets closer to monopolistic competition models than perfect competition).

¹⁵⁵ See generally David Dranove & Mark A. Satterthwaite, *Monopolistic Competition When Price and Quality Are Imperfectly Observable*, 23 RAND J. ECON. 518 (1992) (explaining that improvements in price and/or quality information can perversely decrease welfare when price competition is so intense relative to quality competition that firms elect suboptimal levels of quality).

¹⁵⁶ *Id.*

IV. DEREGULATION AND THE LEGAL PROFESSION: EXPERIENCES ABROAD

a. *The United Kingdom Legal Services Act*¹⁵⁷

The United Kingdom legal market was once characterized by a great degree of professional autonomy.¹⁵⁸ Barristers and solicitors were “little republics” and thought to be immune from state interference.¹⁵⁹ Although barristers and solicitors contested the scopes of their respective domains, they did not compete with non-lawyer providers until the late 1980s when the United Kingdom began licensing professional conveyancers.¹⁶⁰ Nevertheless, lawyers practicing as solo practitioners or in professional partnerships continued to dominate the legal market.¹⁶¹

The profession’s control over the market diminished as regulators began to push deregulatory policies to increase market competition. One of the first salvos concerned attorney advertising.

¹⁵⁷ The focus of this section is on England and Wales. The LSA does not directly apply to Scotland, but the country passed its own version in 2010. See James M. McCauley, *The Future of the Practice of Law: Can Alternative Business Structures for the Legal Profession Improve Access to Legal Services?*, 51 U. RICH. L. REV. 53, 59 (2017); John Flood, *Will There Be Fallout from Clementi: The Repercussions for the Legal Profession after the Legal Services Act 2007*, 2012 MICH. ST. L. REV. 537, 539 (2012). One key difference is that Scotland limits ABS to 49% nonlawyer ownership. See *Legal Services: Alternative Business Structures*, SCOTTISH GOV'T <https://www.gov.scot/policies/access-to-justice/alternative-business-structures/> [<https://perma.cc/MD6M-5ES6>]; Garoupa, *supra* note 18, at 12. Scotland has yet to pass implementing legislation and the pace of change has been described as “glacial.” See Neil Rose, *Time for Scotland to Embrace ABS, Says Watchdog*, LEGALFUTURES (Mar. 25, 2020), <https://www.legalfutures.co.uk/latest-news/time-for-scotland-to-embrace-abss-says-watchdog> [<https://perma.cc/S8W4-WBW8>]; Paul Rogerson, *ABSs in Scotland: Rarer than Nessie*, LAW SOC'Y GAZETTE (Aug. 19, 2016), <https://www.lawgazette.co.uk/practice/abss-in-scotland-rarer-than-nessie/5057191.article> [<https://perma.cc/EH2N-GT86>].

¹⁵⁸ Andrew Boon, *Professionalism under the Legal Services Act 2007*, 17 INT'L J. LEGAL PRO. 195, 196 (2010).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Sundeep Aulakh & Ian Kirkpatrick, *Changing Regulation and the Future of the Professional Partnership: The Case of the Legal Services Act, 2007 in England and Wales*, 23 INT'L J. LEGAL PRO. 277, 279 (2016).

In the early 1980s, the Office of Fair Trading (“OFT”), eventually absorbed into the Competition and Markets Authority, threatened to divest the profession of authority over advertising if it did not loosen restrictions.¹⁶² The House of Commons subsequently legislated on the topic.¹⁶³ The profession chose to eliminate its advertising ban in 1984 before the legislation was put to a vote.¹⁶⁴

Subsequent deregulatory activity concerned fees. The UK was one of the first jurisdictions to embrace conditional fees whereby attorneys would receive higher fees if they prosecuted suits successfully.¹⁶⁵ The government hoped that conditional fees would expand access to legal services for low-and-middle income people and reduce dependence on legal aid.¹⁶⁶ In recent years, “no win, no fee agreements” have also become popular.¹⁶⁷

However, it was the 2007 United Kingdom Legal Services Act (“LSA”) that produced a “seismic” change in the U.K. legal market.¹⁶⁸ Although the LSA had many objectives, including the modernization of regulatory systems, one of its main purposes was to introduce more competition into the UK legal market.¹⁶⁹ As the influential Clementi report that preceded the LSA contended:

[A]ny Regulator of legal services should have as an objective the prevention of unjustified restrictions on the supply of, and encourage competition in, the provision of legal services and the promotion of choice in both the number and type of

¹⁶² Attanasio, *supra* note 19, at 501.

¹⁶³ *Id.* at 502.

¹⁶⁴ *Id.*

¹⁶⁵ Winand Emons & Nuno Garoupa, *US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and the Supply of Legal Services*, 27 *MANAGE. DECIS. ECON.* 379, 379 (2006).

¹⁶⁶ Richard Moorehead, *Conditional Fee Agreements, Legal Aid and Access to Justice*, 33 *U. BRIT. COLUM. REV.* 471, 472 (2000); see Webley, *supra* note 118, at 2355 (“To complement civil legal aid the government introduced a market solution to access justice: a fee regime known as ‘conditional fee arrangements’ . . . These arrangements were intended to shift financial risk from the state to the profession.”).

¹⁶⁷ Webley, *supra* note 118, at 2355.

¹⁶⁸ Aulakh & Kirkpatrick, *supra* note 161, at 278.

¹⁶⁹ See generally Flood, *supra* note 157, at 542–43 (2012) (describing the genesis of the Clementi Report and LSA).

providers, subject to the proper safeguard of consumers' interests.¹⁷⁰

The LSA opened the U.K. legal market to both ABS and multidisciplinary practices.¹⁷¹

Commentators have been effusive about the United Kingdom's reforms. Flood has described the introduction of ABS as a "big bang" and suggested that the reforms would be "hazardous" to the competitiveness of firms operating in less open markets.¹⁷² Hadfield and Rhode have maintained that "consumers are clearly benefiting from the U.K. changes" and endorse further deregulation to promote more innovation and the expansion of access to justice.¹⁷³ The purported success of the U.K. reforms persuaded regulators in Arizona and Utah to open their own markets to ABS.¹⁷⁴

Although one must be cautious in assessing developments in their early days, the LSA's impact seems to have been overstated. The U.K. legal market of today differs from that of a decade ago and features a greater variety of providers. However, there is little evidence that the LSA has fundamentally altered the provision of legal services to clients at either the high or low ends of the market.

With respect to the corporate segment, although large corporate law firms were swept up into the LSA, regulators have largely allowed them to pursue their own agendas.¹⁷⁵ The LSA has especially failed to alter the calculus for globalized law firms because many of these firms' services fall outside of the LSA and

¹⁷⁰ DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT 1, 17 (2004), http://www.avocatsparis.org/Presence_Internationale/droit_homme/PDF/Rapport_Clementi.pdf [<https://perma.cc/X28R-4YJ5>] (emphasis omitted).

¹⁷¹ Flood, *supra* note 157, at 547-48; see also Aulakh & Kikpatrick, *supra* note 161, at 282 ("[I]n England and Wales, changing regulation has opened up the possibility for . . . (the ABS) to emerge in legal services which, in theory, could represent a significant departure from the professional partnership.").

¹⁷² Flood, *supra* note 157, at 548-49.

¹⁷³ Hadfield & Rhode, *supra* note 29, at 1212-13.

¹⁷⁴ See Laurel S. Terry, *Lawyer Regulation Stakeholder Networks and the Global Diffusion of Ideas*, 33 GEO. J. LEGAL ETHICS 1069, 1092-93 (2020). As the Chief Judge of Utah's Supreme Court has explained: "Regulatory reform allows nonlawyers and innovative legal services to tap into a market that lawyers have not historically been able to reach." Deno G. Himonas & Tyler J. Hubbard, *Democratizing the Rule of Law*, 16 STAN. J. C.R. & C.L. 261, 280 (2020).

¹⁷⁵ Flood, *supra* note 17, at 514-21.

have historically received little scrutiny from municipal regulators.¹⁷⁶ Corporate firms have also benefitted from the LSA's emphasis on self-assessment and have successfully lobbied for the easing of conflict of interests rules that are far more relevant to their business models.¹⁷⁷

Although some firms have restructured as ABS pursuant to the LSA,¹⁷⁸ the vast majority of U.K. firms continue to be professional partnerships; only one in ten firms are ABS.¹⁷⁹ ABS firms tend to focus on providing high-volume commoditized services¹⁸⁰ – very different from the complex transactions typically handed by leading corporate law firms.¹⁸¹ Many of these commoditized services were formerly loss leaders for law firms, so greater competition for these services does not seem to have impacted their bottom lines.¹⁸²

Even among the small group of boutique firms that service corporate clients and have formally reorganized, few actually accept nonlawyer investment.¹⁸³ As of this writing, only the shares of eight law firms are publicly traded, and most of these firms provide legal services alongside non-legal services.¹⁸⁴

¹⁷⁶ Justine Rogers et al., *The Large Professional Service Firm: A New Force in the Regulatory Bargain*, 40 U.N.S.W. L.J. 218, 219 (2017); see also Flood, *supra* note 17, at 513 (“Global law firms are less involved in activities that fall into reserved categories and therefore do not find themselves hampered as much by local rules as do those who practice local law.”).

¹⁷⁷ Flood, *supra* note 17, at 513, 518.

¹⁷⁸ Jakob Weberstaedt, *English Alternative Business Structures and the European Single Market*, 21 INT'L J. LEGAL PRO. 103, 108–09 (2014).

¹⁷⁹ See LEGAL SERVS. BD., *THE STATE OF LEGAL SERVICES 2020: A REFLECTION ON TEN YEARS OF REGULATION 17*, https://legalservicesboard.org.uk/wp-content/uploads/2020/11/The-State-of-Legal-Services-Narrative-Volume_Final.pdf [hereinafter LSB].

¹⁸⁰ Aulakh & Kirkpatrick, *supra* note 161, at 286.

¹⁸¹ Flood, *supra* note 17, at 512–13.

¹⁸² See Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 VAND. L. REV. 2051, 2062 (2006) (describing flat fee insurance work as a “loss leader” for law firms).

¹⁸³ See Aulakh & Kirkpatrick, *supra* note 161, at 290–91 (reporting that less than a quarter of ABS plan to accept nonlawyer investment).

¹⁸⁴ Neil Rose, *Mishcon de Reya Confirms Plan to List on Main Stock Exchange*, LEGAL FUTURES (Apr. 28, 2021), <https://www.legalfutures.co.uk/latest-news/mishcon-de-reya-confirms-plan-to-list-on-main-stock-exchange> [https://perma.cc/4ZNNZ-7B9Y].

Why have corporate firms been reluctant to take advantage of the flexibility that the LSA affords? The main reason is that corporate law firms have long been attuned to their clients' needs and these clients have never operated "under a yoke of monopoly constraint."¹⁸⁵ Thus firms have long been investing in technology and collaborations with nonlawyer professionals to deliver legal services more efficiently.¹⁸⁶ The development of legal process outsourcing is a testament to this reality.¹⁸⁷

Other factors also appear to be at play. Corporate law is highly profitable, meaning that U.K. firms operating in this segment have little need for outside capital.¹⁸⁸ Lawyers are wary not only of dividing their profits, but also of answering to external constituents other than their clients.¹⁸⁹ From an investor's perspective, law is a "sleepy market" and investment decisions are complicated by lawyers' duties to their clients and the legal system.¹⁹⁰ Conditions may change in the future, but there is little evidence that the LSA has enabled U.K. firms to outperform transnational firms based in other markets.¹⁹¹ To the extent that they eventually seek to do so, they will likely face significant headwinds, including the possible alienation of foreign partners.¹⁹²

In terms of the consumer segment, the LSA has had little impact on the public's ability to obtain legal services and access to justice. A recent retrospective by the U.K. Legal Services Board ("LSB") has found that:

¹⁸⁵ Flood, *supra* note 17, at 513.

¹⁸⁶ Flood, *supra* note 17, at 513; *see also* LSB, *supra* note 179, at 47 ("[C]ity firms have invested heavily in incubators and new services to serve their clients, but the public has benefited much less.").

¹⁸⁷ *See generally* Aaron R. Harmon, *The Ethics of Legal Process Outsourcing - Is the Practice of Law a Noble Profession, or Is It Just Another Business*, 13 J. TECH. L. & POL'Y 41, 54-55 (2008) (describing various types of LPOs and outsourcing arrangements).

¹⁸⁸ Garoupa, *supra* note 18, at 24.

¹⁸⁹ Aulakh & Kirkpatrick, *supra* note 161, at 290-91.

¹⁹⁰ LSB, *supra* note 179, at 46; Weberstaedt, *supra* note 178, at 105.

¹⁹¹ Garoupa, *supra* note 18, at 24; *see also* Sydney M. Cone, III, *International Legal Practice Involving England and New York Following Adoption of the United Kingdom Legal Services Act of 2007*, 28 Nw. J. INT'L & BUS. 415, 438 (2008) (predicting that prestigious and globalized firms would prefer to finance internally).

¹⁹² *See* Garoupa, *supra* note 18, at 25 (noting Americanization of legal processes and localism are major challenges).

[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.¹⁹³

Whereas firms at the high end of the legal market were already providing the types of services needed by their clients, minimizing the impact of deregulation, penetration of ABS into the consumer market has proven inadequate to overcome barriers faced by low-information consumers.¹⁹⁴ Despite the United Kingdom's deregulated market, large segments of the population continue to believe that legal services are too expensive and that the legal system is stacked against them.¹⁹⁵ 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.¹⁹⁶ Although the United Kingdom has historically allowed for far more non-lawyer involvement in the legal market than countries such as the United States,¹⁹⁷ the LSA increased competition between and among different classes of providers, causing some confusion among consumers.¹⁹⁸

The dilution of lawyers' control over the legal market also means that consumers receive conflicting messages about the availability and quality of legal services.¹⁹⁹ Some consumers and small businesses benefit from the commoditized services that ABS provide, but lower-income individuals are in need of different services.²⁰⁰ A deregulated market has proven to be no substitute for

¹⁹³ LSB, *supra* note 179, at 21, 45.

¹⁹⁴ *Id.* at 22 ("The underlying complexity of many legal issues and the effort and expertise required to resolve them means professional help will continue to be out of reach for large parts of the population to fund privately."); *see also* STEPHEN MAYSON, REFORMING LEGAL SERVICES: REGULATION BEYOND THE ECHO CHAMBER 72 (2020) (noting asymmetries between attorneys and clients and inequalities in representation).

¹⁹⁵ LSB, *supra* note 179, at 21.

¹⁹⁶ *Id.* at 23, 41.

¹⁹⁷ Webley, *supra* note 118, at 2359.

¹⁹⁸ *Id.* at 2359–60.

¹⁹⁹ *Id.* at 2361.

²⁰⁰ MAYSON, *supra* note 194, at 39.

robust legal aid and the UK has seen a rise in self-representation and increase in unregulated providers, including paid “McKenzie friends.”²⁰¹ The LSA, once regarded as revolutionary, is now decried as ineffectual and obsolete by leading U.K. commentators.²⁰²

b. The European Union

Continental Europe has also experienced significant deregulation although more unevenly than the United Kingdom. The driving force of the deregulation agenda in the 2000s has been European law.²⁰³ “Directive 2005/36/EC on professional qualifications has consolidated previous directives and has promoted further integration of professional markets . . . enhancing competition in the traditionally[,] and still largely protected[,] European markets for legal services.”²⁰⁴

Several European Court of Justice (“ECJ”) decisions have also contributed to the deregulation of the European legal market. For example, the *Morgenbesser* case defended the principle that free establishment applies even to those who have not completed their legal educations in their home states.²⁰⁵ In addition, *Koller*²⁰⁶ determined that a legal degree that is completed in a different country (in the particular case, Spain) should not preclude access to the profession in the home country (in the particular case, Austria) even when the countries maintain different standards as Spain did not mandate legal training at that time.²⁰⁷ Previously, in the *Wouters*

²⁰¹ *Id.* at 45, 192. The term ‘McKenzie Friend’ originates from a 1970 Court of Appeal case in which it was confirmed that litigants have a (rebuttable) right to receive lay assistance. LEANNE SMITH ET AL., A STUDY OF FEE-CHARGING MCKENZIE FRIENDS AND THEIR WORK IN PRIVATE FAMILY LAW CASES 5 (2017), <http://orca.cf.ac.uk/101919/> [<https://perma.cc/9DUW-38HD>].

²⁰² MAYSON, *supra* note 194, at 73

²⁰³ Garoupa, *supra* note 18 at 10-13.

²⁰⁴ *Id.* at 10; see also Bugatti, *supra* note 18, at 96-97 (discussing the movement to re-regulate professional services in Europe from 2005 through 2018).

²⁰⁵ Case C-313/01, *Christine Morgenbesser v. Consiglio Dell’Ordine Degli Avvocati di Genova*, 2003 E.C.R. I-13467.

²⁰⁶ Case C-118/09, *Koller*, 2010 E.C.R. I-13627.

²⁰⁷ See generally Julian Lonbay, *The Changing Regulatory Environment Affecting the Education and Training of Europe’s Lawyers*, 61 J. LEGAL EDUC. 479, 484 (2012) (examining effects of the European law on training in Spain and other countries).

case,²⁰⁸ litigants challenged traditional arrangements such as prohibition of multidisciplinary partnerships (in the Netherlands) and, in the *Arduino* case,²⁰⁹ fee limitations (in Italy). In both cases, the ECJ was reluctant to override such practices but stated that lawyering was not *per se* excluded from antitrust principles.²¹⁰ Moreover, the Council of Bars and Law Societies of Europe (“CCBE”) has sought to impose some minimum standards in terms of training and ethics across the European Union, with repercussions in Spain in particular.²¹¹

The support for deregulation has been more visible in court decisions than in public policy in countries such as Germany and France, particularly with decisions against lawyers’ regulatory bodies.²¹² For example, legal markets in Germany are traditionally regulated by statute.²¹³ Although such legislation has largely been immune from competition law, courts have played an important role because disciplinary action can be exercised both by the bar and the courts.

The Professional Regulation for Lawyers in 1997 was a significant development, particularly in connection with advertising, professional ethics, territorial limitations, and, in time, legal fees.²¹⁴ The German Constitutional Court has also actively promoted deregulation in a series of decisions beginning in 1987.²¹⁵ These decisions impacted advertising, employment of lawyers by non-lawyers, fee arrangements, professional indemnity insurance, and new forms of partnerships.²¹⁶ However, liberalization of fee

²⁰⁸ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* (NOVA), 2002 E.C.R. I-1577.

²⁰⁹ Case C-35/99 *Arduino*, 2002 E.C.R. I-1529.

²¹⁰ See Garoupa, *supra* note 10, at 463–95 (discussing case law in Europe, in particular, the immediate implications of the *Wouters* case).

²¹¹ Lonbay, *supra* note 207, at 484.

²¹² Garoupa, *supra* note 18, at 14.

²¹³ *Id.*

²¹⁴ *Id.* at 14–15 (discussing 1997 law); see also Jutta Brunnee, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399, 418–22 (1992) (discussing earlier changes to lawyer training); Eckart Klein, *Legal Education in Germany*, 72 OR. L. REV. 953, 954 (1993) (contrasting American and German legal education).

²¹⁵ For a more detailed discussion, see FRANK H. STEPHEN, *LAWYERS, MARKETS AND REGULATION* 74 (2013).

²¹⁶ See *id.*

arrangements is still limited to out of court settlements in Germany, and some restrictions on multidisciplinary partnerships remain.²¹⁷

Although lawyers are also regulated by statute in France, the coexistence of multiple legal service providers in the legal market has meant that regulation has operated in a decentralized fashion.²¹⁸ However, two trends in regulatory action in French lawyering are easy to identify. The first concerns the profession's effort to exclude multidisciplinary partnerships ("MDPs") and nonlawyer ownership.²¹⁹ Lawyers were able to temporarily forestall these developments, but the Cour de Cassation ultimately decided that the restrictions were contrary to the EU directive.²²⁰ Nevertheless, ABS and multidisciplinary partnerships continue to be limited and highly restricted in France.²²¹ Second, the French bar has been unable to exclude foreign law firms from the Paris market, again because of the EU directive, but the tendencies of these foreign firms to focus on transnational law has blunted the effects on the local bar.²²²

Italian governments have also endeavored to deregulate the country's legal market. The traditional bans on advertising were lifted in 2006 and eliminated in 2012.²²³ Other deregulatory innovations include reforming traineeships by limiting training periods to eighteen months (with the possibility of completion during law school) and the abolition of the *tariffe* (traditionally predetermined by the National Forensic Council with the Ministry of Justice).²²⁴ The legal profession largely resisted these reforms and has been successful at forestalling others.²²⁵ For example, Italy nominally accepts MDPs and ABS, but the legal market is

²¹⁷ Bugatti, *supra* note 18, at 100.

²¹⁸ Garoupa, *supra* note 18, at 16.

²¹⁹ See generally Frank H. Stephen, *The European Single Market and the Regulation of the Legal Profession: An Economic Analysis*, 23 *MANAGERIAL DECISION ECON.* 115, 117 (2002) (noting increasing penetration of MDPs and particularly accounting firms in France).

²²⁰ Garoupa, *supra* note 18, at 17.

²²¹ Hill, *supra* note 34, at 180-81.

²²² Garoupa, *supra* note 18, at 17; see also Flood, *supra* note 17, at 519 ("[Global firms] operate across EU boundaries by virtue of their corporate practices which hardly impinge on local law interests, e.g. transactional work vs advocacy.").

²²³ Bugatti, *supra* note 18, at 101.

²²⁴ Garoupa, *supra* note 18, at 17; Bugatti, *supra* note 18, at 109.

²²⁵ See Garoupa, *supra* note 18, at 17; Bugatti, *supra* note 18, at 108.

dominated almost entirely by small firms that service the local market and rely on word-of-mouth referrals.²²⁶ The general situation is one of “immobilism.”²²⁷

In Portugal, law graduates are accepted for a training period at the end of which there is a national bar exam characterized by high passage rates.²²⁸ As one of us has noted, “due to an expansion of legal education in the mid-1990s, the number of lawyers has increased considerably in the last decade or so, putting Portugal well above average in terms of the number of lawyers per capita within the European Union.”²²⁹ This development has had the effect of creating more competition in a market traditionally characterized by strong cartelization and considerable rent-seeking.²³⁰ “The response from the national bar was simple: introduction of a new (national) bar exam requirement to enter the training period.”²³¹ Portugal has also been able to largely resist the intrusion of ABS.²³² Changes in advertising rules and organizational forms are more consistent with a deregulation trend.²³³

Spain is somewhat of a European outlier inasmuch as the European Law has arguably led to a *more* regulated market. Until about ten years ago, Spain had no bar exam.²³⁴ Law graduates simply needed to register with the local bar after completing their degrees, which required five and then four years of study after the Bologna agreement.²³⁵ As a result, other EU members could claim that Spain was different from the other member states to justify the non-recognition of Spanish lawyers. To avoid this situation, the Spanish government introduced a bar exam in 2006, effective from

²²⁶ Bugatti, *supra* note 18, at 110.

²²⁷ *Id.* at 111.

²²⁸ Garoupa, *supra* note 18, at 3.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² See OECD, OECD COMPETITION ASSESSMENT REVIEWS: PORTUGAL CHAPTER 2 (2d. ed. 2018)), <https://www.oecd-ilibrary.org/sites/9789264300606-8-en/index.html?itemId=/content/component/9789264300606-8-en> [<https://perma.cc/3DXN-N9A2>].

²³³ Bugatti, *supra* note 18, at 102–04.

²³⁴ Garoupa, *supra* note 18, at 2.

²³⁵ *Id.*

2011.²³⁶ Spain has also limited nonlawyer ownership in ABS to twenty-five percent.²³⁷

In sum, all jurisdictions in Europe have wrestled with deregulation in one way or another, largely because of the European Law. However, not all policies enacted have been deregulatory in nature. Some jurisdictions such as Spain have enhanced barriers to entry because of the need to harmonize legal services in Europe.²³⁸

Most important, for purposes of this Article, is that the sum total of these changes have not produced major changes in the EU legal market. Part of the explanation is that lawyers in countries such as Italy and Portugal have resisted changes that would threaten their control over local markets. Yet increased competition has also necessitated the maintenance, and in some cases, expansion of regulations designed to mitigate externalities and information asymmetries.²³⁹ Limits on nonlawyer participation in firms in countries such as France, Germany, and Spain and the adoption of bar examinations in Spain and Portugal are examples. As Bugatti has suggested, national bars have maintained control of legal markets by highlighting risks to consumers posed by liberalization while practicing business as usual vis à vis the corporate segment.²⁴⁰

c. Asia

Asian countries have generally been closed to foreign law firms and maintained high entry barriers such as bar examinations with pass rates well below ten percent.²⁴¹ In the 2000s, Japan and South Korea enacted important legal reforms to modernize the practice of

²³⁶ Soledad Atienza, *The Evolution of Legal Education in Spain*, 61 J. LEGAL EDUC. 468, 473 (2012); Garoupa, *supra* note 18, at 3.

²³⁷ Hill, *supra* note 34, at 183.

²³⁸ Bugatti, *supra* note 18, at 108-11; Garoupa, *supra* note 18, at 3.

²³⁹ Bugatti, *supra* note 18, at 112.

²⁴⁰ *Id.*

²⁴¹ See, e.g., George Schumann, *Beyond Litigation: Legal Education Reform in Japan and What Japan's New Lawyers Will Do*, 13 UNIV. MIAMI INT'L & COMP. L. REV. 475, 526 (2006) (noting the Japanese bar passing rate being less than three percent in the 1980s and 1990s; recent statistics show a number closer to 30%); see also Garoupa, *supra* note 18, at 19.

law and to promote more competition.²⁴² The most immediate consequence has been the notable increase in passage rates on the Japanese and Korean bar exams; while still low by American standards—in many East Asian countries the pass rate remains well below fifty percent—these rates far exceed historical figures.²⁴³ Nevertheless, the easing of bar examination requirements has proven less far-reaching than expected, calling into question the perceived need for more professional lawyers in these countries.²⁴⁴ The legal professions in Taiwan and Hong Kong have largely maintained entry barriers unlike their counterparts in Japan and Korea.²⁴⁵

Mainland China is a unique case. For political and historical reasons dating to the Cultural Revolution in the 1960s, the reform of the legal profession has never been a major priority.²⁴⁶ Passing rates on the Chinese bar are systematically low (possibly below thirty percent).²⁴⁷ Demand for legal services is fundamentally concentrated in and around Beijing and Shanghai.²⁴⁸ Legal education has expanded significantly since the early 1990s, but most commentators agree that quality is very uneven.²⁴⁹ In theory, the

²⁴² See generally, e.g., James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional Into Legal Education*, 13 PAC. RIM L. POL'Y J. 303 (2004) (focusing on Japan); Young-Cheol K. Jeong, *Korean Legal Education for the Age of Professionalism: Suggestions for More Concerted Curricula*, 5 E. ASIA L. REV. 155 (2010) (focusing on South Korea).

²⁴³ See Shigenori Matsui, *Turbulence Ahead: The Future of Law Schools in Japan*, 62 J. LEGAL EDUC. 3, 19–20 (2012) (discussing the new bar examination in Japan).

²⁴⁴ Compare Annelise Riles & Takashi Uchida, *Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3, 27–28 (2009), with Mark Ramseyer, *Law and Economics in Japan*, 2011 UNIV. ILL. L. REV. 1455, 1455–74 (2011).

²⁴⁵ Garoupa, *supra* note 18, at 19.

²⁴⁶ Leland Benton, *From Socialist Ethics to Legal Ethics: Legal Ethics, Professional Conduct, and the Chinese Legal Profession*, 28 UCLA PAC. BASIN L.J. 210, 212 (2010).

²⁴⁷ The passing rates have increased after the 2002 modernization of the bar exam (up from around seven percent in 2002 to around twenty-five percent after 2008). See Garoupa, *supra* note 18, at 20.

²⁴⁸ *Id.*

²⁴⁹ See generally Neils J. Philipsen, *Regulation of Liberal Professions and Competition Policy: Developments in the EU and China*, 6 J. COMPETITION L. & ECON. 203, 203 (2010) (“[I]nformation asymmetry may have more relevance in China than

market is heavily regulated by the government, which considerably limits foreign influence.²⁵⁰ However, global law firms have circumvented regulations by partnering with local firms to establish footholds in China; the government has in effect sanctified these arrangements.²⁵¹ Chinese firms have also effectively used globalization to engage in practices that are nominally prohibited in China, including seeking funding from outside investors and delivering non-law-related services.²⁵² The legal profession as a whole consists of a wide variety of providers and remains highly fragmented despite governmental efforts to create a more unified profession.²⁵³

The Chinese legal market has become far more sophisticated since the 1990s to accommodate the country's rapid growth and development, but regulation seems to have played almost no role. Many of the changes that have occurred in more liberalized markets have also occurred in China because of globalization and the increased deployment of technology in law.²⁵⁴ Arguments for deregulation in the Chinese context focus predominately on the practical reality that restrictions with respect to foreign firms, ABS, and MDPs have been ineffectual.²⁵⁵

in Europe . . . the fact that liability rules may not yet be good alternative for (or supplement to) quality regulation may also make a stronger case for regulation in China.”); Mark A. Cohen, *International Law Firms in China: Market Access and Ethical Risks*, 80 *FORDHAM L. REV.* 2569, (2012) (“[I]nternational law firms in China face enormous difficulties establishing and expanding their presence in the Chinese legal market.”); Jun Zhao & Ming Hu, *A Comparative Study of the Legal Education System in the United States and China and the Reform of Legal Education in China*, 35 *SUFFOLK TRANSNAT'L L. REV.* 329 (2012) (examining “legal education reform in China in the face of both internal requirements of *rule of law*, as well as external pressures imposed by globalization”).

²⁵⁰ Jing Li, *The Legal Profession of China in a Globalized World: Innovations and New Challenges*, 26 *INT'L J. LEGAL PRO.* 217, 219 (2019).

²⁵¹ *Id.* at 228–29.

²⁵² *Id.* at 235, 242.

²⁵³ *Id.* at 229–31.

²⁵⁴ *Id.* at 252.

²⁵⁵ *Id.* at 253.

V. REREGULATION: A PATH FORWARD

Thus far we have questioned the impact of deregulatory reforms on both the corporate and consumer segments and supported our theoretical analysis via examination of deregulatory reforms in the United Kingdom, Europe, and Asia. Rather than focusing on promoting competition generally, we maintain that regulators should instead seek to combat negative externalities in the corporate segment of the legal market and information asymmetries in the consumer segment.

a. The Corporate Segment

The corporate legal sector has largely been unaffected by deregulatory reforms. As this Article has shown, purportedly seismic reforms such as the United Kingdom's LSA have done little to alter this highly competitive and globalized market. Indeed, firms based in highly regulated markets such as China seem to be at no disadvantage vis à vis firms based in liberalized markets such as the United Kingdom.

These findings stand to reason because corporate clients do not suffer from information asymmetries and have a greater ability to monitor and control their attorneys than do regulators.²⁵⁶ These clients do not materially benefit from deregulation in areas such as advertising and fees because of their sophisticated understanding of the legal services market, which enables them to avoid search costs and to secure favorable fee arrangements.²⁵⁷ They can also advocate

²⁵⁶ See *supra* Part II.a.iv.

²⁵⁷ Many commentators have attributed the rise of corporate clients' bargaining power to the 2008 recession. See, e.g., Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 36-38 (2011); see also Atinuke O. Adediran et al., *Making the Best of a Bad Beginning: Young New York Lawyers Confronting the Great Recession*, 9 NE. U. L.J. 259, 264 (2017) ("The Great Recession was therefore a major factor that impacted external relationships and internal processes within organizations, including law practice and the overall organization of the legal profession.").

for changes in the law that will inure to their benefit via law firms or otherwise.²⁵⁸

The chief problem with respect to the corporate legal sector is not information asymmetry but that lawyers will be “captured” by their clients and fail to forestall negative externalities relating to their clients’ conduct.²⁵⁹ As Remus has observed, “[i]n the corporate hemisphere, the principal challenge is to bolster lawyers’ independence from their clients . . . to protect third parties, the public, and lawyers themselves[.]”²⁶⁰ Despite widespread awareness that lawyers might facilitate misconduct and other negative conduct, the problem is largely unaddressed in the deregulation literature.

Mandatory reporting is one means of counteracting negative externalities that follow from client misconduct. For example, in response to Enron and other high-profile corporate scandals in the 2000s, the American legal profession adopted ethical rules requiring lawyers who represent organizations to “report up the ladder” when they become aware of serious unlawful conduct.²⁶¹ Under certain circumstances, lawyers can also report unlawful conduct outside of their organizations, notwithstanding confidentiality obligations.²⁶² These rules were adopted under pressure from the U.S. Congress and financial regulators who sought to empower the profession vis à vis their corporate clients.²⁶³

Restrictions on ABS could also plausibly be justified in terms of negative externalities. For example, limiting the percentage of outside investment, as some EU members do, could discourage law firms from excessive risk-taking in case selection because they are

²⁵⁸ See generally Dana Remus, *Hemispheres Apart: A Profession Connected*, 82 FORDHAM L. REV. 2665, 2674 (2014) (“Backed by the lawyers and resources of the corporate hemisphere, corporate clients can engage in legislative and litigation-reform campaigns Examples include efforts to limit the availability of punitive damages and to exclude certain classes of individual claims from court”).

²⁵⁹ For a general discussion of the client capture literature, see Ronit Dinovitzer et al., *Unpacking Client Capture: Evidence from Corporate Law Firms*, 1 J. PROF'L & ORGS. 99, 102 (2014).

²⁶⁰ Remus, *supra* note 258, at 2679–80.

²⁶¹ MODEL RULES OF PRO. CONDUCT r. 1.13(b).

²⁶² *Id.*; see also Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 229–30 (2003) (suggesting that the rules do not go far enough).

²⁶³ See *id.* at 228.

required to maintain "skin-in-the-game."²⁶⁴ Similarly, allowing lawyers to form associations only with other professionals²⁶⁵ could make it more likely that lawyers will exercise professional detachment towards their clients and refuse to assist with illegal acts.²⁶⁶ Although traditional law firms may be no more or less likely than ABS to forestall their clients' misconduct, the ability of regulation to address this problem depends largely on the power of legal service providers to resist market pressures that are diminished in deregulated markets.²⁶⁷

In the view of some scholars, deregulation has not caused an ethical race to the bottom and there is no reason to believe that nonlawyers are less ethical than lawyers and other professionals.²⁶⁸ Yet, accepting the truth of these claims, corporate clients can more readily obtain legal assistance that is antithetical to the public interest in a larger and more heterogenous legal services market. Clients are willing to pay for "bad" legal advice because "regardless of its merit, it confer[s] on [corporate clients] a significant measure of immunity from liability or public criticism."²⁶⁹ Greater competition, in other words, may reduce regulatory capture while

²⁶⁴ For example, the Dodd Frank Act guards against moral hazard by requiring issuers of securities to retain at least a five percent interest in their securities. See Adam J. Levitin, *Skin-in-the-Game: Risk Retention Lessons from Credit Card Securitization*, 81 GEO. WASH. L. REV. 813, 815-16 (2013).

²⁶⁵ Bugatti, *supra* note 18, at 104-05.

²⁶⁶ See Hughes, *supra* note 8, at 660. Regulations directed to specific types of ABS may also be advisable. For example, accounting firms are increasingly involved in the legal services market, and some have registered as ABS in the United Kingdom. See Boon, *supra* note 158, at 201. However, there are inherent conflicts in accounting firms providing both audit-related services and legal advice relating to, *inter alia*, taxation. See generally Prem Sikka & Mark P. Hampton, *The Role of Accountancy Firms in Tax Avoidance: Some Evidence and Issues*, 29 ACCT. F. 325, 333-43 (2005) (discussing KPMG's marketing of dubious tax shelters to its audit clients).

²⁶⁷ See Boon, *supra* note 158, at 196 (observing that the legal profession's ability to police standards of behavior in the United Kingdom has been weakened since the LSA). See generally Remus, *supra* note 258, at 2677 ("Without the protections of professional regulation in the corporate hemisphere, the dangers of insufficient professional independence, long noted by scholars, would be fully realized. There would be little to stop sophisticated corporate actors from co-opting lawyers into facilitating excessively aggressive or unethical business schemes.").

²⁶⁸ Hadfield & Rhode, *supra* note 29, at 1214-15.

²⁶⁹ William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1557 (2008).

exacerbating “client capture.” Economists have largely overlooked that firms are able to compete on the advice they are willing to provide and not simply on its price and quality.²⁷⁰

b. The Consumer Segment

The chief regulatory problem with respect to the consumer segment is that individuals in need of legal assistance go without because they are either unaware of their legal needs or are skeptical about the value of assistance.²⁷¹ These issues bedevil consumers generally and not merely low-income ones because of general ignorance about legal services among infrequent users. As leading empirical researchers have explained:

Well-meaning observers often speak and write as though access to justice is only an issue for the poor, and assume that poor people desire lawyers’ services but cannot obtain them because those services are so very expensive . . . [T]he picture is much more complex: civil justice problems are ubiquitous, both poor and nonpoor people typically do not think of their civil justice problems in legal terms, people often do not think of lawyers’ services as a helpful route to solving civil justice problems, private lawyers’ services are not always that expensive, and concerns about cost play only a small role in people’s decisions not to turn to lawyers or to courts.²⁷²

Deregulation fails to address this complex and multi-faceted problem because it is ultimately one caused by information asymmetries. Pro-deregulation scholars have at times acknowledged this point while eliding that what may be needed in many instances is more regulation, not less.²⁷³ Lawyers and other

²⁷⁰ For example, Hadfield’s recent review neglects client capture and negative externalities entirely. See Hadfield, *supra* note 2.

²⁷¹ See generally Markovic, *supra* note 143, at 73 (summarizing research).

²⁷² Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117 (2013).

²⁷³ See generally Hadfield, *supra* note 31, at 49 (defining cost to include “cost to the consumer of recognizing the need for and then finding, evaluating, understanding, and implementing the analysis and recommendation”).

legal services providers face a collective action problem in educating consumers about their legal needs.²⁷⁴ Mass market advertising is expensive and individual lawyers and firms have no incentive to educate the public about the importance and availability of legal services when they could instead tout their own services and prices.²⁷⁵ Many of the nascent advances in the consumer market stem not from deregulation but from technological developments that have facilitated individual consumers' access to legal information.²⁷⁶

The LSA has received virtually all of the scholarly attention, but regulators in the United Kingdom are increasingly focusing on legal market interventions to address informational asymmetries. For example, the LSB recently began to require solicitors and other professional groups to post price and service information on their websites that comparatively few providers had disclosed previously.²⁷⁷ The purpose of this requirement is to lower search costs for consumers, and there is some evidence that this measure has already led to more comparison shopping.²⁷⁸ UK regulators also operate a website dubbed "Legal Choices" that helps people to understand their rights as citizens and how to choose lawyers.²⁷⁹ Individual firms and lawyers would have little incentive to provide the information provided by Legal Choices.

Another way that the United Kingdom and other jurisdictions confront information asymmetries in the consumer segment is by relying on nonlawyer intermediaries to connect consumers with legal assistance. The United Kingdom has long maintained government-funded citizen advice bureaus that are staffed by nonlawyers and "provide advice about how to handle justice issues and many other kinds of problems remotely over the Internet or

²⁷⁴ See generally Erika J. Rickard, *The Role of Law Schools in the 100% Access to Justice Movement*, 6 *IND. J.L. & SOC. EQUAL.* 240, 248-49 (2018) ("The justice system faces a collective action problem . . . [E]fforts to enhance access to justice are generated by individual stakeholders, each of which is limited both by its own self-interest and by the dearth of knowledge about effective ways of addressing legal needs.").

²⁷⁵ Elizabeth Chambliss, *Marketing Legal Assistance*, 148 *DAEDALUS* 98, 102 (2019).

²⁷⁶ Markovic, *supra* note 143, at 92-93.

²⁷⁷ LSB, *supra* note 179, at 42.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 16.

telephone, or personally at more than 3,000 locations around the country.”²⁸⁰ For some consumers, advice from bureaus will be sufficient, but for many others, they will serve as entry points to full-scale legal representation.

Similarly, recent research conducted in the Canadian province of Ontario points to the crucial role that community organizations play in advising lower-income individuals about their rights and empowering them to seek redress for violations of those rights.²⁸¹ Legal problems often have nonlegal dimensions, and individuals are far more likely to trust members of their communities than attorneys.²⁸² Although nonlawyers based in not-for-profits and charitable organizations are not supposed to provide legal assistance in Ontario, many of these organizations function as *de facto* citizen advice bureaus, and there is little apparent appetite to disrupt them.²⁸³ Formalizing relationships between the not-for-profit and charitable sectors and lawyers and other legal service providers would undoubtedly benefit consumers.²⁸⁴

Regulators could also seek to foster greater cooperation between lawyers and nonlawyers in the private sector by removing impediments to referral fee arrangements.²⁸⁵ In the United States, lawyers can pay referral fees only to other attorneys, and referral fees are also uncommon in much of Europe.²⁸⁶ The theoretical

²⁸⁰ Rebecca L. Sandefur, *Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 964 (2009).

²⁸¹ JULIE MATHEWS & DAVID WISEMAN, COMMUNITY JUSTICE HELP: ADVANCING COMMUNITY-BASED ACCESS TO JUSTICE 15-16 (2020), <https://www.srln.org/node/1472/paper-community-justice-help-advancing-community-based-access-justice-cleo-2020> [<https://perma.cc/Y85D-22PF>].

²⁸² *Id.* at 15.

²⁸³ *See id.* at 18 (noting that there are no documented cases of prosecutions of non-profits for the unauthorized practice of law).

²⁸⁴ Although beyond this Article's purview, in the United States it is an open question whether charities and non-profits can be engaged in the unauthorized practice of law. *See generally* Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 FORDHAM L. REV. 2397, 2413 (1999) (“The concept of the unauthorized practice of law is outdated insofar as it applies to entities that provide free legal services.”).

²⁸⁵ For a discussion of the access to justice benefits of referral fees in the United Kingdom context, see Andrew Higgins, *Referral Fees: The Business of Access to Justice*, 32 LEGAL STUD. 109, 114 (2012).

²⁸⁶ *See id.* at 126 (“Referral fees are not common in Europe.”). Compare MODEL RULES OF PRO. CONDUCT r. 1.5(e), with MODEL RULES OF PRO. CONDUCT r. 7.2(b).

justification for restricting referral fees is to ensure that clients are not steered to unqualified or unscrupulous attorneys, but any risk of undue influence in the selection of counsel could be mitigated by requiring attorneys and other providers to disclose referral arrangements and payments to prospective clients.²⁸⁷ Prohibitions on referral fees have also impeded lawyers' ability to work with technology companies that have created platforms that link consumers and lawyers.²⁸⁸

As Abel has explained, the legal profession has been unable to unify behind measures that increase demand for legal services.²⁸⁹ Whether it may do so in the future—if only to forestall greater deregulation and diminution of its own standing and power—remains to be seen. However, collective action problems will only be more acute in deregulated markets characterized by heterogenous providers, necessitating governmental intervention and involvement.²⁹⁰

To address the problem of access, regulators should concentrate on improving the information that is available to consumers. They should also engage with nonlawyer intermediaries to educate the public about the need for and availability of legal services. Deregulation alone fails to confront the market failures that are endemic in the consumer segment.

VI. CONCLUSION

Countries across much of the world have deregulated aspects of their legal markets over the last thirty years. Scholars drawing on public choice theory have exposed inefficiencies and persuaded regulators to deregulate in areas ranging from fees and advertising to organizational forms. Although these reforms have promoted greater competition and diminished the legal profession's dominance of legal markets in certain jurisdictions, we have not seen

²⁸⁷ Markovic, *supra* note 143, at 91.

²⁸⁸ For an in-depth discussion of one such technological service, see Alberto Bernabe, *Avvo Joins the Legal Market; Should Attorneys Be Concerned?*, 104 GEO. L.J. ONLINE 184 (2016).

²⁸⁹ See RICHARD L. ABEL, *AMERICAN LAWYERS* 140 (1989).

²⁹⁰ Webley, *supra* note 118, at 2360.

the transformation that many commentators expected. Supply-side reforms have not fundamentally changed markets or altered clients' legal spending decisions. Even the United Kingdom—the jurisdiction that has most internalized the deregulatory, pro-competition ethos—has begun to recognize the inadequacy of focusing predominately on market structure.

This inertia in legal markets is not entirely surprising when we consider both the traditional rationales for professional self-regulation and the segmentation of legal markets. Sophisticated corporate entities have long been able to avoid regulations that they regard as cumbersome and have sufficient bargaining power to demand efficiencies that may not be contemplated by existing regulations. Conversely, the consumer segment is plagued by informational asymmetries that impede access to legal services. Focusing on increasing the number and types of providers fails to address informational asymmetries and may in fact exacerbate them.

This Article does not deny that professional self-regulation can be self-serving or that some deregulation is advisable. However, regulators should approach the corporate and consumer segments differently. The chief danger with respect to the corporate segment is not exploitation but rather negative externalities associated with the provision of legal services by (potentially captured) providers. With respect to the consumer segment, regulators should intervene to ensure that consumers receive reliable information about their legal needs and the availability of legal services. Barriers to cooperation between lawyers and nonlawyers impedes access to justice and should also be reconsidered.

Notwithstanding globalization, rapid technological advancement, and various forms of deregulation, legal markets continue to be dominated by lawyers. We do not see this dynamic changing in the foreseeable future, but regulators are able to make legal markets more efficient if they do not wed themselves solely to the deregulatory competition paradigm.