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An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation - Courts, Legislatures, or the Market

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AN INSTITUTIONAL ANALYSIS OF LAWYER REGULATION: WHO SHOULD CONTROL LAWYER REGULATION—COURTS, LEGISLATURES, OR THE MARKET?

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The litany of the legal profession's woes is now so well-known as to verge on the prosaic. The legal profession, while always unpopular,[1] has reached new lows in the public's esteem.[2] Lawyers,

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[1] *See, e.g.*, JETHRO K. LIEBERMAN, CRISIS AT THE BAR 47 (1978) (quoting John Quincy Adams as stating in 1787, "The mere title of lawyer is sufficient to deprive a man of public confidence. . . . The popular odium which has been excited against the practitioners in this Commonwealth prevails to so great a degree that the most innocent and irreproachable life cannot guard a lawyer against the hatred of his fellow citizens."); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1407-20 (1999) (furnishing lengthy history of lawyer unpopularity in America); Kathleen M. Sullivan, *The*

academics, and judges all complain about lawyer competency[3] and decency,[4] and lawyers themselves are increasingly unhappy with their profession.[5] The regulation of lawyers[6]—via barriers to entry

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Good That Lawyers Do, 4 WASH. U. J.L. & POL'Y 7, 7-8 (2000) (providing short history of lawyer unpopularity).

[2] *See, e.g.*, Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse*, 66 U. CIN. L. REV. 805, 809 (1998) ("When, in 1991, a national sample was asked to volunteer 'what profession or type of worker do you trust the least,' lawyers were far and away the most frequent response. Almost as many (23%) spontaneously volunteered lawyers as the next two categories (car salesman, 13%, politicians, 11%) combined."); Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51, 53 (1999) (noting negative public perception of lawyers); *Public Opinion*, CIN. ENQUIRER, Nov. 21, 1999, at A2 (reporting that lawyers rank among "[t]he three professions that have lost the most in the ratings over the last 10 years" in public opinion poll regarding ethics and honesty in various professions).

[3] *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 158-68 (2000); *see also* Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973) (stating that "[o]ne-third to one-half of the lawyers who appear in the serious cases are not really qualified"); Bryant G. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Prospective*, 1983 WIS. L. REV. 639, 639-40 ("No one with any practical experience would deny the superficiality and shoddiness of much legal work, nor would anyone claim that the bar's institutions of quality control have provided effective means of self-regulation in the past."); Edward D. Re, *The Causes of Popular Dissatisfaction With the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 110-13 (1994) (discussing continuing problems with attorney competence); Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 288-90 (1986) (discussing ongoing debate over attorney competence); William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 634 (1980) ("[S]urveys indicate that judges rate the overall performance of around one-tenth of the lawyers appearing before them as less than adequate and prejudicial to their client's cause."); Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers*, 61 TEMP. L. REV. 1211, 1214 (1988) (same). *See generally* AMERICAN BAR ASS'N, FINAL REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON PROFESSIONAL COMPETENCE (1983) (detailing two years of findings regarding attorney competence).

[4] *See, e.g.*, PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO 80-105 (1998) (noting lack of common decency among lawyers and blaming increased competition); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 192 (1994) (noting that many attorneys believe that "zealously representing clients means pushing all rules of ethics and decency to the limit"); Robert F. Cochran, Jr., *Honor as a Deficient Aspiration for "the Honorable Profession": The Lawyer as Nostromo*, 69 FORDHAM L. REV. 859, 860 (2000) ("[The legal profession] (or at least many of its members) is not honorable.").

[5] *See, e.g.*, David A. Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 457-77 (1997) (delineating some causes of lawyer unhappiness); Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 623-24 (1994) (describing some of changes to legal practice and their maligning effects upon the "quality of life and work environments of lawyers"); Deborah L. Rhode, *Ethics*

such as the bar exam and the character and fitness process, and via the rules of conduct and disciplinary apparatus—is doing little to remedy these difficulties and may exacerbate the problem.[7] There is growing scholarly accord that regulating lawyers is designed as much, or more, to benefit lawyers than to protect the public.[8] Public

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in Practice, *in* ETHICS IN PRACTICE 4-8 (Deborah L. Rhode ed., 2000) (detailing economics of legal practice, and its deleterious effect on lawyer happiness); Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888-906 (1999) (explaining poor health and unhappiness of lawyers); Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1443-46 (2000) (reviewing ARTHUR L. LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY (1998), and depicting and partially debunking claims of lawyer unhappiness).

[6] When referring to "regulation," this Article refers to the administrative rules that govern the conduct of existing lawyers and the rules that govern entry into the practice. These rules certainly are not the only determinants of lawyer behavior, both the common law claims of legal malpractice and abuse of process, *see generally* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101 (1995), and the informal behavioral norms of attorneys, *see generally* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001), influence and control lawyers.

[7] A short overview of lawyer regulation, both of entry and conduct, along with cites to some of the various criticisms of this regulation scheme, is included as an Appendix to this Article. *See infra* notes 298-308 and accompanying text. If the reader needs convincing that lawyer regulation is more self-interested than public spirited, please refer to this Appendix, or see generally Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001).

[8] The scholarly work in this area takes many forms. Some have taken an overarching view and argued that the system as a whole favors lawyers. *See, e.g.*, RICHARD L. ABEL, AMERICAN LAWYERS 142-65 (1989) (examining critically past, present, and future of American lawyer regulation); JEROLD S. AUERBACH, UNEQUAL JUSTICE 3-129 (1976) (arguing that legal regulation has favored social and racial elites); RHODE, *supra* note 3, at 143-83 (2000) (finding lawyer self-interest in almost all aspects of attorney regulation). Some scholars have criticized particular portions of legal regulation as self-interested. *See, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 3-9 (1998) (arguing that confidentiality rules are structured primarily for benefit of lawyers); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 270-72 (1985) (arguing that conflict of interest rules favor interests of legal profession over public interest); Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 67-100 (1984) (illustrating applications of Bar character requirement, and finding requirement irregularly applied); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 507-46 (1985) (arguing that character and fitness requirement for bar admission is of little use and aimed primarily at assisting lawyers). I have previously compared the various justifications—such as addressing market failures or protecting lawyer independence—for regulating the legal market against the regulations themselves, and established that much of the regulation cannot be justified and exists primarily for the benefit of lawyers. *See generally* Barton, *supra* note 7.

interest groups,[9] judges,[10] and even the ABA[11] have questioned the efficacy of lawyer regulation. The proposals for reform have ranged from the ongoing (and largely ineffective) bar association "professionalism" crusade,[12] to more thoughtful treatments of lawyers' ethical duties and place in American society.[13]

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[9] *See, e.g.*, SHARON TISHER ET AL., BRINGING THE BAR TO JUSTICE 86-117 (1977) (surveying dismal lawyer discipline rates of six bar associations); Overlawyered.com, About This Site, *at* http://www.overlawyered.com/pages/aboutus.html (last visited Apr. 4, 2003) (describing mission and activities of Overlawyered Group); HALT: An Organization of Americans for Legal Reform, Lawyer Accountability Project, *at* http://www.halt.org/laphome.php (last visited Apr. 4, 2003) (criticizing lawyer regulation and stating HALT's goal of ending lawyer self-regulation).

[10] Consider, for example, Chief Justice Burger's well-publicized criticisms of lawyer regulation. *See, e.g.*, Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 950 (1995) (arguing that failure to appropriately sanction professional misconduct by lawyers has led to decline in public esteem of lawyers); George M. Gold, *Burger Urges Reform of Lawyer Discipline*, BAR LEADER, May-June 1984, at 29 (same).

[11] *See* CTR. FOR PROF'L RESPONSIBILITY, AMERICAN BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 11 (1992) [hereinafter MCKAY REPORT] ("Existing regulation, while generally effective in disciplining serious misconduct, does not adequately protect the public from lawyer incompetence and neglect."); SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter CLARK REPORT] (describing state of lawyer discipline as "scandalous situation").

[12] *See* Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 226 (2002) (outlining professionalism movement, and describing it as akin to religious faith). *See generally* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995) (describing and critiquing professionalism movement); W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557 (2001) (same).

[13] Deborah Rhode's excellent and comprehensive *In the Interests of Justice*, for example, suggests both a philosophical realignment of the profession towards the ideal of justice, and nuts-and-bolts regulatory reform. RHODE, *supra* note 3, at 207-13; *see also* MARY ANN GLENDON, A NATION UNDER LAWYERS 280-94 (1994) (evincing confidence that legal profession will survive its current malaise); ANTHONY T. KRONMAN, THE LOST LAWYER 375-81 (1993) (expressing hope that profession can return to "lawyer-statesman" model); DAVID LUBAN, LAWYERS AND JUSTICE, at xxiv (1988) ("[P]rovid[ing] a eulogy" and praising "progressive public interest lawyers."); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 195-215 (1998) (advocating shift in lawyer roles toward justice and away from zealous advocacy). Others have more explicitly focused on the ins and outs of lawyer regulation. *See, e.g.*, ABEL, *supra* note 8, at 142-65 (presenting exhaustive study of history and current nature of lawyer regulation); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 963-82 (2000) (theorizing on operation of market for legal services); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX L. REV. 689, 689-720 (1981) (assessing American Bar Association Rules of Professional Conduct); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 822-47 (1992) (contrasting various institutions that enforce lawyer regulations).

Given the existence of a regulatory problem, this Article assesses lawyer regulation from the top down. Utilizing the tools of comparative institutional study and the economic analysis of law, this Article compares the strengths and weaknesses of the various institutions that could control the regulation of lawyers and tries to locate some of the problems at their source.[14] Currently, state supreme courts govern the regulation of lawyers in all fifty states,[15]

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[14] Given a problematic regulatory outcome, administrative law scholars suggest a close analysis of the regulatory process to determine what changes, if any, might improve the regulatory output. *See, e.g.*, NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW 121-23 (1997) (describing comparative institutional approach to legal-economic analysis); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 7 (1998) ("[F]ocusing on the administrative process reveals that procedural reforms of the regulatory state's decisionmaking apparatus may very well go far to answer criticisms about the inevitability of regulatory failure."). This Article compares the various institutions that might govern lawyer regulation, *i.e.*, the institutions that could create the policies governing the market and then delegate their enforcement. *See infra* notes 30-308 and accompanying text. The questions of rule-making covered here were explicitly eschewed in Professor Wilkins' ground-breaking article discussing who should enforce the existing rules governing lawyer conduct. *See* Wilkins, *supra* note 13, at 810:

> [I]t is necessary to assume a single set of rules that will be interpreted and applied by all enforcement officials. Because the ABA's Model Rules of Professional Conduct and Model Code of Professional Responsibility continue to constitute the most influential sources of professional norms, I assume that all enforcement officials agree that lawyers can only be sanctioned for conduct proscribed in one of these two documents.

Id.

[15] *See* MCKAY REPORT, *supra* note 11, at 2 ("Today, judicial regulation of lawyers is a principle firmly established in every state."); SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 116 (1992) ("[J]udicial regulation of *all* lawyers is a principle firmly established today in every state. Today the highest courts of the several states are the gatekeepers to the profession both as to competency and as to character and fitness."); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 24 (1986) (stating that state supreme court regulation "covers every aspect of the practice of law, 'starting with admission, ending with disbarment and covering everything in between' " (quoting *In re* LiVolsi, 428 A.2d 1268, 1272 (N.J. 1981))); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 462 & n.7 (1996) (stating that "the oversight of lawyers has been predominantly a judicial function"); Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 921-24 ("The regulation of the legal profession is primarily under the control of state supreme courts."). Both state legislatures and federal regulatory agencies are beginning to involve themselves more in lawyer regulation. For a description of the recent uptick in state legislative activity in lawyer regulation, see *infra* notes 287-94 and accompanying text. For a description of the activities of federal agencies in lawyer regulation, see Peter C. Kostant, *Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering*, 36 WAKE FOREST L. REV. 49, 64 (2001) ("[T]he organized bar has complained that the Securities and Exchange Commission and the Office

but a full institutional analysis must consider the strengths and weaknesses of several other potential institutions, including other judicial bodies (*e.g.*, district courts or the United States Supreme Court), state legislatures or Congress, or deregulation (allowing the market, with *ex post* tort remedies, to dictate lawyer entry and conduct).[16]

There are several reasons why this analysis is particularly appropriate. First, given the general dissatisfaction with lawyer regulation, it is useful to study the problem from its root causes. Second, while challenging state supreme court control of lawyer regulation may seem counterintuitive or even heretical today, state supreme courts have not always controlled lawyer regulation. In fact, during the mid-nineteenth century, state legislatures set the general requirements for bar admission, and district courts generally governed the administration of admissions.[17]

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of Thrift Supervision have sometimes gone too far in demanding candor from lawyers."); Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 FORDHAM L. REV. 149, 153-200 (1996) (depicting incentives of lawyers and regulators in regulation of lawyers); Wilkins, *supra* note 13, at 807-08 & n.30 (delineating agency attempts to regulate lawyers).

[16] There has been a recent scholarly reinvigoration of institutional analysis. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994) (arguing that institutional analysis is critical, and frequently missing, aspect of legal scholarship); Daniel H. Cole, *The Importance of Being Comparative*, 33 IND. L. REV. 921 (2000) (promoting importance of institutional analysis); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) (contending that "the new legal process" could serve as unifying theme for fractured scholarly discourses). This trend has its historical roots in the "legal process" movement spearheaded by Professors Hart and Sacks. *See generally* HENRY HART & ALBERT SACKS, THE LEGAL PROCESS (William Eskridge & Philip Frickey eds., 1994); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994). Legal scholarship is not alone in a renewed emphasis on institutional analysis; a "new institutionalism" has taken hold in both political science and economics. *See, e.g.*, WENDELL GORDON, INSTITUTIONAL ECONOMICS 3-33 (1980); SVETOZAR PEJOVICH, ECONOMIC ANALYSIS OF INSTITUTIONS AND SYSTEMS 23-47 (2d ed. 1998); B. GUY PETERS, INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE "NEW INSTITUTIONALISM" 1-25 (1999); Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, *in* STRUCTURING POLITICS 1-32 (Sven Steinmo et al. eds., 1992). For a creative recent application of "the new institutionalism" by a legal scholar, see generally Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (describing how racism arises unknowingly from series of "institutional" and cognitive sources).

[17] *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 278-79 (1950) ("From colonial days on, statutes set down at least the general form of requirements for admission to the bar."); Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 533 (1983) (stating that in

From the late-nineteenth century forward, state supreme courts began to claim an inherent judicial authority to regulate the practice of law as an outgrowth of the constitutional separation of powers between the legislative and judicial branches.[18] Using this inherent judicial authority, many state supreme courts barred both district courts and state legislatures from regulating lawyers until state supreme courts alone governed.[19] The question, however, is whether state supreme courts are the most effective body to control lawyer regulation. The few commentators who have addressed this question have approached it as a matter of doctrine, *i.e.*, whether the "inherent authority" claimed by state supreme courts is a proper reading of state constitutional law,[20] or have treated the topic

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majority of states in mid-nineteenth century, courts "were content to consider individual cases and let the legislature set general rules"); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 465-68 (1993) (describing colonial and postrevolutionary licensing statutes, and illustrating that in colonial era, responsibility for regulating lawyers was largely shared by colonial courts and legislatures); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 60 n.267 (1998) (noting historical involvement of legislatures); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 211 (2002) ("The prevalence of legislative regulation of lawyers remained the accepted arrangement throughout much of the nineteenth century.").

[18] *See* Comm. on Legal Ethics v. Ikner, 438 S.E.2d 613, 616 (W. Va. 1993) (citing proposition that courts have inherent authority to regulate lawyers); UNAUTHORIZED PRACTICE HANDBOOK 3 (Justine Fischer & Dorothy H. Lachmann eds., 1972) (asserting that because of separation of powers "the power to define and regulate the practice of law has been regarded as a judicial rather than a legislative function"); Alpert, *supra* note 17, at 536-51 (delineating history of courts claiming inherent power to regulate lawyers); Theresa A. Gabaldon, *The Self-Regulation of Congressional Ethics: Substance and Structure*, 48 ADMIN. L. REV. 39, 46-49 (1996) (describing state supreme courts' inherent authority to regulate entry and conduct); Bruce A. Green, Doe v. Grievance Committee*: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 530-31 & nn.161-62 (1989) (noting that state supreme courts supervise and discipline lawyers pursuant to inherent judicial authority "to admit, suspend, and disbar attorneys who practice within the jurisdiction of the court"); Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 327 & n.20 (1989) (same); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 787-95 (1976) (describing history of how Minnesota Supreme Court came to control lawyer regulation).

[19] *See* WOLFRAM, *supra* note 15, at 22-32; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 6-16 (1989-90) (overviewing exclusiveness of court's "inherent power" to regulate lawyers).

[20] *Compare* Alpert, *supra* note 17, at 553 (arguing that inherent powers doctrine is unsupportable because "the police power gives the legislature control over the practice of law"), *with* Leroy Jeffers, *Government of the Legal Profession: An Inherent Judicial Power*

glancingly.[21] This Article seeks to address the propriety of state supreme court control of lawyer regulation as a question of institutional analysis.[22]

Third, it is unusual in institutional analysis to examine courts as legislative rather than as adjudicative bodies. It is routine to compare the regulatory strengths and weaknesses of courts and legislatures. Typically, however, the choice is between a statutory scheme passed by a legislature or a common-law scheme overseen on a case-by-case basis by the courts.[23] Here, the comparison is between courts and legislatures as legislators (*i.e.*, as explicit policy and rule-making bodies), an unusual and intriguing institutional comparison that sheds a unique light upon judicial behavior and incentives. The actions of state supreme court justices as lawyer regulators should be of particular interest to the many scholars examining the incentives that govern judicial behavior.[24]

Approach, 9 ST. MARY'S L.J. 385, 385-403 (1978) (arguing in favor of inherent authority based upon separation of powers justification).

[21] *See, e.g.*, JETHRO K. LIEBERMAN, CRISIS AT THE BAR 222 (1978) ("Courts are not necessarily the best agency to govern professional conduct, and legislatures ought not to be intimidated into thinking so."); Martin Garbus & Joel Seligman, *Sanctions and Disbarment: They Sit in Judgment*, *in* VERDICTS ON LAWYERS 47, 56-60 (Ralph Nader & Mark Green eds., 1976) (advocating legislative creation of "an agency independent of the state and local bar associations" to govern lawyer discipline); Schneyer, *infra* note 87, at 41 (postulating that "[t]he judiciary's expertise, its interest in the integrity of the legal process, and its legitimate need for independence from the 'political' branches" make judicial control of lawyer regulation palatable).

[22] The key insight of both the "legal process" movement and the renewed emphasis on institutional analysis is that critiques of legal structures or doctrines are incomplete without some consideration of how the doctrine arose and whether the creation process itself is optimal. A critical analysis of the process must do more than simply point out the weaknesses in the law as it stands; it should suggest a process that will result in better law.

[23] The most obvious example is tort law. *See, e.g.*, KOMESAR, *supra* note 16, at 153-95 (considering relative strengths of courts, legislatures, and market as "tools for the social control of safety"); Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 190-96 (1987) (comparing institutions that control tort law); *see also* Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 514-16 (1997) (comparing Canadian and American approaches to bankruptcy reorganizations); Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 52-54 (2000) (applying institutional analysis to regulation of firearms).

[24] There is a burgeoning literature that ranges from the theoretical and economic, *see generally* Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827, 838; Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993), to the philosophical, *see generally* Frederick Schauer, *Incentives, Reputation, and the*

Part I of this Article briefly details the methodology and goals of the institutional analysis.[25] Part II then analyzes the strengths and weaknesses of the judiciary—with special attention paid to state supreme courts—as lawyer regulators, concluding that the judiciary has some advantages in institutional expertise, but may be both too susceptible to lawyer lobbying and too inaccessible to the public.[26] Next, Part III covers legislatures and concludes that legislatures are more open to the public and less likely to favor lawyers, but may be lacking in institutional expertise.[27] Then, Part IV considers deregulation of the market and reasons that, despite its many advantages, it would prove crippling to the operations of the courts.[28] Finally, Part V concludes that, although each institution has substantial weaknesses that likely will result in lawyer dominance of the regulatory process, a legislative body—either Congress or state legislatures—would be more likely to produce public-minded regulation and limit lawyer rent-seeking.[29]

I. INSTITUTIONAL ANALYSIS

This Section details the methodology for an institutional analysis of lawyer regulation. Although the comparative study of govern-

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Inglorious Determinants of Judicial Behavior, 68 U. CIN. L. REV. 615 (2000); Lynn A. Stout, *Judges as Altruistic Heirarchs*, 43 WM. & MARY L. REV. 1605 (2002), to studies based in cognitive psychology, *see generally* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000), to empirical studies of judicial decisions, *see generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2002). Adding the behavior of judges as lawyer regulators to this mix can help round out a picture of judicial behavior, because judicial self-interest is easier to observe outside of the relatively closed world of deciding cases.

[25] *See infra* notes 30-60 and accompanying text.

[26] *See infra* notes 61-186 and accompanying text.

[27] *See infra* notes 187-240 and accompanying text.

[28] *See infra* notes 241-72 and accompanying text.

[29] *See infra* notes 273-97 and accompanying text. Rent-seeking has been defined as an effort to obtain "economic rents" (*i.e.*, "payments for the use of an economic asset in excess of the market price") through "government intervention in the market." Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 224 n.6 (1988); *see also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 70 (1990) (defining rent-seeking "as the dissipation of wealth through efforts to redistribute resources by way of politics, rather than the production of wealth through markets").

ment and market institutions has enjoyed a renaissance, there are still many different approaches, and economists, legal scholars, and political scientists do not always agree on the definition of "institution." Scholars of the "new institutionalism" define institutions broadly as "formal and informal rules that constrain individual behavior and shape human interaction; the *institutional environment* varies with a person's position in society."[30] Under this definition, institutions are groups of individuals joined by a constellation of common behaviors, both conscious and unconscious, that define and confine behavior. Institutions are an explicit reaction to transaction costs that "provide a basis for action in a world that would otherwise be characterized by pervasive ignorance and uncertainty."[31] Law professors, by contrast, tend to define "institution" more narrowly as either a branch of government or the free market.[32] Although this article uses "institution" in the

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[30] Thrainn Eggertsson, *A Note on the Economics of Institutions*, *in* EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 6, 7 (Lee J. Alston et al. eds., 1996); *see also* GORDON, *supra* note 16, at 16 ("[A]n institution is a grouping of people with some common behavior patterns, its members having an awareness of the grouping. . . . [T]he essence of the institution is the commonly held behavior pattern."); Lynne G. Zucker, *Organizations as Institutions*, *in* RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 1, 2 (Samuel B. Bacharach ed., 1983) (positing that institutionalization is "phenomenological process by which certain social relationships and actions come to be taken for granted" and where institutions define "what has meaning and what actions are possible"). There are various disagreements among economists, sociologists, and others about the precise definition of "institutions," *see* Paul J. DiMaggio & Walter W. Powell, *Introduction*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 7-9 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (describing different definitions of institution), but the basic idea remains the same.

[31] MALCOLM RUTHERFORD, INSTITUTIONS IN ECONOMICS: THE OLD AND THE NEW INSTITUTIONALISM 81 (1994); *see also* James A. Acheson, *Welcome to Nobel Country: A Review of Institutional Economics*, *in* ANTHROPOLOGY AND INSTITUTIONAL ECONOMICS 3, 8 (James M. Acheson ed., 1994) ("Institutions are a substitute for accurate information."). In this regard, the "new institutionalism" in economics can be traced back to the ground-breaking work on transaction costs by Ronald H. Coase. Coase refocused the study of economics from the theoretical world of perfect competition to the real world study of barriers to perfect information or free transactions (*i.e.*, transaction costs) and how individuals overcome those barriers. For a concise and brilliant overview of Coase's distinguished and Nobel prize-winning work, *see generally* RONALD H. COASE, THE FIRM, THE MARKET AND THE LAW (1988). This work led to the theories of Douglass C. North and others, further refining the study of transaction costs and specifically focusing on the human institutions that serve as a palliative for those costs. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 27 (1990) ("My theory of institutions is constructed from a theory of human behavior combined with a theory of the costs of transacting.").

[32] *See, e.g.*, KOMESAR, *supra* note 16, at 153-95 (comparing courts, political process, or the market as regulators of torts); William W. Buzbee, *Sprawl's Dynamics: A Comparative*

narrower sense, it still applies the tools of the "new institutionalism" in that issues of character and trained behaviors are considered at least as important as institutional structures.

A further controversy in institutional analysis is the choice of the values that underlie the analysis and the criteria for comparison.[33] Obviously, choosing goals for a comparison of lawyer regulators is highly debatable. Economic theorists would demand an emphasis on efficiency,[34] while others would focus upon maximizing social justice[35] or democratic concerns.[36] This Article will focus upon the following three interrelated goals for lawyer regulation: limiting the potential for rent-seeking, maximizing procedural efficiency, and democratization.[37] This approach has the advantage of expanding upon the traditional economic goal of utility maximization without altogether abandoning the helpful tools of economic analysis. Furthermore, a focus upon democratizing regulation has important

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Institutional Analysis Critique, WAKE FOREST L. REV. 509, 523-35 (2000) (comparing courts, political process, or market as regulators of urban sprawl).

[33] Critics of Neil Komesar's work have focused on the unstated and nonspecific goals of the analyses in *Imperfect Alternatives*. *See* Buzbee, *supra* note 32, 514 ("Komesar gives only limited attention to how goal choices are made and how they fit into the process of policy analysis."); Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959, 988 (1997) (noting that choice of policy goals can have powerful effect on comparative institutional analysis).

[34] The concept of efficiency is, as applied to institutions, elusive. Most economic approaches emphasize choosing an institution to maximize overall societal utility. *See* KOMESAR, *supra* note 16, at 4 ("The economic approach to legal analysis is cast in terms of a single social goal—resource allocation efficiency."); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 24-26 (6th ed. 2003) (noting that normative law and economics scholarship emphasizes efficiency and utility maximization). Another possibility is to focus on the most "efficient" regulatory process, setting aside questions of the ultimate goal. *See* Cole, *supra* note 16, at 930 (defining most efficient regulatory process as "mechanism that could achieve society's goal at the lowest overall cost or highest net benefit").

[35] *See, e.g.*, LUBAN, *supra* note 13, at 237-89 (using right to legal services to demonstrate role for justice in lawyer regulation); SIMON, *supra* note 13, at 26-76 (arguing against societal right to injustice through lawyer regulation).

[36] *See, e.g.*, PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION 1-6 (1999) (arguing that legal profession is uniquely responsible for, and to, American democracy); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18 (1993) (noting America's "central constitutional goal of creating a deliberative democracy").

[37] For a similar view of the goal of institutional analysis, see PETERS, *supra* note 16, at 59 ("Institutions, in the rational choice perspective, are designed to overcome identifiable shortcomings in the market or the political system[;] a good institution is one which performs that assigned task well and efficiently, usually while maintaining commitment to other powerful norms such as democracy.").

economic benefits, and may in fact limit rent-seeking.[38] Admittedly, goal selection is controversial (and some might argue arbitrary). Nevertheless, this Article focuses on these three goals because they promote both economic efficiency and public participation, and they help identify the institution that will create policy that makes society better off and best involves the public in governance.[39] With these goals in mind, this Article analyzes the various potential institutions of lawyer regulation under the following two criteria, defined below: regulatory accessibility to lobbying and institutional expertise and capacity.[40]

A. PROPENSITY FOR AGENCY CAPTURE AND INTEREST GROUP THEORY

The first prong of analysis, regulatory accessibility to lobbying, addresses both rent-seeking and democratic concerns. As interest-group theory[41] has demonstrated, representative democracy frequently lends itself to industry rent-seeking. Interest-group theory originated from the recognition that government regulation and regulators frequently serve the interests of a regulated industry ahead of the public at large, a phenomenon dubbed "agency capture."[42] George Stigler and other interest-group theorists eventually

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[38] *See infra* notes 50-52 and accompanying text.

[39] The above-listed goals may prove contradictory. For example, many public choice scholars would argue that representational democracy leads inevitably to rent-seeking through governmental regulation. *See, e.g.*, Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 559-63 (2001) (describing traditional public choice framework); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) ("[R]egulation is acquired by the industry and is designed and operated primarily for its benefit."). Further, a focus upon democratization may inevitably lessen institutional efficiency; democracy has long been recognized as a trade-off between efficiency and public input. *See* Benjamin E. Hermalin, *The Firm as a Noneconomy: Some Comments on Holmstrom*, 15 J.L. ECON. & ORG. 103, 104 (1999) (noting that in heat of battle "dictatorships are more efficient than democracies"); *cf.* Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 96 (1991) (asserting that "efficiency might suggest [a] benign dictatorship").

[40] *See infra* notes 41-60 and accompanying text.

[41] Known alternatively as public choice theory.

[42] Political scientists first noted agency capture as situations where the regulators functioned less as "a policeman and more [as] a manager of the industry." MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 87 (1955). For other seminal works, see ROBERT S. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 40-44 (1969); THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF

argued that agency capture is not an aberration but is endemic to the actions of rational, self-interested industries, regulators, and legislators.[43] The key principle is that government regulation is a

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PUBLIC AUTHORITY 68-72 (1969); JAMES S. TURNER, THE CHEMICAL FEAST 202-16 (1970).

[43] The foundational work in interest-group theory belongs to George Stigler, with amplification and follow-up by Richard Posner and Sam Peltzman. *See generally* MANUEL F. COHEN & GEORGE J. STIGLER, CAN REGULATORY AGENCIES PROTECT CONSUMERS? (1971); GEORGE J. STIGLER, THE CITIZEN AND THE STATE (1975); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974) [hereinafter Posner, *Economic Regulation*]; Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971); Stigler, *supra* note 39. For a discussion of the further development of the field through theoretical expansion and empirical research, see Robert D. Tollison, *Regulation and Interest Groups*, *in* REGULATION: ECONOMIC THEORY AND HISTORY 59-76 (Jack High ed., 1991). Interest-group theory has been criticized on multiple levels over the years. Some commentators have rejected the notion that a theory of regulation should be based upon interest groups battling for influence in the regulatory process, stating that the political process should not be treated "as an aggregation of purely private interests, but as a deliberative effort to promote the common good." SUNSTEIN, *supra* note 29, at 12; *see also* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (arguing that administrative state provides "best hope of . . . deliberative decision-making informed by the values of the entire polity"). Other commentators have taken a more sanguine approach to "agency capture," postulating that changes in agency and legislative processes could solve whatever problems exist. *See* SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA 187-93 (1992); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1637-40 (1985); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1685-86, 1805-13 (1975). Additional commentators have attacked the theory for its predictions concerning the behavior of individual regulators and legislators. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 42-45 (1998); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis*, 7 J.L. ECON. & ORG. 167, 176-81 (1990). Others have criticized interest-group theory for ignoring the regulatory process. *See* KENNETH J. MEIER, REGULATION: POLITICS, BUREAUCRACY, AND ECONOMICS 9-36 (1985). In addition, some commentators have challenged the empirical basis for the claims of interest-group theorists. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 200-01 (1997); LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATIONS, AND POLITICS 254-58 (1994); Posner, *Economic Regulation*, *supra* note 43, at 336-37. These more "empirical" criticisms are surely valid, because public choice, like any other overbroad theory of human and economic behavior, will suffer when placed against the complexities of real life. Even the most ardent of public choice theorists would not argue that *every* government regulation or legislative act favors the powerful few over the disenfranchised many. Nevertheless, interest-group theory remains the dominant critical model for analyzing regulatory structures. *Cf.* Croley, *supra*, at 34-41 (discussing public choice theory before rejecting it); Clayton P. Gillette & James E. Krier, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027, 1065 & n.103 (1990) (noting major literature on agency capture theory); James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 360 (James Q. Wilson ed., 1980) (stating that "[t]he virtues of the economic perspective on regulation are clear[;]" despite appearance of factual patterns which do not fit model, "it offers an elegant

product that can, in a sense, be purchased by industries to increase their own wealth.[44] Industries pay with votes and campaign donations.

Industries obtain favorable regulation because of the difficulties involved in organizing large groups of voters to oppose any particular piece of harmful legislation. In general, small, concentrated groups with a lot at stake per capita regularly triumph over diffuse, large groups with little individual stake, even though the aggregate cost to the large group is considerable and often greater than the gain to the small group. Large groups fail to organize because of the high transaction costs per individual; for any given individual in the large group, the costs of organizing outweigh the cost of doing nothing.[45] Mancur Olson grouped these impediments under the rubric of collective action problems.[46]

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and parsimonious way of explaining a great deal of human behavior").

[44] The government is a uniquely powerful entity because it has the power to coerce private behavior through law. The state can seize money through taxation or enforce certain standards of industry or consumer behavior. Indeed, "[t]hese powers provide the possibilities for the utilization of the state by an industry to increase its profitability." Stigler, *supra* note 39, at 4. Thus, "every industry or occupation that has enough political power" will seek to utilize the state's power to assist its business, either through direct subsidies, price-fixing, barriers to entry (in the legal market, consider entry requirements such as law school or the bar exam), or through suppression of competing industries (consider laws barring the unauthorized practice of law) and the encouragement of complementary products. *Id.* For example, "[c]rudely put, the butter producers wish to suppress margarine and encourage the production of bread." *Id.* at 6.

[45] The costs of monitoring politicians and organizing voters are considerable. As Stigler noted, a consumer's "sole defense" against interest group regulation "is to organize a political campaign to change or eliminate [an undesirable regulatory activity]. For the individual consumer, this is a bleak prospect. The costs—in time, effort, and money—to change legislation are large; the reward to any one consumer joining the consumer lobby is negligible." COHEN & STIGLER, *supra* note 43, at 15. By contrast, "[t]he sheltered farmers, milk companies and laborers in the industry have much larger stakes, and they can and do mount the legislative drives which create and dominate such legislation." *Id.*

[46] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 43-52 (1971). *See generally* RUSSELL HARDIN, COLLECTIVE ACTION (1982) (providing background on collective action theory). Olson differentiated between two types of groups and predicted the likelihood that these groups would provide a collective good. OLSON, *supra* at 43-52. A small group with a collective good of considerable value to each individual member of the group would be likely to organize and provide the collective good. *Id.* at 43-52. By contrast, a relatively large group, with a collective good of relatively small value to each individual, would probably not provide the collective good, despite the fact that provision of the good would make the group better off as a whole. *Id.* Ironically, some have used the reliance of interest group theorists upon the logic of collective action as a linchpin of criticism because the theory has trouble accounting for public voting:

Nevertheless, no industry, no matter how powerful, can run roughshod over consumers and rival industries through regulation because purchasing favorable regulation involves costs, and although the public opposition to such regulation will be weak, it is not nonexistent. As the cost to the public of the regulation rises, the incentives for large group organization increase.[47] As a result, there is a process of equilibrium, in which the industry "purchases" as much helpful regulation as it can afford, given the costs of providing votes and donations, up to the resistance point of the opposing group (either consumers or another industry).[48] Thus, interest group theory predicts that the parties eventually will reach a point of equilibrium.[49]

> Given the number of voters, the chance that an individual vote will change the outcome is virtually nil. Since voting is costly in terms of time and inconvenience, no economically rational person would vote.... Yet, millions of people do in fact vote. A theory that cannot even account for people going to the polls, let alone explain how they vote once they get there, can hardly claim to provide a complete theory of politics.

DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 24-25 (1991). *But see* Michael E. DeBow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993, 993 (1988) (refuting this argument and others). For the individual costs of monitoring politicians, consider a representative Boondocks cartoon. Huey regales Caesar with a lesson in civics, and pledges to more closely monitor the actions of politicians. When Caesar answers, "Wow, so who is our Representative Huey?" Huey answers, "Who Knows. Some chump." Aaron McGruder, *The Boondocks*, KNOXVILLE NEWS-SENT., Apr. 1, 2002, at B8.

[47] As any industry pushes for more and more profitable regulation, it risks taking so much that it galvanizes the public to organize and retaliate against the offending politicians. For example, if the dairy industry successfully lobbied to raise milk price supports to twenty dollars a gallon, there would be palpable consequences for the legislature in the next election. Consider, furthermore, the moderating role, however limited, of judicial oversight on the regulatory and lawmaking process. *Cf.* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 33 (1991) (describing current standards of judicial review of agency actions and statutes, and discussing whether interest group theory justifies "more intrusive judicial review").

[48] STIGLER, *supra* note 43, at 138-39; *see also* Wilson, *supra* note 43, at 360-61 (stating that neither industries nor consumers get everything they want, instead they are both "optimally disgruntled"); *Mr. PC Goes to Washington*, THE ECONOMIST, June 1, 2002, at 59-60 ("Arguably, [high-tech lobbying] could be called business as usual in Washington: industries defend their competing interests and, more often than not, end in stalemate."); *cf.* Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. R. 279, 285-87 (1984) (describing multiple influences upon regulation of coal strip-mining).

[49] BRUCE M. OWEN & RONALD BRAEUTIGAM, THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS 14-15 (1978); William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 954 (1998) ("Politicians broker

For purposes of institutional analysis, the key insight is not that regulation will tend to favor the regulated over the public, because that is axiomatic. The critical point is that the choice of a governing institution can affect the equilibrium. If one chooses an institution that the public can influence more easily and cheaply, the equilibrium shifts in favor of the public. Likewise, as the industry costs of purchasing regulation rise, more public-minded legislation should result.[50]

Therefore, an institutional analysis of lawyer regulation focuses on the following two sides of the accessibility question: the accessibility of regulators to lawyers (lawyer accessibility), and the accessibility of regulators to the public at large (public accessibility).[51] As public accessibility waxes and lawyer accessibility wanes, the interest-group equilibrium shifts, and regulatory outcomes become more public-minded. In other words, rent-seeking is lessened and democratization is increased.[52]

B. INSTITUTIONAL CAPACITY AND CHARACTER

Consideration of the relative capacities and areas of expertise of the various institutions is the next step. Institutional capacity encompasses how the institution makes policy (*i.e.*, the nuts and

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these transfers, pairing suppliers with demanders to establish political market equilibrium.").

[50] This proposition is the basic argument presented by supporters of campaign finance reform. *See, e.g.*, Steve Padilla, *Campaign 2000: A Historical Perspective in Politics, Money Talks—and Keeps Talking*, L.A. TIMES, July 16, 2000, at A3 (describing history of special interest control over politics and campaign finance reforms); Editorial, *Voters Must Pressure for Campaign Finance Reform Despite Reforms*, S.F. CHRON., Mar. 3, 1997, at A22 (arguing for campaign finance reform). Dissenters note that money will simply migrate to other vote-buying fora—such as industry lobbying groups—resulting in little net change.

[51] Focusing on accessibility and performing an institutional analysis places this Article within the more optimistic public choice camp. *Cf.* Saul Levmore, *From Cynicism to Positive Theory in Public Choice*, 87 CORNELL L. REV. 375, 375 (2002) (expressing optimistic, rather than cynical, view of public choice theory); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 106-28 (2000) (applying optimistic version of public choice theory to administrative state). Less optimistic scholars likely would conclude that bar association access to any and all decisionmakers is so overwhelming that every institution will produce regulations disproportionately favoring lawyers.

[52] *See* Robert H. Bates, *Social Dilemmas and Rational Individuals: An Essay on the New Institutionalism*, *in* ANTHROPOLOGY AND INSTITUTIONAL ECONOMICS 43, 60-61 (James M. Acheson ed., 1994) (submitting that selecting institution "depend[s] upon costs of transacting").

bolts of its decisionmaking process) and how it responds to changed circumstances.[53] In particular, an institution's proclivity for delegation and oversight is critical because many of the institutions that could govern lawyer regulation would have to delegate some or most of the day-to-day regulation to a separate body.[54] In any delegation, there is a danger of slack between the desires of the delegator and the incentives of the delegatee,[55] and much of interest-group theory focuses on the tendency in any delegation of regulatory agencies to serve their own ends ahead of the goals of the legislature.[56] Since many bureaucrats are rational and self-interested,

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[53] Part of the goal of institutional analysis is to find a regulating institution that will provide the maximum benefits at the least cost. Rubin, *supra* note 16, at 1431-32; *see also* Erich Schweighofer, *New Developments in the Law of the European Union: Harmonization and the Austrian Experience*, 24 INT'L J. LEGAL INFO. 5, 10 (1996) (commenting on importance of selecting institutions for "efficient decision-shaping and decision-making process"). Note, however, that many critics of governmental or regulatory action consider government gridlock to be a blessing in disguise, *i.e.*, the less the government does, the better society runs as a whole. *See, e.g.*, John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121, 1144-45 (2001) (positing that "gridlock government" is "acceptable to citizens of a political economy that does not favor extensive government action"); Edwin A. Roberts, Jr., *The Lash of Unanticipated Eventualities*, TAMPA TRIB., Mar. 4, 2001, at A1 ("I often think the greatest blessing democracy can provide is legislative gridlock. Doing nothing is not always the worst choice on the shelf."). These theorists would, therefore, choose the *least* efficient governmental actor.

[54] *See* Croley, *supra* note 43, at 23:

> Because legislators themselves cannot build highways, inspect food and drugs, protect the environment, ensure the safety of nuclear plants or the airlines, or allocate the airwaves—though they can and do pass general statutes governing all of these areas—legislators delegate regulatory authority to administrators, that is, to administrative agencies.

Id.

[55] Interest-group theorists and political scientists have generated an extensive literature on this delegation/slack problem, using an analysis that treats legislators and bureaucracies as principals and agents. For a thorough review of this literature, see Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 63-67 (1995); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information and Agency Discretion*, 38 AM. J. POL. SCI. 697, 703 (1994); Matthew McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 253-64 (1987); David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 411-46 (1997).

[56] *See, e.g.*, DENNIS MUELLER, PUBLIC CHOICE II, at 250-57 (1989) (detailing other works on budget-maximizing bureaucracy theory); WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 120-23 (1971) (theorizing that rational, self-interested bureaucrat will shirk his duties while padding his budget); *cf.* Saul Levmore, *Irreversibility and the Law: The Size of Firms and Other Organizations*, 18 J. CORP. L. 333, 336-39 (1993) (describing incentives of managers to expand organizational size). *See generally* THE BUDGET MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (André Blais & Stéphanie Dion eds.,

they naturally seek to make their jobs easier and increase their influence.[57] They accomplish these goals by catering to the entities they most frequently encounter and the parties who care about the regulation, such as the regulated industries. Thus, interest group theory predicts that agency capture occurs on two levels; regulated industries first influence the legislature through votes and donations, and then they gain further advantages by lobbying the agency to which the legislature delegates its authority.[58] In order to deter further policymaking drifting towards rent-seeking, this Article utilizes institutional analysis to determine which institution will most closely monitor its delegations.[59]

Another consideration is institutional expertise. The more familiar policymakers are with the regulated industry, the less time they spend investigating and fact-finding, thus increasing efficiency. Furthermore, agency capture is particularly prevalent when policymakers are ignorant, because they tend to rely upon interested parties—typically the regulated industry—to educate them about the issues.[60]

1991) (providing essays building on Niskanen's theories).

[57] *See* Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: "Rent-Seeking" Charities or Virtuous Politicians?*, 1996 WIS. L. REV. 971, 1064 & nn.489-90; Spence, *supra* note 55, at 413.

[58] Some refer to this phenomenon as the "iron triangle" of interest group theory, in which interest groups, legislators, and agencies form the three sides of the triangle, and the public is left out. *See, e.g.*, Edward J. Janger, *The FDIC's Fraudulent Conveyance Power Under the Crime Control Act of 1990: Bank Insolvency Law and the Politics of the Iron Triangle*, 28 CONN. L. REV. 67, 67-70 (1995); Michael Lyons, *Congressional Self-Interest, Bureaucratic Self-Interest, and U.S. Environmental Policy Implementation*, 30 ENVTL. L. REP. 10,786, 10,786 (2000); Harold A. McDougall, *Lawyering and the Public Interest in the 1990s*, 60 FORDHAM L. REV. 1, 8 (1991); Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 503-04 & nn.4-5 (2000).

[59] Although many public choice theorists agree that closer monitoring will result in less agency capture, not all do. *See* Spence & Cross, *supra* note 51, at 99-100 ("While subsequent public choice analyses of agencies were more optimistic about the possibility of good government, that optimism hinged not on a more charitable view of agency decisionmaking, but rather on the contention that politicians could effectively control the exercise of agency discretion."). An alternative possibility is that increased oversight will result in increased agency capture. *Cf.* Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 8-14 (2000) (claiming that although "[a]t times, regulatory institutions instead appear to advance broad, diffuse interests, even at the expense of more powerful, concentrated interests," Congress has multiple tools to rein in public-minded agencies). Nevertheless, given that most agencies will prove self-interested, it is much more likely that increased oversight will lessen, not increase, agency capture.

[60] *See* JETHRO K. LIEBERMAN, THE TYRANNY OF THE EXPERTS 17-21 (1970) (providing

II. THE JUDICIARY

This Part assesses various judicial options for the control of lawyer regulation. Because state supreme courts have the final word in lawyer regulation in virtually every state, Section II.A begins the institutional analysis with these courts.[61] Next, Sections II.B and II.C consider other possibilities, as follows: the United States Supreme Court could control a federalized system of lawyer regulation,[62] or, at the opposite extreme, district courts (federal or state) could control a decentralized and local system of regulation.[63] These institutions are not considered in the same detail as state supreme courts because, as judge-driven institutions, they have more similarities to state supreme courts than differences. Nevertheless, an institutional analysis that considered only state supreme courts, or treated all of these institutions under the moniker "the judiciary," would be misleading and incomplete.

A. STATE SUPREME COURTS

Although there are great variations among the state supreme courts in state constitutional structure and the number of justices, there are many commonalities. First, all state supreme court justices are lawyers.[64] Second, in contrast to federal judges, most supreme court justices face some kind of election to gain or keep

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example of cosmetologists pushing through state cosmetology licensing requirements); BENJAMIN SHIMBERG ET AL., OCCUPATIONAL LICENSING 14 (1973) (detailing how legislatures rely on industry experts when passing occupational licensing statutes).

[61] *See supra* notes 64-163 and accompanying text.

[62] *See supra* notes 164-76 and accompanying text.

[63] *See supra* notes 177-86 and accompanying text.

[64] *See* Henry R. Glick & Craig F. Emmert, *Characteristics of State Supreme Court Justices*, *in* AMERICAN COURT SYSTEMS 315, 317 (Sheldon Goldman & Austin Sarat eds., 2d ed. 1989) (displaying chart showing that in 1980 all state supreme court justices had graduated from law school and practiced law); *see also* 33 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 135-36 (2000) [hereinafter BOOK OF STATES] (listing state requirements for supreme court justices). Although New Hampshire and Massachusetts do not require their justices to be lawyers, all of the current justices are lawyers. *Id.* at 135; Supreme Judicial Court of Massachusetts, Justices, *at* http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/justices.html (last updated May 14, 2002); New Hampshire Supreme Court, *Meet the Supreme Court Justices*, *at* http://www.courts.state.nh.us/supreme/justices.htm (last visited Apr. 6, 2003).

their jobs,[65] and only the justices in Massachusetts, New Hampshire, and Rhode Island are appointed for life and face no retention decision.[66] Thus, state supreme courts typically are much less independent from voter sentiment than federal courts.

1. Propensity for Agency Capture. At first blush, one would assume that state supreme courts would have the substantial advantage of independence from lobbying. America's traditional paradigm of judicial integrity naturally includes the assumption that judges and courts are independent from public or private pressure or lobbying.[67]

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[65] The following nine states have partisan elections for state supreme court justices: Alabama, Arkansas, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, Texas, and West Virginia. BOOK OF STATES, *supra* note 64, at 137-39. In addition, the following thirteen states have nonpartisan elections for their justices: Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin. *Id.* The following fifteen states appoint judges via a "merit" plan, followed by a nonpartisan retention election: Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. *Id.* Although these three types of elections are different procedurally, for purposes of institutional analysis they may be treated similarly. The key point is that most justices face a retention election, and the public has an opportunity to vote them in or out of their position. *Cf.* THEODORE J. BOUTROUS ET AL., STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 10 (1996) ("Only twelve states completely exempt judges from any form of election."); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726 n.114 (1995) ("[I]n practical terms these different [elective] systems operate in much the same way."). For a description of the operation of judicial merit selection plans, see ALLAN ASHMAN & JAMES J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 12-69 (1974); Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 19-24 (1994). For overviews of selection in general, see generally LARRY BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS (1980); MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY—SELECTION, COMPENSATION, ETHICS AND DISCIPLINE (1987); SARI S. ESCOVITZ, JUDICIAL SELECTION AND TENURE (1975). For an excellent history of the selection of American judges, see generally Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081 (1966).

[66] BOOK OF STATES, *supra* note 64, at 131-32, 137-39. Ten other states have terms of office for their justices, with retention decisions by the legislature, a judicial review council, or the governor: Connecticut, Delaware, Hawaii, Maine, New Jersey, New York, Rhode Island, South Carolina, Vermont, and Virginia. *Id.* at 131-32, 137-39.

[67] *See, e.g.*, Charles D. Cole, *Judicial Independence in the United States Federal Courts*, 13 J. LEGAL PROF. 183, 187 (1988) (arguing that judicial independence is critical to governments that protect basic human rights); Scott H. Rice, *Judicial Independence and Accountability Symposium*, 72 S. CAL. L. REV. 311, 312 (1999) (introducing series of articles regarding balance between "judicial independence and accountability"); Penny J. White, *It's a Wonderful Life, or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 7 (1996) (arguing that judicial independence has been critical to development of United States).

In fact, even typically skeptical public choice scholars have preferred judicial decisionmakers—or at least the federal judiciary—to legislative decisionmakers, because theoretically the judiciary is less likely to be swayed or lobbied by interest groups.[68] Most theorists have attributed this favoritism to the structure and independence of the courts.[69] One of the great concerns of interest group theory is legislative openness to interest group lobbying (through votes, campaign contributions, or simply information), and courts are thought to be largely insulated from lobbying.[70] In fact,

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[68] *See, e.g.*, POSNER, *supra* note 34, at 569 ("[J]udge-made rules tend to be efficiency-promoting while those made by legislatures tend to be efficiency-reducing."); Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 358-60 & nn.15-17 (1999) (listing legal scholars favoring increased judicial review of legislative acts); Elhauge, *supra* note 47, at 44-48 (cataloging prominent legal scholars who have favored increased judicial review of legislative acts in response to public choice theory); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-56 (1986) (stating preference for judiciary and "traditional method of statutory interpretation" because courts that give "a statute its public rather than private meaning . . . may reach a result that serves the public interest, but fails to honor the terms of the original [rent-seeking] deal between the legislature and the interest group"); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 60 (1991) (noting that courts have been favored by academics because "legislatures were regarded as being dominated by interest groups with narrow distributional objectives, whereas common-law courts were regarded as being immune from this type of distortion"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 478-79 (1989) (praising judicial oversight of agency decisions and cases where courts "appear to have reacted to the possibility that collective action problems will undermine regulatory programs"); *cf.* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 278-79, 323-37 (1988) (suggesting that courts consider size and power of interest groups benefited and burdened by statute, and if appropriate, construe statute narrowly). *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (drawing in part on public choice ideas to support wide-ranging judicial activism under the Takings Clause); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980) (using interest group analysis to justify more intrusive judicial review of legislation for rationality).

[69] *See, e.g.*, POSNER, *supra* note 34, at 569-70 (commenting that court "procedures," such as standing, and court characteristics, like fixed judicial compensation and conflict of interest rules, tend to produce more efficient legal rules); Cross, *supra* note 68, at 357-58 (explaining that "judges do seem to be less susceptible than legislators and bureaucrats to collective interests seeking rents at the expense of the general welfare" because of judicial independence); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Power*, 15 CARDOZO L. REV. 137, 150 (1993) (observing that advantages of adversarial system make courts proper forum for constitutional interpretation).

[70] POSNER, *supra* note 34, at 569-70; *see also* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 969 (1995):

given the structure and nature of state supreme courts and their busy caseloads, it is difficult to imagine how traditional, legislative-style lobbying could occur.

Nevertheless, although there may be excellent reasons to favor courts as *adjudicators*, when regulating lawyers state supreme courts act as *legislators*,[71] they are not as independent or free from self-interest in that role.[72]

a. Accessibility to Lawyers. The first step of the interest group equilibrium is to assess the institution's openness to lobbying by the regulated industry, in this case, lawyers. There are a number of reasons to believe that, although state supreme courts are not open to lobbying in the traditional sense, they are uniquely vulnerable to lobbying by lawyers.[73]

> A further significant feature is the insulation of judges against many forms of influence that might derogate from their willingness to fulfill these expectations: their terms of office are long (for American federal judges, a life sentence); pay is free from control for individual judges and generally set in a very public manner for a large class (for American federal judges, pay cannot be reduced); and direct attempts to secure special treatment through threat or bribe are criminal offenses. Even judges who must stand for election are insulated in various ways from the sort of direct influence common to the legislative arena.

Id.

[71] None of the hallmarks of adjudication are present in state supreme courts' regulation of lawyers, *e.g.*, there is no case or controversy, presumably any interested party has standing, and the court is free to adopt any rule, regardless of breadth or precedent. In fact, in ruling upon the Wisconsin Supreme Court's order to create a unified bar, the United States Supreme Court held that the act was legislative—not judicial—in character. Lathrop v. Donohue, 367 U.S. 820, 824-25 (1961). For a discussion of the differences between "adjudicating" and "legislating," see *infra* note 215 and accompanying text.

[72] Some scholars have postulated that when judges are acting outside of their role as adjudicators, their actions are more easily analyzed through a typical economic analysis of costs and benefits. *See, e.g.*, CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST 15-39 (1995) (presenting example of federal courts as lobbyists for court reforms); Richard A. Epstein, *The Independence of Judges: The Uses and Limitation of Public Choice Theory*, 1990 B.Y.U. L. REV. 827, 841-44 (using clerkship selection process as prime example of judges' behavior being analyzed under cost-benefit analysis); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 630-31 (1994) (utilizing example of judges drafting rules of civil procedure).

[73] For stylistic purposes, this Article frequently refers to lobbying by "lawyers" or "lawyers' shared interests," which glosses over disputes among lawyers, and a great diversity in lawyer interests. Further, "lawyers" as a group rarely, if ever, lobby courts or legislatures, but bar associations and groups of lawyers (like the American Trial Lawyers Association) do. Nevertheless, when using the term "lawyers," this Article refers to the majority (and usually the great majority) of lawyers, as represented by the lobbying and activities of bar associations.

Justices and lawyers have multiple shared interests on regulatory issues. Most importantly, both lawyers and justices have powerful reasons to favor inflated entry standards to the profession. Raising entry barriers has been the *sine qua non* of the formation of modern bar associations and lawyer lobbying.[74] Lawyers, of course, have an excellent reason to favor higher entry standards, namely that such standards decrease the supply of legal services and raise the price for those services.[75] Moreover, the higher prices are a windfall for the current members of the profession lobbying for more difficult standards; they enjoy the higher prices without having to meet the new, higher standards.[76] This explains why every complaint about *current* practitioners is solved by a burden upon

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[74] From its inception, the American Bar Association (ABA) pilloried what it considered to be the undesirable element in the bar and focused upon tightening bar entry. *See, e.g.*, 1 A.B.A. REP. 212 (1878) (proposing tightening of bar admissions standards because low admissions standards had contributed to "extraordinary numbers" of "ignorant" and "unprincipled" lawyers); 29 A.B.A. REP. 601-02 (1906) (proposing standards of ethical conduct to battle new breed of lawyers who "believe themselves immune, the good or bad esteem of their co-laborers is nothing to them provided their itching fingers are not thereby stayed in their eager quest for lucre"); AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS 5 (2001) ("Concern for improving the competence of those entering the profession was a major reason for creating the American Bar Association in 1878. . . . The Association remains vitally and actively interested in improving the legal profession through legal education."); EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 72-75 (1953) (discerning that legal education and admission to the bar "received more attention" from ABA during its early years "than any other" issue). The ABA was not alone in its desire for greater barriers to entry; state and local bar associations formed around the same goal. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 562-63 (1973) (noting that Iowa and Chicago bar associations were formed to eliminate lawyers guilty of "shystering and unprofessional conduct"); GLENN R. WINTERS, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES 1 (1954) (providing example that one goal of bar associations was "to elevate standards of integrity, education and public service among the members of the legal profession"); W. Hamilton Bryson & E. Lee Shepard, *The Virginia Bar, 1870-1900*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 171 (Gerald W. Gawalt ed., 1984) (discussing qualifications for Virginia bar); Marvelle C. Webber, *Origin and Uses of Bar Associations*, 7 A.B.A. J. 297, 298 (1921) (discussing organization of New York bar as prototype to combat "notorious influence[s] to the . . . bench and bar").

[75] *See* Barton, *supra* note 7, at 441-43 (providing full description of entry barrier supply and demand effect, and general unavailability of substitute goods).

[76] Generally, current practitioners are "grandfathered" into the new, more stringent entry regulations. Simon Rottenberg, *Introduction*, *in* OCCUPATIONAL LICENSURE 1, 5 (Simon Rottenberg ed., 1980); *see also* Barton, *supra* note 7, at 443-44. The bar exam has continued to become more difficult, and recently, passage rates have declined substantially. *See* Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 929 (2001) ("[T]he percentage of test takers passing the bar has dropped sharply since 1994.").

future practitioners.[77] Consider the growing utilization of the Multistate Professional Responsibility Exam (MPRE) as a response to claims of unethical lawyering,[78] or the original bar associations' drive to establish the bar examination and extensive legal education as a response to perceived lawyer incompetence.[79] While rising entry standards have multiple benefits to lawyers, there is little evidence that the benefit to consumers is equivalent to the higher cost of services.[80]

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[77] One notable exception is mandatory continuing legal education (CLE). Scholars argue that CLE classes do little or nothing to guarantee competence and are designed to be the least intrusive possible response to public concerns over lawyer competence. *See, e.g.*, Barton, *supra* note 7, at 449. The addition of Rule 11 to the Federal Rules of Civil Procedure also added a new, substantive burden on practicing lawyers.

[78] Forty-seven states now require students to pass the MPRE. *See* SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 21 (2000) [hereinafter BAR REQUIREMENTS]. Obviously, forcing new lawyers to take the MPRE will do nothing to protect the public or judges against lawyers who are currently unethical, which is presumably the problem. The MPRE may result in future lawyers being ethical, although given the hypertechnical, multiple choice nature of the exam, that is questionable. *Cf.* AM. BAR ASS'N, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 517-22 (1999) (reprinting ten sample MPRE questions and their answers). But the MPRE will not affect current practitioners, except insofar as it makes it more difficult to become a lawyer, therefore making the profession more lucrative for existing lawyers.

[79] If the worry concerned currently incompetent practitioners, raising entry barriers for future lawyers would do little to assist with the immediate problem. A current example of this phenomenon is the many states (presently twenty-six and rising) that are beginning to adopt the "Multistate Performance Test," that requires applicants to display more practical lawyering skills like brief or memo writing. *See* BAR REQUIREMENTS, *supra* note 78, at 21; National Conference of Bar Examiners, Multistate Performance Test, *at* http://www.ncbex.org/tests/mpt/mptxt.htm#contents (last visited Apr. 7, 2003). The test was adopted as a reaction to perceived lawyer incompetence, another burden on applicants in response to the failures of current practitioners.

[80] The costs to consumers are substantial, and the benefits are negligible. In order to measure the efficacy of a licensing scheme, it is helpful to consider the minimum requirements under the system, because all that a licensing scheme can guarantee is that a licensed practitioner has met the minimum barriers. What legal skills can we guarantee to a consumer on the day that a newly minted lawyer passes the bar? Can the lawyer definitely draft a complaint and pursue a lawsuit through the courts, draft a will, complete a real estate closing, or file a copyright infringement or antitrust claim? Bar passage and law school guarantees none of these skills, and therefore the protection offered to the public is minimal, while the expense is considerable. *See* Barton, *supra* note 7, at 445-48 (discussing limited efficacy of bar exam and legal education requirements); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1204-28 (1995) (finding bar exam not necessary to ensure competent attorneys).

Nevertheless, since state supreme courts have controlled, lawyer regulation entry barriers have evolved from virtual nonexistence[81] to the complex system of today.[82] Some of this growth is surely due to the power of bar association lobbying, but the susceptibility of the justices to their lobbying is worth considering. Part of the answer is that justices, like lawyers, have a great incentive to favor more difficult entry standards. Lawyers do so to increase their wages; judges do so to ease their jobs. Many of the studies of judicial preferences have noted that, although judges cannot be paid more regardless of how they decide cases, judges strongly value leisure (*i.e.*, a reduction or streamlining in their caseload or their administrative responsibilities).[83] In the American court system, judges rely heavily on lawyers to process and prosecute the cases on their dockets, in that lawyers are in charge of filing suits, discovery, researching and presenting the law in arguments and briefs, and assembling cases before the courts.[84] As such, the quality of the

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[81] *See* FRIEDMAN, *supra* note 74, at 564-66 (stating that during mid-nineteenth century "[f]ew states controlled admission to the bar through a single agency or court. . . . Even in these jurisdictions the control was often slight, and the standards of admission vacuous."); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 212 (1989) ("Beginning in the 1830s, local authorities lost control over the certification of lawyers to state government and . . . it was not until the post-Civil War era that professionalization of law practice surged."); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 7-8 (1983) (noting that during mid-nineteenth century "outward manifestations of professionalism appeared to collapse" and there were few entry requirements).

[82] Bar entry is centrally controlled in every United States jurisdiction by sizeable bureaucracies. *See* National Conference of Bar Examiners, Bar Admissions Offices, *at* http://www.ncbex.org/offices.htm (last visited Apr. 7, 2003) (listing bureaucracy contacts in each state); American Bar Association, Directory of State Bar Admissions Offices, *at* http://www.abanet.org/legaled/baradmissions/barcont.html (last visited Apr. 7, 2003) (providing directory of state offices).

[83] *See* Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 24-26 (1992) (suggesting penalty for going to trial is function of increasing judge's workload); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 475-76 (1998) ("[O]ne would expect judges to decide at least some cases so as to protect or increase their leisure time."); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994) (stating that judges "further their own self-interest by pursuing nonmonetary interests such as increasing leisure (reduction in workload)"); Posner, *supra* note 24, at 20-21 (listing examples of "leisure-seeking . . . judicial behavior"); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1483-85 (1998) ("[T]he judges' workload, measured in terms of size and proportion of criminal docket, indeed influences judicial behavior.").

[84] Even a cursory review of the federal rules of civil and criminal procedure establishes

lawyering is critical to a judge; the better the lawyers, the easier the job.[85] Thus, justices had a powerful incentive to support and mandate the continual tightening of entry standards throughout the twentieth century.

Further evidence of this trend is the language of the state supreme court decisions claiming the regulatory authority that allowed entry barriers to rise. In claiming their control over entry and conduct regulation, courts frequently noted that lawyers, as "officers" of the court, were critically "necessary to the proper performance of the courts."[86] In ordering the unification of the bar,[87]

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that lawyers (or in some cases *pro se* litigants) are primarily responsible for almost all of the legal and factual research, as well as the procedural aspects of every case on a judge's docket.

[85] Compare, for example, judicial frustration with *pro se* litigation to the judicial pleasure of a well-litigated case. *Cf.* Margaret F. Brown, *Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law*, 34 COLUM. J.L. & SOC. PROB. 279, 286 & n.54 (2001) (stating that "[e]vidence suggests that 'many judges find it frustrating to deal with pro se litigants' "); Charles E. Ramos & Alvin K. Hellerstein, *A View from the Judiciary*, 5 FORDHAM J. CORP. & FIN. L. 129, 139 (2000) (offering "an unpaid advertisement" for commercial courts division in Manhattan based upon "well litigated" cases and "wonderful attorneys"); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1806 & n.119 (2001) ("Some courts are openly hostile to unrepresented parties, whom they view as tying up the system or attempting to gain tactical advantages.").

[86] *In re* Bailey, 248 P. 29, 30 (Ariz. 1926) ("[T]here is no more important duty, nor one whose performance is more necessary to the proper performance of the courts, than to see that their officers are of proper mental ability and moral character."); *see also In re* Sparks, 101 S.W.2d 194, 196 (Ky. 1936) ("The power to regulate the conduct and qualifications of its officers does not depend upon constitutional or statutory grounds. It is a power which is inherent in this court as a court—appropriate, indeed necessary, to the proper administration of justice."); *Ex parte* Steckler, 154 So. 41, 45 (La. 1934) (holding that state supreme court has ultimate authority over bar admission because "[a] proper administration of justice depends as largely upon the conscience, competence and conduct of the members of the bar, as upon the work of the men on the bench"); Ayres v. Hadaway, 6 N.W.2d 905, 908 (Mich. 1942) (quoting *In re* Disbarment Proceedings of William L. Newby, 107 N.W. 850, 852 (Neb. 1906)):

> Attorneys practicing in the district courts of this state are officers of the courts in which they practice. Their position is an honorable one; they are the trusted advisers of the court. There can be no doubt that the court has ample power to protect itself against dishonorable and corrupt practitioners.

Id. Courts also frequently complained of legislative efforts to "destroy the courts" by admitting "persons without legal learning, and wanting in the proper conception of the ethics of the profession." Alpert, *supra* note 17, at 539-40 (quoting *In re* Thatcher, 22 Ohio Dec. 116 (Lucas County Common Pleas Ct. 1912)).

[87] The bar is unified (*i.e.*, integrated) in thirty-six states and the District of Columbia. Terry Radtke, *The Last Stage in Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934-1956*, 81 MARQ. L. REV. 1001, 1001 (1998). In a state within a unified bar, a lawyer must be a member of the state bar association in order to practice law in that state. DAYTON MCKEAN, THE INTEGRATED BAR 21-23 (1963); Bradley A. Smith, *The Limits of*

state supreme courts regularly noted their interest in the quality of the lawyers appearing before them.[88] This rationale even stretched to mandatory fee schedules, the most blatantly anticompetitive of bar association activities.[89]

Compulsory Professionalism: How the Unified Bar Harms the Legal Profession, 22 FLA. ST. U. L. REV. 35, 36 (1994). For an overview of the unified bar, see generally GLENN R. WINTERS, THE UNIFIED BAR IN THE UNITED STATES (1973); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1 & n.1 (1983). Bar unification is the crown jewel of lawyer self-regulation. *See* Susan A. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 707 (1981) ("Thus, unlike other professionals, who are supervised by state regulatory agencies, lawyers remain a virtually self-regulated profession."); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 14-16 (opining that legal profession has reached unique heights of self-regulation); Schneyer, *supra*, at 37 ("Self-regulatory institutions have a firmer hold in law than in most occupations."). In more than half of the states, state supreme courts have delegated much, if not all, of their regulatory authority to unified state bars. Wolfram, *supra* note 17, at 37 ("Courts have shown little inclination to resist strongly and widely held [bar association] views.") This delegation clearly offers lawyers unparalleled advantages under interest group theory.

[88] *See, e.g.*, *In re* Mont. Bar Ass'n, 368 P.2d 158, 162 (Mont. 1962) (integrating Montana Bar by court order because "[t]here is need for improvement in our court, the district and justice courts, and in the Bar of which we are members"); *In re* Integration of Neb. State Bar Ass'n, 275 N.W. 265, 267-68 (Neb. 1937) (approving integration because "the court has an immediate interest in the character of the bar, for the court's own sake").

[89] Consider the following from the Wisconsin Supreme Court:

> The State Bar recently adopted a recommended minimum fee schedule covering legal services. The present economic plight of the lawyers in this country is one which has disturbed the bench and the bar. Able young men who otherwise might be attracted to entering the legal profession are being discouraged not to because of this. Lawyers already in the profession because of insufficient incomes are caused to forsake the practice of law for more financially attractive fields of endeavor. According to statistics gathered by the Economics of Law Practice Committee of the American Bar Association during the period of 1929 to 1951 the net income of lawyers increased but 58 per cent, while for the same period that of dentists rose 83 per cent and that of physicians 157 per cent. During the same period the net income of employees of all industry increased 131 per cent. During 1954 the net income before taxes of one-third of all practicing lawyers of the nation was less than $5,485.
>
> The quality of legal service which will be rendered to the public is likely to suffer if young men of ability are dissuaded from entering the profession because of the difficulty of securing an adequate financial reward to enable them to properly support themselves and their families. A minimum fee schedule which realistically recommends charges for legal services that are in keeping with the increased cost of living that has taken place since World War II, should have a tendency toward remedying this condition.

Lathrop v. Donohue, 102 N.W.2d 404, 413-14 (Wis. 1960).

The judicial sympathy and empathy for bar association lobbying also can be seen in the battle between the "upper" bar (white middle-class males) and the "lower," entrepreneurial bar (immigrants and minorities that had to struggle for business).[90] At the turn of the nineteenth century, American Bar Association membership was almost exclusively from the "best" of the bar.[91] In each of the efforts to tighten bar admission, or punish unethical attorneys, there was an implied (and sometimes blatant) effort to bar immigrants, Jews, and blacks from joining the profession.[92] Bar associations and judges railed against shysters and "ambulance chasers" as lawyer discipline was formalized and entry standards were tightened, a clear signal of the upper bar's disdain for the entrepreneurial bar.[93] Complaints against the entrepreneurial bar had a

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[90] From an interest-group perspective, the history of the growth in lawyer regulation is interesting precisely because the regulated industry (*i.e.*, lawyers) rarely has spoken with a unified voice. More typically there are internecine squabbles among different layers of the bar. For example, the New York bar voted against unification because of disputes between the urban New York City bar association and the rural lawyers upstate. JEROLD S. AUERBACH, UNEQUAL JUSTICE 121-23 (1976); *see also* William A. Glaser, *The Organization of the Integrated Bar* (1960), *reprinted in* VERN COUNTRYMAN & TED FINMAN, THE LAWYER IN MODERN SOCIETY 348, 350 (1966) ("The urban-rural balance of power is often a principal issue when integration is being planned.").

[91] The ABA was founded in 1878 by "seventy-five gentlemen from twenty-one jurisdictions, out of approximately 60,000 lawyers then practicing in the United States." ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 208 (1921); *see also* John A. Matzko, *"The Best Men of the Bar": The Founding of the American Bar Association*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 75-90 (Gerard W. Gawalt ed., 1984) (providing overarching history of founders and founding of ABA). In general, the members of the other new bar associations also were drawn by invitation from the "elite" of practice. *See* FRIEDMAN, *supra* note 74, at 563; ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 255-70 (1953).

[92] Jerold S. Auerbach's seminal work, *Unequal Justice*, contains innumerable examples of prominent bar members and professors seeking to "purify" the legal profession by raising entry barriers. *See* AUERBACH, *supra* note 8, at 102-29. For example, Pennsylvania devised a system in which every applicant to the bar needed the support of three current members of the bar, a system that effectively barred African-American applicants from bar membership from 1933-43 and strongly discouraged Jews from applying. *Id.* at 125-28; *see also* Alpert, *supra* note 17, at 537-38 (describing late nineteenth century Illinois Supreme Court case rejecting statute granting graduates of Illinois law schools automatic bar admission because schools were "diploma mills" and students were frequently immigrants).

[93] Chief Judge Benjamin Cardozo of the New York Court of Appeals decried an "unscrupulous minority" of the bar for "[a]mbulance chasing" among other "evil practices," and held that the court had authority to investigate and punish "professional misconduct" by an "act of its own motion." Karlin v. Culkin, 162 N.E. 487, 488-89 (N.Y. 1928). These actions were taken in response to complaints from bar associations, which Cardozo termed "the organs of [the profession's] common will." *Id.* at 488.

particular resonance with state supreme court justices, who naturally considered themselves part of the "finest men" of the profession.[94] As a result, throughout this period, state supreme courts proved an invaluable asset to bar associations. Entry into the profession tightened markedly,[95] and acting upon their own motion in response to bar requests, supreme courts investigated the unauthorized practice of law,[96] instituted new entry standards,[97] and even made some bar associations mandatory.[98]

Judges also have a substantial interest in maximizing their own "prestige," which generally means standing among other lawyers.[99]

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[94] Consider the irony of Judge Cardozo, himself Jewish, railing upon an "unscrupulous minority" of lawyers. *See Karlin*, 162 N.E. at 488; *see also* Rodney L. Mott et al., *Judicial Personnel*, *in* JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 195, 205 (Glendon Schubert ed., 1964) (reporting that from 1900 to 1929 more than 70% of state supreme court justices received "the highest Martindale rating for legal ability"). Moreover, even if state supreme court justices actually were not originally from the "upper crust" of society, their appointment to the bench, and the regular lobbying of the bar associations, certainly placed them there. *Cf.* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 811-16 (2001) (noting that judges, like most people, suffer from "egocentric bias" when analyzing their own abilities and presumably social standing); Posner, *supra* note 24, at 17 ("Another source of judicial utility must be mentioned at this juncture. It is the deference that judges receive from lawyers and from the public generally.").

[95] From 1880 to 1940, all of the following current barriers to entry were established or strengthened: central boards of bar examiners, *see* REED, *supra* note 91, at 103; the national conference of bar examiners, *see* SUNDERLAND, *supra* note 74, at 58; character and fitness examinations, *see* Rhode, *supra* note 8, at 496-500; written bar exams, *see* Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817, 833 (2000); and increased prohibition of the unauthorized practice of law, *see* HURST, *supra* note 17, at 320-21.

[96] *See* Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 636-37 (1935) (listing cases, and stating that courts had independently defined "practice of law" and had independently pursued unauthorized legal practitioners).

[97] *See* ABEL, *supra* note 8, at 47 ("The history of legal education in the first half of the twentieth century, therefore, is largely a story of the struggle by the ABA to persuade state licensing authorities (supreme courts or integrated bar associations) to adopt its entry standards."); STEVENS, *supra* note 81, at 94 ("After 1878 the ABA added its voice. Slowly, boards of examiners, normally controlled by local bar associations, replaced the supreme courts as the examining authorities.").

[98] *See* MCKEAN, *supra* note 87, at 49 (listing various courts that formed unified bars by court order alone).

[99] *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 971-73 (1995) (asserting that judges "who conform to the model of judicial decision-making" curry favor from lawyers and other judges); Drahozal, *supra* note 83, at 475 (commenting that judges seek to "gain respect within the legal community"); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 784-85 (2000) (noting Supreme Court Justices' interest in reputation); Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 974

This effect, or simple empathy for fellow lawyers, may make justices an easy target for lawyer lobbying.[100]

The recent literature of the "new institutionalism" sheds further light upon state supreme courts' natural affinity with the interests and concerns of lawyers.[101] State supreme court justices, as a defined group and "institution," respond to the world, and particularly to policy decisions, as *lawyers*.[102] Legal thought itself is a powerful and constraining institution.[103] As evidence of the "institution" of legal thinking, consider its great resistance to change.[104] In this regard, the phrase that most frequently describes the gist of American law school, teaching students to "think like a lawyer," takes on a particularly institutional flair.[105] Justices have had the

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(1997) (contemplating judges' "institutional motivation" and assuming that judges "seek to maximize some extrinsic good, such as their prestige"); Schauer, *supra* note 24, at 627-31 (outlining "the effect of reputation" upon judges).

[100] *Cf.* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1343 (1978) (pointing out that judicial reticence to sanction discovery abuses is likely result of "judges' understanding [as] former lawyers"). Further, despite seeing a great deal of shoddy lawyering, judges rarely make complaints to disciplinary authorities. *See* STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT, at iii (1984) (citing research showing that "judges represent a minority of the complaintants even against easily detected serious misconduct directly affecting the administration of justice").

[101] *See supra* notes 30-39 and accompanying text.

[102] *See* Wolfram, *supra* note 17, at 211 ("[I]n both England and America, there has never been any significant difference between judges and lawyers in their background, training, mutual set of expectations about the nature of the work that each would perform, professional ambitions, or professional culture.").

[103] *Cf.* Lynn M. Lopucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1501-02 (1996) ("Law is practiced mostly in communities. Those communities forge shared mental models of the law and process cases principally in accord with them.").

[104] Much of the research in the "new institutionalism" has focused upon institutional resistance to change. *See* Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 30, at 83. Law and legal reasoning have proven resistant to change. *See* NORMAN F. CANTOR, IMAGINING THE LAW 373 (1997) ("A London barrister of 1500 would need only a few months of remedial education to step into an American courtroom today."); Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1042, 1042-43 (1999) (quoting Norman Cantor as saying that "lawyers and judges today talk and argue and justify in pretty much the same curious way that they have used for generations").

[105] *See* AMSTERDAM & BRUNER, *supra* note 24, at 3 ("[T]he ways of lawyers and judges and students of the law are specialized ways, often so ostentatious in their specialization as to suggest the esoteric flimflam of a jealous guild."); Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 685 (2001):

transformative experiences of law school and practice, and therefore view the world in a very specific way.[106] Further, state supreme court justices are likely to be individuals who particularly thrived under the written and unwritten rules of the legal world. State supreme courts thus approach their work with a prescribed set of heuristics, behaviors, and notions about the world. These cognitive institutions are precisely why these individuals have succeeded as lawyers and why they are valued as judges. Nevertheless, these same factors lead justices to uniquely empathize with and under-

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> Most judges are chosen from the ranks of practicing attorneys. Although a few may have harbored long-held dreams of becoming judges, at the time that they attended law school almost all of them intended to become lawyers, rather than judges. It is often said that American law schools teach students to "think like a lawyer."

Id. Many have noted the great difference between the lawyer's thought process and that of a lay person. *See, e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 14 (1996) (commenting that "to nonlawyers or to people from other cultures" lawyer's thinking is "weird or exotic"); Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 164-278 (2002) (outlining model for unique decisionmaking process of lawyers).

[106] *See* ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 259-63 (2d ed. 1992) (depicting "the judicial socialization process"); Paul J. Dimaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 30, at 63, 71 ("[I]ndividuals in an organizational field undergo anticipatory socialization to common expectations about their personal behavior, appropriate style of dress, organizational vocabularies, and standard methods of speaking, joking, or addressing others."). Many have noted that law schools provide a particularly jarring and shaping form of education (and therefore *institution* building). *See, e.g.*, Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* DAVID KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40-61 (1982) (describing process of legal education); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2331-32 (2000) (noticing that some find law school "intellectually stunting"); James Ogloff et al., *More Than "Learning to Think Like a Lawyer": The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 110-11 (2000) (denoting powerful effects of law school education). Others have noted the continuing effect that law school has upon judges and justices. *See, e.g.*, Julius Getman, *Of Labor Law and Birdsong*, 30 CONN. L. REV. 1345, 1349 (1998) (depicting "the transformative experiences of law school, judicial clerking, and high level legal practice" upon judges); Charles E. Rice, *The Role of Legal Education in Judicial Reform*, *in* A BLUEPRINT FOR JUDICIAL REFORM 273, 273 (1981) (noting that law schools contribute to judicial interpretation of law). Similarly, practicing law greatly affects judicial thinking. *Cf.* PHILIP ELLIOTT, THE SOCIOLOGY OF THE PROFESSIONS 94-115 (1972) (covering powerful psychological and sociological effects of "professionalization"); Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, *in* THE SOCIOLOGY OF THE PROFESSIONS 152, 171-73 (Robert Dingwall & Philip Lewis eds., 1983) (describing sociological effects of mega-law firms on practice of law, and on "upper crust" of bar).

stand the interests and views of lawyers.[107]

Aside from the more esoteric and academic reasons for justices to favor lawyers' interests, there are a number of more crass reasons. First, most justices are members of bar associations.[108] Since 1910, the American Bar Association (ABA) has recognized the importance of recruiting the judiciary and made a concentrated effort to sign up judges, boasting that as of 1915, eighty-five percent of the federal judiciary and fifty-six percent of state judges were members.[109]

Second, bar associations lobby tirelessly on behalf of judges. The ABA lobbies for higher salaries,[110] better benefits,[111] and improved public opinion of the judiciary.[112]

Third, the coarsest possible reason, justices frequently rely upon lawyers and bar associations to obtain and keep their jobs. For example, lawyers provide most of the elected judiciary's campaign

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[107] Consider also Lawrence Baum's discussion of fundamental attribution error, "Some psychologists have argued that the situations in which individuals act have a more critical impact on behavior, and intrinsic traits of individuals less, than most people realize. Indeed, the tendency to give undue weight to intrinsic traits has been labeled the 'fundamental attribution error.' " LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 33-34 (1997) (citations omitted). Baum concludes that the nature of a judge's practice and training has a significant effect on the judge's goals and thought processes. *Id.* Professor William Bishop has noted that this consonance of interest has affected the very structure of administrative law. *See* William Bishop, *A Theory of Administrative Law*, 19 J. LEG. STUD. 489, 493-94 (1990) (claiming that because "judges tend to see the public interest through the eyes of the men and women they once were," they have created "a 'lawyer's paradise' within administrative law").

[108] In the thirty-six states with a unified bar, all justices are licensed attorneys, and *ipso facto* are members of the state bar association. COUNCIL OF STATE GOV'TS, STATE COURT SYSTEMS 6-7 (1978). Twenty-seven states explicitly require their justices to be members of the state bar. *Id.*

[109] 40 A.B.A. REP. 30 (1915). The ABA specifically founded a "Judicial Section" designed to allow judges to meet and confer on "the duties and responsibilities of the judiciary." 38 A.B.A. REP. 152-53 (1913).

[110] In 1912, the ABA formed a committee to increase judicial salaries, 37 A.B.A. REP. 36-37 (1912), which later succeeded in lobbying the United States Congress for higher salaries. The committee also gathered and disseminated the salaries of state judges, to induce raises in the low-salary states. 56 A.B.A. REP. 58-59 (1931).

[111] *See generally* NAT'L CTR. FOR STATE COURTS, A SURVEY OF STATE JUDICIAL FRINGE BENEFITS (2d ed. 1996) (lobbying for increased benefits for state courts).

[112] *See generally* LAWYERS CONFERENCE, JUDICIAL ADMIN. DIV., AM. BAR ASS'N, UNJUST CRITICISM OF JUDGES (1986) (presenting report from ABA's subcommittee on unjust criticism of bench). The ABA also worked with judges to draft the ABA Judicial Code. *See* LISA L. MILFORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 3-8 (1992) (describing ABA's central role in code's development).

donations.[113] In elective states, including merit selection states with retention elections, bar associations frequently endorse judicial candidates[114] and conduct and publish "bar polls" on the judges.[115] Many justices were selected for their positions through "merit plans" that place substantial selection authority in state and local bar

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[113] *See* Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex. App. 1983) ("It is not surprising that attorneys are the principal source of contributions in a judicial election."); David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 393 (2001) (delineating judiciary's reliance upon lawyer campaign contributions and its deleterious effects); William C. Cleveland, *Money and Judicial Elections*, 68 DEF. COUNS. J. 393, 393 (2001) ("A California commission interviewed dozens of judges, campaign consultants and academic experts in reaching its findings that controversial races create pressure to raise money, that candidates are forced to solicit campaign contributions from lawyers and litigants, and that candidates are often left in debt after the expense of elections."); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 93-94 (1985) (stating that bulk of elected judges' campaign donations come from lawyers); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 458 (1988) ("[N]ot surprisingly, much of the financing for judicial campaigns comes from lawyers."); Mark A. Grannis, Note, *Safe Guarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 416 (1987) (discussing advantages and disadvantages of lawyer contributions); Bradley A. Siciliano, Note, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217, 221-23 (1991) (presenting argument for attorney contributions). Studies have suggested that the donations may be influential. *See* Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 137-38 (2000) ("Similar polls in other states found that voters, by large margins, believed that judicial decisions are influenced by campaign contributions and that attorneys and judges agreed that campaign donations influence judicial decisions."). As a review of the above literature demonstrates, many have worried that elected judges might favor a lawyer campaign contributor in a particular case. None have noted the *systematic* difficulty of having justices regulate the same lawyers on which the justices rely for campaign donations.

[114] *See* Henry T. Reath, *Judicial Evaluation—The Counterpart to Merit Selection*, 60 A.B.A. J. 1246 (1974) (noting that bar associations frequently are involved in process of judicial evaluations); Schotland, *supra* note 113, at 121-32 (describing effect of bar endorsements); Feature, *HBA Lawyers Look Back*, HOUS. LAW., Sept./Oct. 1995, at 46 ("Aspiring to elect judges on merit, we urged the newspapers in their editorial endorsements to pay heed to the Bar's preferences because lawyers, better than anyone else, were able to evaluate the candidates with an eye toward ability and professionalism.").

[115] *See* PHILIP L. DUBOIS, FROM BALLOT TO BENCH 67-69 (1980) (reporting on use of bar polls "for public consumption" or "official endorsement"); JAMES H. GUTERMAN & ERROL E. MEIDINGER, IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES 19-51 (1977) (evaluating and surveying national bar polling practices); DOROTHY L. MADDI, JUDICIAL PERFORMANCE POLLS 3-4 (1977) (reporting that bar polls are conducted to influence both public and judges themselves); John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 878 (1990) (describing process and uses of bar polling, and effect of bar polls upon merit retention elections).

associations.[116] Any state judges who hope to join the federal judiciary rely on the ABA for a favorable rating.[117]

Lastly, even though justices are not open to lobbying in the traditional sense (*i.e.*, paid lobbyists or nonprofit organizations entreating them on a particular issue), they are very open to informal lawyer lobbying at bar association meetings, conferences in chambers, by their clerks, or simply in social gatherings with their current and former colleagues, partners, or associates. Lawyers and bar associations have a high level of access to, and influence over, justices. As an institutional matter, the interests, social status, and even thought processes of the judiciary and lawyers substantially dovetail.

b. Accessibility to the Public. While state supreme courts are particularly susceptible to lawyer and bar association lobbying, they are particularly inaccessible to lobbying from the public. As a

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[116] *See* CHARLES R. ASHMAN, THE FINEST JUDGES MONEY CAN BUY 242 (1973) (alleging that under merit selection "all that has happened is that the politics of the governor and the bar association have replaced the politics of the county party chairman and the electorate"); STUART S. NAGEL, COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS 30 (American Political Series No. 04-001, Randall B. Ripley ed., 1973) (discussing bar association preferences in merit selection and nominating systems); RICHARD A. WATSON & RONDOL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR, JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 87, 170 (1969) (stating that selection process is personalized and involves intense campaigns, and discussing role that appellate clientele play in judicial selection process); Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 656 (2002) ("History has shown that trial lawyers and their acolytes have controlled merit selection committees."); Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 521 (1978) (stating that commissions are loaded with partisan gubernatorial appointees and generally are not bipartisan); Goldschmidt, *supra* note 65, at 21-22 (observing that "attorney members of nominating commissions are either appointed by the governor, or elected or appointed by the state or local bars," and listing states in corresponding footnotes); Laurance M. Hyde, *The Missouri Non-Partisan Court Plan*, *in* SELECTED READINGS: JUDICIAL SELECTION AND TENURE 47 (Glenn R. Winters ed., 1967) (stating that lawyers on Missouri plan judicial selection committees "are elected by the bar").

[117] *See generally Hearing Before the Committee on the Judiciary, United States Senate, The Role of the American Bar Association in the Judicial Selection Process*, 101st Cong. (1989); JOEL B. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION (1965). Not surprisingly, scholars have noted that ambition plays a part in the judicial utility function. *See, e.g.*, Cohen, *supra* note 83, at 16-17 (discussing prospect of appointment to higher bench as potential constraint on judges); Schauer, *supra* note 24, at 631-33 (discussing occupational ambition); Sisk et al., *supra* note 83, at 1487-93 (discussing promotion as potential factor).

logistical matter, courts are not set up to be lobbied.[118] The public cannot stop by a justice's chambers to complain about lawyer regulation, nor are justices provided staff to respond to constituent complaints or lobbying. In fact, courts are organized precisely to minimize the effect of public opinion and lobbying upon judges.

Moreover, courts have a "new institutional" aversion to lobbying. Recurrent calls for judicial independence[119] have a powerful effect on how justices view their institutional roles and jobs.[120] For the great bulk of a state supreme court justice's work, immunity from public opinion and lobbying is laudable. When courts regulate lawyers, however, this immunity becomes problematic.

Even if state supreme courts were more open to lobbying, there is the substantial difficulty of public ignorance about state supreme courts and lawyer regulation. Transaction costs and the expense of public education on issues contribute substantially to the power of interest groups in the political system.[121] Thus, the deeper the ignorance about the nature and role of the government body involved, the steeper the cost of organizing the public at large. Studies have shown that the public is unlikely to know who their state supreme court justices are.[122] Judicial elections tend to be "low

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[118] *See* United States v. Grace, 461 U.S. 171, 183 (1983) (remarking that courts "are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing or pressure groups"); Harold J. Krent, *Should* Bouie *Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 89-93 (1997) (arguing that judges, and particularly federal judges, are immune from political pressures); William F. Shughart & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 958-59 (1998) ("No other institution of democratic government is supposedly more insulated from the political process than the judiciary.").

[119] *See* White, *supra* note 67, at 1-15 (arguing that judicial independence is critical element of American democracy); James W. Dolan, *Undermining the Court System*, BOSTON GLOBE, Dec. 26, 2001, at A19 (noting that legislative oversight of court administration undermines judicial independence); Editorial, *Keep Politics Out of Justice*, S. FLA. SUN-SENTINEL, Nov. 4, 2001, at F4 ("Judicial independence is the cornerstone of our democracy.").

[120] The first canon of judicial ethics commands that "[a] judge shall uphold the integrity and independence of the judiciary." MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2000).

[121] *See supra* notes 41-52 and accompanying text.

[122] *See* Deborah R. Hensler, *Do We Need an Empirical Research Agenda on Judicial Independence*, 72 S. CAL. L. REV. 707, 721 (1999):

> A 1995 survey of North Carolina citizens found that about 60% of respondents did not know that their state supreme court and intermediate appellate court justices were elected. A 1997 survey of New Mexico residents found that 96% of respondents could not name any state

salience," meaning that voters do not "have much interest in, or information about, the candidates for judicial office,"[123] and voter turnout in judicial elections is low.[124] Voter apathy is partially a result of the behavior of the candidates—the judicial canons of ethics and professional norms discourage any campaign promise beyond "the faithful and impartial performance of the duties of the office"[125]—and partially because voters have little incentive to learn about any specific judicial candidate.[126]

> supreme court or intermediate appellate court justice, and that two-thirds could not name any of their local district court judges.

Id.

[123] Philip L. DuBois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 LAW & SOC'Y REV. 395, 397 (1984); *see also* Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1315-18 (1997) (noting that judicial elections are low salience); Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 300-01 (1992) (citing voters' reliance upon their reaction to candidate's name in voting for state supreme court race); Allen T. Klots, *The Selection of Judges and the Short Ballot*, *in* SELECTED READINGS: JUDICIAL SELECTION AND TENURE 108, 108-09; Bridget E. Montgomery & Christopher C. Conner, *Partisan Elections: The Albatross of Pennsylvania's Appellate Judiciary*, 98 DICK. L. REV. 1, 20-22 (1993) (alleging voter apathy in judicial races); Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U. L. REV. 1, 43-44, 44 n.63 (1956) (pointing out voter ignorance in judicial elections); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 26 (1995) (depicting widespread voter apathy in judicial elections, particularly in nonpartisan races); Glenn R. Winters & Bob Allard, *Two Dozen Misperceptions About Judicial Selection and Tenure*, *in* JUDICIAL SELECTION 130, 132 (1993) (finding that few voters know for which judges they are voting). *Contra* Croley, *supra* note 65, at 734 (arguing that some judicial races are evincing higher salience).

[124] *See* Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 992 (2001) ("A relatively small percentage of the electorate votes in judicial elections. In Wisconsin, ordinarily less than 25% of the electorate participate in judicial elections, and Wisconsin is a state with one of the highest presidential election turnouts in the country."); David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 11, 21 (1992) (reporting low voter turnout in both Mississippi's partisan and nonpartisan judicial elections); Jay A. Daugherty, *Edge of Extinction or a Survivor in Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 322-23 (1997) ("[J]udicial retention elections attract the smallest voter turnout of all types of elections.").

[125] MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1990); DUBOIS, *supra* note 115, at 65-66; *see also* Jack Ladinsky & Allan Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128, 153-54 ("Professional norms and codes inhibit or prevent utterly the substantive discussion of judicial decisions or legal philosophies."). The Court's holding in *Republican Party v. White*, 122 S. Ct. 2528, 2542 (2002), that the Minnesota version of this judicial canon violated the First Amendment, however, may result in more openness in judicial elections.

[126] *See* Croley, *supra* note 65, at 731-32 (concluding that voters have "little incentive" to learn about judicial candidates because "the likelihood that a given judicial candidate would

Moreover, voters do not know that justices regulate the legal profession.[127] The programs that evaluate judicial performance (presumably for the benefit of the voters) wholly ignore the judicial role in lawyer regulation.[128] Thus, even in the occasional high salience judicial election, lawyer regulation is not an issue.[129] In general, most people tend to think that bar associations run lawyer discipline, and they do not connect whatever issues they have with lawyers or lawyer regulation to state supreme court justices.[130]

The first barriers to public input on lawyer regulation are thus logistical and structural in that the public does not know who their state justices are, or that they control lawyer regulation. Ironically, even if those barriers could be overcome, it would still prove difficult to vote out an offending justice over lawyer regulation, because the few informed voters in judicial elections vote on the justice's abilities as a judge, not as a lawyer regulator.[131] Since judging is the great

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render a decision affecting any given voter is small").

[127] *See* Steele, *supra* note 15, at 962-63 (stating that 35 out of 45 disgruntled former clients interviewed "did not know of the existence of the disciplinary agency; 4 others knew of it but could not describe its function"); *see also* Ann Davis, *Bar Readmissions Cloaked in Secrecy*, NAT'L L.J., Aug. 12, 1996, at A1 ("[R]eadmissions [to the bar] can be as covert as midnight town meetings to lay people."); HALT: An Organization of Americans for Legal Reform, Lawyer Accountability Project, *at* http://www.halt.org/laphome.php (last visited Apr. 8, 2003) (describing "invisibility" of lawyer regulators, "secrecy" of disciplinary processes, and lack of public participation in process).

[128] *See* ARIZ. COMM'N ON JUDICIAL PERFORMANCE REVIEW, VOTER INFORMATION GUIDE (2000) (evaluating Arizona judges up for retention election while never mentioning attorney regulation); SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, AM. BAR ASS'N, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE 9-30 (1985) (describing evaluation of judges and ignoring lawyer regulation); NAT'L CONFERENCE OF STATE TRIAL JUDGES, AM. BAR ASS'N, JUDICIAL PERFORMANCE EVALUATION HANDBOOK 1-7 (1996) (overviewing judicial evaluation programs with no mention of attorney regulation).

[129] *See, e.g.*, Myron Bright, *Judicial Independence*, 20 U. HAW. L. REV. 611, 614 (1998) (discussing several examples of dismissals or rejections of state judges with no mention of lawyer regulation); Traciel V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 69-77 (1999) (describing two highly charged retention elections with no mention of lawyer regulation); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 627-28, 648-51 (1999) (detailing several campaigns against state supreme court justices with no mention of lawyer regulation).

[130] In many cases, of course, they are right. In multiple states, the supreme court has delegated all or most of the regulation of lawyers to bar associations. *See infra* note 150 and accompanying text. Consider also the lingo of the profession. A licensed practitioner is called "a member of the bar." The licensing exam is called "the bar examination."

[131] *See supra* notes 121-24 and accompanying text.

bulk of any justice's job, this voting strategy makes perfect sense. This lack of accountability makes the problems associated with interest-group theory particularly acute because the only real public check on the power of interest groups is the power to vote an offending legislator out of office, and the dual role of justices as judges and regulators makes it unlikely that a motivated voter would vote to oust a justice over lawyer regulation.[132]

2. Institutional Capacity and Character. State supreme courts have some advantages (*e.g.*, expertise) and some disadvantages (*e.g.*, inexperience as delegators) as regulators of lawyers.

a. Institutional Characteristics. Courts are not natural legislators. It cuts against the grain of their institutional mission and self-image. Courts consider themselves, first and foremost,

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[132] *See* Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 641-46 (1978) (describing strategies for public participation in regulation of legal profession). A short description of the steps a citizen would need to take to alter lawyer regulation also helps elucidate the multiple hurdles involved in any lobbying effort. Consider, for example, the necessary steps for a group of law school students lobbying the supreme court to reinstate the diploma privilege (a diploma privilege automatically admits graduates of certain in-state schools to that state's bar). *See* W. Ray Williams, *Hand-up or Handout? The Americans with Disabilities Act and "Unreasonable Accommodation" of Learning Disabled Bar Applicants: Toward a New Paradigm*, 34 CREIGHTON L. REV. 611, 621 n.28 (2001) ("Some states (Montana, South Dakota, West Virginia and Wisconsin) grant graduates of selected schools a diploma privilege and they are admitted to practice in those states without taking a bar examination."). First, the group would have to appeal to the state bar association. The bar association is unlikely to support any measures that raise the number of lawyers in practice because of the possible disadvantageous changes to competition and pricing. In fact, bar associations have historically fought tooth and nail against the diploma privilege. *See* ABEL, *supra* note 8, at 62-68, 263-64. The group could take its complaint to the state supreme court, although it is difficult to imagine how the group would gain access. As noted above, state supreme courts are purposefully designed to avoid the possibility of lobbying by disgruntled citizens. Even if the students could attract the supreme court's attention, the odds of the supreme court bucking the bar association are slim. In fact, state supreme courts have been willing partners in eliminating diploma privileges all over the country. *See id.* If the state supreme court did not overrule the bar association's decision, it would be extremely difficult for the group to punish the supreme court justices. If appointed, their removal would require impeachment proceedings, a nearly impossible task. If elected, the group would have to organize an opposition campaign. The campaign likely would flounder because it would require substantial voter education about the role of state supreme courts, plus education on the multiple costs associated with entry barriers versus the benefits. Even if the group educated voters, it still would be difficult to get them to vote on the basis of lawyer regulation, because educated voters presumably vote for justices on the basis of their abilities as judges, not as regulators.

interpreters of the law, not policymakers.[133] Nearly every supreme court shrinks—at least in judicial opinions—from the bugaboo of "judicial legislating."[134] It is difficult for justices to alter their mindset of being simple adjudicators narrowly deciding disputes. Furthermore, whatever policies or interpretations courts do produce tend to occur piecemeal, in small incremental steps, and are constrained by stare decisis and past precedent.[135] Judges thus are unaccustomed to crafting broad new programs or approaching societal problems from a policymaking perspective.

Membership on supreme courts also turns over much more slowly than other government bodies, allowing great institutional consis-

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[133] *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 2 (1998) (finding that, although judges clearly do make policy, they typically are almost embarrassed about it and "insist that they simply do not engage in policy making").

[134] *See, e.g.*, Four County (NW) Reg'l Solid Waste Mgmt. Dist. Bd. v. Sunray Servs., Inc., 971 S.W.2d 255, 259 (Ark. 1998) ("[J]udicial review of legislative action is not undertaken *de novo* by a trial court because that would be judicial legislating."); State v. Iowa Dist. Court, 620 N.W.2d 271, 275 (Iowa 2000) (applying plain language rule because "[t]o adopt another interpretation of this language would be nothing short of judicial legislating"); Rose v. Council for Better Educ., 790 S.W.2d 186, 211 (Ky. 1989) ("[W]e do not engage in judicial legislating. We do not make policy. We do not substitute our judgement for that of the General Assembly."); Lanier v. State, 635 So. 2d 813, 819 (Miss. 1994) (refusing to "engage in judicial legislating in order to circumvent the statutory scheme"); Jewish Home & Infirmary, Inc. v. Comm'r, 640 N.E.2d 125, 130 (N.Y. 1994) (eschewing invitation to "the forbidden realm of judicial legislating"); Peterson v. Holm, 607 N.W.2d 8, 13 (S.D. 2000) (rejecting minority view on statute of limitations, because to hold otherwise "would be an end-run around the statute by judicial legislating"); Phillips v. Duro-Last Roofing, Inc., 806 P.2d 834, 836-37 (Wyo. 1991) (avoiding opportunity to "engage in comprehensive judicial legislating").

[135] *Cf.* SUNSTEIN, *supra* note 29, at 35-61 (1996) (describing judiciary's propensity for "incompletely theorized agreements," or incremental steps); Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396-401 (1981) (comparing legislative policymaking ("comprehensive rationality") with judicial policymaking ("incrementalism")); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-409 (1978) (arguing that judges have great difficulties implementing large-scale social programs); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 383-93 (1988) (offering alternative rationale for role of precedent that permits competing societal influences to be reconciled with stare decisis). For a psychologist's take on the essentially conservative nature of the judiciary, see Craig Haney, *Psychology and Legal Change: On the Limits of a Factual Jurisprudence*, 4 LAW & HUM. BEHAV. 147, 159-60 (1980) (presenting "political disjunction theory" that judges are predominantly politically conservative, and that legal system based on stare decisis and precedent is also essentially conservative). *See generally* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); KARL LLEWELLYN, THE COMMON LAW TRADITION (1960); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

tency.[136] Courts are, therefore, a uniquely conservative (in the nonpolitical sense) institution.[137] Although this institutional conservatism has numerous advantages for a judicial body, it hampers adaptability in policymaking.[138]

Furthermore, there is no reason to believe that judges will make particularly good legislators. State supreme court justices are selected or elected because of their abilities as judges, not as attorney regulators. There is nothing in the selection process for judges that suggests they will be natural administrators of lawyer regulation.[139]

The institutional difficulties are compounded by the need of a busy, relatively small body to delegate at least day-to-day regulatory authority. Given these institutional constraints, the question is not whether state supreme courts will have to delegate, it is the nature of the delegation. State supreme courts are extremely busy, and much has been made about the "caseload crisis" in the federal[140] and state courts,[141] including state appellate courts.[142] State supreme

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[136] *See* G. ALAN TARR & MARY PORTER, STATE SUPREME COURTS IN STATE AND NATION 238-39 (1988) (arguing that state supreme courts "can develop consistent institutional identities more readily than other governmental bodies can").

[137] *See* Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 LAW & CONTEMP. PROBS. 157, 171 (1998) (remarking that federal appellate judges are "a group characterized by its inherent institutional conservatism"). Consider also Adrian Vermeule's excellent discussion of the power of habit over judicial thinking. *See* Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 391 ("Judges, like other people, become habituated to and invested in the tasks, activities, and procedures they customarily and repetitively perform.").

[138] Naturally, critics of government regulation might see this as a singular advantage of the courts, *i.e.*, the less the government does, the better.

[139] Query, however, whether *any* of our democratic institutions are designed to select especially competent elected or appointed government officials.

[140] *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-93 (1985); Martin J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WISC. L. REV. 11, 25-26 (discussing federal caseload crisis); Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1487-91 (1995) (same).

[141] *See, e.g.*, Jon R. Muth, *The Answer to "Why?"*, 74 MICH. B.J. 120, 122 (1995) (describing "exceptional growth" and "crisis" in Michigan's state courts); POSNER, *supra* note 140, at 86-87 (citing substantial rise in court filings in state trial courts); John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233, 2234-38 (1993) (detailing California's state and federal court caseload crisis).

[142] *See, e.g.*, APPELLATE JUDGES CONFERENCE, STANDARDS RELATING TO APPELLATE DELAY REDUCTION 11 (1988) (elucidating upon state appellate court caseload crisis); John J. Watkins,

courts are relatively small and cannot grow because of logistical and constitutional concerns.[143] Given that judges are faced with a scarcity of resources and a desire for a modicum of leisure,[144] something has to give. Justices are naturally reluctant to forgo their responsibilities as judges, so the abdication of their regulatory responsibilities is a convenient solution.

This is especially true because state supreme courts approach the task of regulating lawyers with little joy or alacrity.[145] Few, if any, state supreme court justices pursued their position in order to regulate attorneys. In practice, state supreme courts tend to treat lawyer regulation the way that district courts treat discovery disputes, as a less palatable aspect of the job.[146]

Therefore, we would expect supreme courts to delegate as much of their authority over lawyer regulation as they can, to preserve leisure and to maximize the time and energy they have to spend on their primary job, deciding cases. The degree of delegation depends upon the consequences of overdelegation.[147] In this circumstance, the public at large, hampered by collective action problems and the structure of the courts, has limited opportunities to punish justices for overdelegation. Lawyers, however, are well-organized and care greatly about the justices' policies and their delegation of authority. Thus, we would expect state supreme courts to delegate as much authority as they can without upsetting lawyers.

Division of Labor Between Arkansas's Appellate Courts, 17 U. ARK. LITTLE ROCK L.J. 177, 177 (1995) (describing "crisis in volume" afflicting Arkansas's state appellate courts).

[143] *See* DAVID B. ROTHMAN ET AL., STATE COURT ORGANIZATION 1993, at 18-19 (1993) (listing numbers of justices on each state supreme court, varying from five to nine); POSNER, *supra* note 140, at 14 (explaining logistical barriers to expanding size of supreme courts).

[144] *See supra* notes 64-109 and accompanying text.

[145] *See* WOLFRAM, *supra* note 15, at 37 ("The relationship between the unified bar and the court that has often created it is sometimes that of unruly offspring and compliant parent.").

[146] *Cf.* AM. BAR ASS'N, *supra* note 100, at ii (describing judges' general lack of knowledge about disciplinary system and concluding that "[t]he judiciary must become more informed about lawyer discipline"); CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 7-16 (1999) (summarizing steps that are necessary for state supreme courts to improve lawyer professionalism); MCKAY REPORT, *supra* note 11, at 7 (stating that survey of state high court justices "showed that while they considered discipline important, most were not aware of the many problems we have discovered").

[147] *See* Croley, *supra* note 14, at 22-25 (outlining process of delegation, resulting problems with shirking and slacking, and responses of monitoring and punishment).

In practice, of course, this has been exactly the outcome. State supreme courts have satisfied their own and lawyers' interests by delegating virtually all of their regulatory authority under the vaunted system of "lawyer self-regulation."[148] This delegation kills two birds with one stone, because state supreme courts maximize delegation and please the only players who care, lawyers. Lawyers maximize their control (or capture, to use a more loaded term) over the regulation of their profession.[149] The more of the regulation that lawyers control, the more likely it becomes that the regulation will serve lawyers' interests.

The ultimate example of this phenomenon is the unified bar. State supreme courts literally delegate almost all of their regulatory authority back to lawyers.[150] A more prevalent example is state supreme court reliance on the ABA to draft the rules that govern lawyer behavior.[151]

A comparison between two different areas of lawyer regulation—one that lawyers care about, and one that they do not—demonstrates this process in practice. First, consider entry barriers. From the late nineteenth century, bar associations have lobbied relentlessly for higher entry barriers. These efforts have proven enormously successful, and entry is now guarded by well-oiled machines and multiple, growing requirements.[152]

Second, compare attorney discipline procedures. For obvious reasons, regulation of attorney discipline is a low priority for bar associations.[153] The ABA itself, among others, has determined that

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[148] For a description of lawyer self-regulation, see Barton, *supra* note 7, at 434-44, 463-64 (comparing possible justifications for entry restrictions in legal market to current regulation, and comparing potential justification for regulation of attorney conduct to current state attorney regulations); L. Ray Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695, 695 (1981) ("The purpose of a code of legal ethics is to implement the legal profession's prerogative of self-regulation.").

[149] Recall that agency capture occurs precisely because the regulated industry (in this case lawyers) are the primary and repeat players before the agency.

[150] MCKAY REPORT, *supra* note 11, at 23. Following complaints about the egregious state of disciplinary enforcement, justices in some states have recently stripped their unified bars of full regulatory authority, generally by removing responsibility for disciplinary enforcement. *See id.* at 23-31 (advocating removing disciplinary functions from unified bars).

[151] *See supra* notes 74-80 and accompanying text.

[152] *See supra* notes 81-85 and accompanying text.

[153] Again, once a lawyer is licensed she loses much of her incentive to police the profession itself, and public calls for legal reform are by and large shunted onto *entrants* to the

attorney discipline is, and always has been, a neglected area.[154] Attorney discipline is underfunded.[155] There are backlogs for investigations.[156] In most states, the process is secret.[157] Up to ninety percent of the complaints are summarily dismissed, partially because many complaints are over fee disputes which generally are not covered by the rules.[158] The comparison shows how the regulatory preferences of lawyers are well-reflected in the actual processes.[159]

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profession, increasing the costs of joining the profession and raising the price for legal services.

[154] *See* CLARK REPORT, *supra* note 11, at 1 (describing attorney discipline as "a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions."); MCKAY REPORT, *supra* note 11, at xiii-xx (noting positive changes since Clark Report, but listing additional necessary steps for improvement); RHODE, *supra* note 3, at 158 (quoting ABA research finding that public thinks attorney discipline is "[t]oo slow, too secret, too soft and too self-regulated").

[155] *See* MCKAY REPORT, *supra* note 11, at xviii (detecting that "funding and staffing [of disciplinary committees] have not kept pace with the growth of the profession," and that "some agencies are so underfunded and understaffed that they offer little protection against unethical lawyers"); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 485 (1993) (noting that "many disciplinary offices are under-funded"); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1121 (1996) ("Disciplinary boards are notoriously underfunded and [are] unable or reluctant to mount the effort needed to do battle with wealthy class action lawyers and powerful members of the defense bar.").

[156] *See* Lisa J. Frisella et al., *State Bar of California*, 17 CAL. REG. L. REP. 203, 205 (2000) ("In his initial February 1999 report, Justice Lui reported that the Bar's discipline system faces an unprecedented backlog of over 7,000 open complaints and reports against attorneys from consumers and courts."); Mark E. Hopkins, *Open Attorney Discipline: New Jersey Supreme Court's Decision to Make Attorney Disciplinary Procedures Public—What it Means to Attorneys and to the Public*, 27 RUTGERS L.J. 757, 769 (1996) (noting backlog of New Jersey disciplinary cases in 1980s).

[157] *See* Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and "Disclosure Advertising": Towards a New Ethos*, 72 N.C. L. REV. 351, 357-59 (1994) (delineating "tradition of invisibility" for lawyer disciplinary procedures); Paula A. Monopoli, *Legal Ethics and Practical Politics: Musings on the Public Perception of Lawyer Discipline*, 10 GEO. J. LEG. ETHICS 423, 424-25 (1997) ("Historically, lawyer discipline has been conducted behind closed doors."); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform its Disciplinary System*, 68 U. CIN. L. REV. 65, 108 (1999) ("Ohio's disciplinary process for attorneys and judges is cloaked in secrecy.").

[158] *See* JEROME E. CARLIN, LAWYERS' ETHICS, A SURVEY OF THE NEW YORK CITY BAR 150-64 (1966); MCKAY REPORT, *supra* note 11, at xv, 11; Rhode, *supra* note 8, at 93 & nn.385-86; RHODE, *supra* note 3, at 160; F. Raymond Marks, *Discipline Within the Legal Profession: Is it Self-Regulation?*, 2 ILL. L.F. 193, 214-19 (1974); Steele & Nimmer, *supra* note 15, at 980.

[159] Note, however, that substantial progress has been made on lawyer discipline, *see* MCKAY REPORT, *supra* note 11, at 89-129 (listing areas of progress since 1970 Clark Report),

b. Institutional Expertise. State supreme courts have expertise in the area of legal regulation. First, the regulation of lawyers is at least partially motivated by a desire to meet the needs of the courts, and supreme courts are in an excellent position to determine those needs.[160] Second, all of the justices are former lawyers, so they have a good understanding of the legal market, and presumably the effects their regulation will have on the market.[161] As such, state supreme courts have a comparative advantage in expertise, and theoretically state supreme courts should be less reliant upon the outside expertise of lawyers (the regulated industry), and therefore more resistant to agency capture.

Nevertheless, this advantage is certainly tempered by the fact that courts rarely use this expertise. They generally delegate almost all of their authority back to bar associations or regulatory agencies.[162] Moreover, most justices have experienced the legal field as lawyers, not as clients or litigants. Their expertise may favor the regulated because the justices are more familiar with the lawyer's perspective than with the perspectives of other players in the system.[163]

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a sign that justices and lawyers have not been wholly immune to public criticism.

[160] For a discussion of how lawyer regulation can be justified as a response to the needs of the courts, see Barton, *supra* note 7, at 450-52. The vast majority of lawyers will never appear before a state supreme court, however, so justices still need to poll trial judges, because they have the most day-to-day contact with lawyers. Nevertheless, justices seem to be in a better position than members of other institutions to gather and interpret the concerns of courts.

[161] Most justices come to the bench from a litigation background. Their knowledge of the practices of other areas of specialty, such as tax or transactional law, might be limited. The regulation of lawyers (from law school requirements to the Rules of Professional Conduct) has been criticized as overly focused on litigation concerns. *See, e.g.*, Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer"*, 62 U. PITT. L. REV. 335, 335 & n.1 (2000) ("For some years, law professors who hark from careers making deals rather than trying cases have complained that law schools do not train students for transactional practice."); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 49 (1998) ("Bankruptcy needs its own ethics code."); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149 (1993) (asserting that additional ethical codes are necessary for nonlitigators).

[162] *See infra* notes 303-06 and accompanying text.

[163] *See* Macey, *supra* note 72, at 631 (postulating that judges' "investment in the legal system is likely to align their preferences with the preferences (and interests) of the legal community as a whole"). The "expertise" argument itself is colored by lawyerly efforts at "mystification," the conscious and unconscious clouding of professional norms to make the

B. UNITED STATES SUPREME COURT

As dissatisfaction with the current state of regulation has grown, there have been increasing calls for a federalized system of lawyer regulation.[164] These calls generally have assumed that Congress would lead the way,[165] presumably because of logistical and constitutional concerns. Of any federal body, Congress seems to be the only body capable of seizing control from the states.[166] While the Supreme Court theoretically has an "inherent authority" similar to that of state supreme courts,[167] the Court has been much more reticent to flex its regulatory muscles.[168] This is partially because of a greater sense of deference to Congress on these issues[169] and

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entire system appear unintelligible to outsiders. *See* Wolfram, *supra* note 132, at 625-30 (describing process and effects of mystification).

[164] *See generally* Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969 (1992) (suggesting that "it is time to think seriously of a national bar, governed by uniform federal norms of professional conduct in all practice contexts"); Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473 (1995) (delineating patchwork approaches of federal courts to conduct regulation); Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453 (1997) (advocating for national admission for advice on federal law); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 335 (1994) (considering advantages and limits of adopting uniform federal code whose enforcement would largely be left to states). *But see generally* H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997) (arguing against federalizing lawyer regulation).

[165] *See, e.g.*, Needham, *supra* note 164, at 503 ("If Congress so desired, it could set criteria for bar admission."). Zacharias, *supra* note 164, at 376-77 (assessing competence of Congress to develop uniform code of legal ethics).

[166] Presumably such a move would rely upon Congress's powers under the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3. Whether federal regulation of lawyers would prove constitutional, however, is an open question. *See* Moulton, *supra* note 164, at 117-23 (assessing whether nationalizing lawyer ethics would be constitutional under current precedent or appropriate in light of federalism values).

[167] *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (" 'Certain implied powers must necessarily result' " to the federal courts " 'from the nature of their institution,' powers 'which cannot be dispensed with . . . because they are necessary to the exercise of all others.' " (quoting United States v. Hudson, 11 U.S. 21, 23 (1812))).

[168] Furthermore, even a robust vision of the Supreme Court's inherent authority to regulate lawyers would likely only apply to the federal courts, and not to appearances in state court, or to lawyering outside court.

[169] Consider, for example, the Court's relative deference to Congress on rules of procedure. Rather than seizing the ultimate authority as part of its inherent judicial power, the Court has allowed Congress the final say on rules of evidence and procedure. *See* Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify

partially because the Court is unceasingly leery of creating new administrative responsibilities and increasing its overall workload.[170]

In fact, the biggest impediment to the Court's serving as a regulator of lawyers is logistical. The Court likely would prove unwilling or unable to find the time necessary to regulate lawyers without fully delegating all responsibility. The Court has been extremely parsimonious with its institutional capacities and likely could not or would not take on a major new responsibility. The Court has, for example, fastidiously ignored the regulation of lawyers in federal courts, leaving it up to district and appellate courts to forge their own approaches.[171] Similarly, the Court has delegated many of its other regulatory authorities, such as the drafting of the federal rules of procedure and evidence.[172] The Court's avoidance of these issues establishes a legitimate concern that the Court would similarly shirk any additional regulatory duties.

Regardless of the logistics, there are many similarities and a few differences between the Court and state supreme courts as potential attorney regulators. In terms of accessibility to lawyers and the public, the Court likely would be less accessible. The Court has long

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or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."). Compare the Supreme Court's deference on these issues to the more bellicose stands of some state supreme courts. *See* Carl Baar, *Judicial Activism in State Supreme Courts: The Inherent-Powers Doctrine, in* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 129, 129-41 (Mary C. Porter & G. Alan Tarr eds., 1982):

> In inherent-powers cases, state trial courts have for many years been willing to challenge executive and legislative authorities, issue mandatory writs to elected and appointed officials, and even hold those officials in contempt. Numerous state supreme courts have approved the inherent-powers doctrine and applied it against administrative and legislative officials.

Id.

[170] *See generally* David M. O'Brien, *The Rehnquist Court's Shrinking Plenary Docket*, 81 JUDICATURE 58 (1997) (addressing how Supreme Court has reduced its caseload through fewer grants of certiorari).

[171] *See* Mashburn, *supra* note 164, at 473-74 (noting Court's lack of regulation and district courts' varying approaches to lawyer regulation).

[172] For a summary of the oversight process for the Federal Rules of Civil Procedure, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103-41 (2002). For the Rules of Evidence, see 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 6-7 (7th ed. 1998).

been heralded as the most independent in the land, because of its tenure, constitutional position, and prestige.[173] This would have the salutary effect of lessening the access of lawyers in the regulatory process, but also would further alienate the public from any meaningful involvement.[174] Furthermore, although the physical access of lawyers would be greatly limited, all of the psychological and institutional concerns would remain, and perhaps be exacerbated.[175]

The capacity and character issues are also similar, although the Court likely would make even greater efforts than state supreme courts to delegate their authority. This is partially because the Court is extremely busy and has structural limitations on its capacity[176] and partially because regulating lawyers in all fifty states would prove much more difficult and time consuming than regulating within a single state. The Court also would have less expertise than state supreme courts because it is farther removed from the day-to-day existence of district courts or the practices of all but the most elite lawyers.

C. DISTRICT COURTS

During the eighteenth and nineteenth centuries, legislatures and district courts were at least as involved in lawyer regulation as state supreme courts.[177] For example, many state district courts were the primary agents for bar admission.[178] There were few formal

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[173] *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing role of life tenure in guaranteeing judicial independence in Federal Courts); Steven B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 318-26 (1999) (describing history and architecture of judicial independence in United States); Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 128-29 (1999) (noting factors leading to independence of Supreme Court).

[174] This includes, of course, the loss of even the nominal opportunity to vote out an offending justice. *See* U.S. CONST. art. III, § 1 (granting federal judges life tenure).

[175] Because one of the psychological biases of judges (and all people) is egocentrism, judges overestimate their own abilities, and their own fairness. *See* Guthrie et al., *supra* note 24, at 813-16 (discussing egocentric biases among judges). Justices can be assumed to suffer from this bias, and this would further limit the accessibility of the public.

[176] *See* POSNER, *supra* note 140, at 14 (explaining logistical barriers to expanding size of Supreme Court).

[177] *See supra* note 17 and accompanying text.

[178] *See* POUND, *supra* note 91, at 144-47 (listing three different forms of admission, as

standards, and district courts typically performed an oral bar examination of a new applicant.[179] Furthermore, there was little regulation of lawyer conduct,[180] and district courts supplied what little regulation existed.[181] In this historical model for district court

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follows: each individual court controlled admission to that court (Massachusetts, New Hampshire, Pennsylvania, and Maryland), any district court could admit lawyer to practice in any court in state (Rhode Island, Connecticut, and Delaware); and centralized admission (New York, New Jersey, South Carolina, Virginia, and North Carolina)); *see also* 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 241-43 (1965) (describing lawyer regulation system in Connecticut).

[179] *See* RANDALL COLLINS, THE CREDENTIAL SOCIETY 149 (1979) (noting that nineteenth century bar examinations were typically "oral and administered in a very casual fashion"); REED, *supra* note 91, at 87-90, 98-101 (describing early practices of oral bar examinations and beginning of uniformity within states); STEVENS, *supra* note 81, at 25 (explaining that nineteenth century bar examination was "oral and normally casual"); Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 394-95 (1996) (commenting that bar exam was originally oral examination given before judge of court in which one sought to be admitted to practice). Consider, for example, this description of Abraham Lincoln's examination of a potential attorney in Illinois as Lincoln lounged in a tub:

> He asked me in a desultory way the definition of a contract, and two or three fundamental questions, all of which I answered readily, and I thought, correctly. Beyond these meager inquiries . . . he asked nothing more. . . . The whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all.

Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 646.

[180] *See* HALL, *supra* note 81, at 212 (stating that early nineteenth century lawyer regulation was based upon "local control and built on a restrictive system of personal alliances including marriage, paternal occupations, and extended apprenticeship"); HURST, *supra* note 17, at 286 (arguing that "there was little formal discipline" during mid-nineteenth century); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perception of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1134 (1999) ("Prior to the 1870s and the institutionalization of the legal profession, no formal mechanisms for discipline appear to have existed. To the extent discipline was imposed at all, it took place locally and informally."); Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 932 (1995) (describing how attorney behavior was "taught in associations dedicated to passing on standards of acceptable professional conduct," not through official regulation).

[181] Despite the general lack of formal controls, lawyer behavior was controlled by common law torts and criminal sanctions. Each court retained the common law "summary jurisdiction" over the lawyers who practiced before it, and could disbar or sanction an errant attorney. *See Ex parte* Wall, 107 U.S. 265, 270-74 (1882) (upholding trial judge's authority to disbar attorney who had incited lynching); Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 912-17 (1994) (describing early nineteenth century lawyer discipline administered by judges); Charles W. Wolfram, *Towards a History of the Legalization of American Legal Ethics I—Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 473-79 (2001) (describing early American disbarment

regulation of lawyers, state legislatures established general rules for admission, and district courts handled the rest, including an ad hoc common-law style of conduct regulation.[182] This Section, however, considers district courts as the primary regulator of lawyers.

There are substantial logistical obstacles to placing district courts (state or federal, or a combination of the two) fully in charge of lawyer regulation. District courts could follow the loose, common-law regulatory approach of nineteenth century America, but this would prove a disaster for modern America's broad and complicated legal market. Colonial judges could admit and sanction individual lawyers on an ad hoc basis because there were few lawyers and even fewer courts to consider. Imagine, by contrast, if every judge in America admitted lawyers separately and under his or her own set of eligibility criteria. Lawyers in large metropolitan areas likely would spend all of their time getting admitted.[183] In short, having each district court individually enforce its own set of entry or conduct standards would create a patchwork of regulation that would cripple the legal market.[184]

An alternative would require district courts to act as legislative bodies and attempt to create uniform policies. Given the current workload of federal and district courts,[185] this would either prove

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procedures).

[182] *See supra* notes 177-81 and accompanying text. Note that this structure more closely resembles the typical legislation/delegation paradigm. The legislature set the broad policies, and the district courts, acting in this regard almost as agencies, enforced the specifics.

[183] Or consider a system where admission to any state or federal court meant admission to all courts. The variation in skills and training required by each court would make such a system untenable and likely tantamount to deregulation.

[184] Although district courts could not realistically regulate entry, consider whether a common-law approach to conduct regulation might prove realistic and possibly even more effective than the current rule-based program. *See* Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 945-46 (1996) (advocating replacement of Model Rules and Code with common-law system of lawyer regulation). The difficulty is again the logistics. Because of the expense and hassle of litigation, aggrieved clients will sue lawyers only for conduct egregious enough to create a substantial recovery. Presumably all or most of these viable claims are already brought as malpractice actions, meaning that a common-law approach would overlook the behavior currently controlled by conduct regulation. Of course, given the lax state of enforcement, it might be a small loss. *See infra* note 255 and accompanying text.

[185] *See* POSNER, *supra* note 140, at 86-87 (discussing rising state district court caseloads); Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871,

logistically impossible or require a massive delegation of authority.

Aside from the logistical challenges, district courts suffer from many of the same weaknesses as state supreme courts. Public accessibility would be severely limited. Although any individual judge is likely more accessible than an individual justice, trying to lobby numerous district judges would be nearly impossible. Lawyer accessibility also would be hampered by the volume and disparate locations of the judges, but more accessability may be given to local and county bar associations that generally have closer relationships with local district courts.[186] Expertise would be improved, because district courts would be well aware of their own needs as lawyers, but the time pressures district courts face suggest that delegation would likely become even more prevalent.

III. LEGISLATIVE CONTROL

Until the late nineteenth century, state legislatures, and not state supreme courts, generally controlled lawyer regulation.[187] The turn of the century brought the advent of the inherent powers doctrine and the rise of state supreme court control.[188] This Section analyzes the various strengths and weaknesses of legislatures as policymakers for lawyer regulation. For simplicity's sake, we again

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877 (1983) (noting significant increases of both civil and criminal filings in federal district courts); Wolf Heydebrand & Carroll Seron, *The Rising Demand for Court Services: A Structural Explanation of the Caseload of United States District Courts*, 11 JUST. SYS. J. 303, 313-20 (1986) (same).

[186] This closer relationship may explain why judges initiate so few complaints of lawyer misconduct, despite being in an excellent position to witness such misconduct. *See* Wilkins, *supra* note 13, at 822-23 (noting that vast majority of disciplinary complaints are filed by clients rather than lawyers or judges); *see also* Leslie W. Abramson, *The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 753-55 (1997) (describing judicial disincentives to reporting lawyer misconduct).

[187] *See supra* notes 16-18 and accompanying text.

[188] *See generally* Dowling, *supra* note 96; Leon Green, *The Courts' Power Over Admission and Disbarment*, 4 TEX. L. REV. 1 (1925); Loris Shanfeld, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar*, 19 ST. LOUIS L. REV. 163 (1934).

begin our analysis in Section III.A with state legislative control.[189] Section III.B then addresses federal congressional control.[190]

A. STATE LEGISLATURES

Although there are variations in the structure, size, and constitutional powers of the various state legislatures, there are many commonalities.[191] First, although some legislators are lawyers, a law degree is not required, and the numbers of lawyer-legislators has been declining recently.[192] Second, all state legislators are elected.[193] Consequently, all state legislators face the pressures involved in getting elected and staying in office.

1. Propensity for Agency Capture. Just as courts are seen as relatively immune to agency capture, legislatures are the poster children for interest-group theory. Under the purest form of interest-group theory, legislatures are filled with rational, self-serving legislators who repeatedly cater to concentrated interests that can deliver votes or campaign contributions at the expense of the public at large.[194] Nonetheless, institutional analysis is all about *comparative* advantages and disadvantages,[195] so it is

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[189] *See infra* notes 191-229 and accompanying text.

[190] *See infra* notes 230-40 and accompanying text.

[191] *See generally* LYNN HELLEBUST, STATE LEGISLATIVE SOURCEBOOK 2001 (2001); NAT'L CONFERENCE OF STATE LEGISLATURES, INSIDE THE LEGISLATIVE PROCESS (7th ed. 1997); NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE STAFF SERVICES PROFILES OF THE 50 STATES AND TERRITORIES (1999); STATE GOVERNMENT ORGANIZATION CHARTS (Keon S. Chi et al. eds., 1995).

[192] *See infra* notes 203-04 and accompanying text.

[193] *See* WILDER CRANE, JR. & MEREDITH W. WATTS, JR., STATE LEGISLATIVE SYSTEMS 34-37 (1968) (discussing election systems in all fifty states); WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 57-107 (7th ed. 1989) (discussing election processes for state and federal legislatures).

[194] *See* Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 715 & n.134 (2002) (applying public choice theory to tax preferences). *See generally* ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT 7-12 (1981) (providing overview of interest group theory and legislatures); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988) (same); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988) (same). Note, however, that many interest group theorists have a more nuanced view of the operation of representational government. *See supra* notes 121-32 and accompanying text.

[195] *See* KOMESAR, *supra* note 16, at 14-50, 50:

essential to consider state legislative openness to both sides of the interest group equilibrium—the regulated industry and the public at large.

a. Accessibility to Lawyers. State legislatures are certainly ready, willing, and able to enjoy the fruits of lawyer lobbying, and therefore capture is a significant possibility. The success of trial lawyers in blocking "tort reform" in various states is a prime example of the current power of the trial lawyers' lobby.[196] Furthermore, while state supreme courts ordered bar unification in many states, lawyers successfully lobbied state legislatures for unification in other states.[197]

The success of lawyers before legislatures is a natural consequence of their organizational advantages. The question is whether lawyers would have the same special advantages before legislatures that they have before state supreme courts.[198] There are some

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> No economist [or legal theorist] can study any social choice except in terms of its alternatives. Economic analysts of law are studying institutional choices, usually the choice between the market and the courts. They cannot simply rely on single institutional notions, like market failure. Here the need to consider and compare institutional alternatives is primary, not secondary, to competent economic analysis.

Id.; William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 512-13 (2000) ("An inordinate focus on a single institution and the concomitant failure to analyze ways various institutional options are likely to suffer failures is the chief analytical error identified by Komesar and his fellow scholars of comparative institutional analysis."); Daniel H. Cole, *The Importance of Being Comparative*, 33 IND. L. REV. 921, 928-36 (2000) (describing "the importance of comparative legal analysis and comparative institutional analysis") (emphasis omitted). As Ronald Coase aptly notes, "[a]ll solutions have costs," and it is the comparison of these transaction costs that should drive policy choices. COASE, *supra* note 31, at 118.

[196] *See, e.g.*, John Caher, *Lobbyists Collide at State Capitol on Tort Reform*, N.Y. L.J., Apr. 23, 2002, at 1:

> New York trial lawyers and their legislative foes—primarily doctors and businesses—are battling this week at the capitol, with advocates on both sides of the so-called "tort-reform" debate unleashing their lobbyists in a major late-session push. The result, insiders suggest, is likely to be nil as two or more powerful and influential forces cancel each other out and perpetuate the status quo.

Id.; Lynne W. Jeter, *For Biz, At Least Session Over*, MISS. B.J., Apr. 22, 2002, at 1 ("Barred by trial lawyers in key leadership positions in the executive and legislative branches, even the weakest tort reform legislation died before the second deadline.").

[197] *See* MCKEAN, *supra* note 87, at 49 (listing unification method in various states).

[198] The term "special advantages" refers to advantages beyond the financial and organizational advantages that come with being a professional group with many shared economic interests, *e.g.*, the many institutional similarities between lawyers and the

structural and institutional reasons to believe that they would not. First, although legislatures are open to lawyer lobbying, they have no particular reason to favor lawyers over other groups. Legislatures do not share the judicial institutional interest in strong entry regulations, because legislatures are not dependent upon lawyers to process their work.[199] Legislators often rely on lawyers to draft statutes or act as staff members, but lawyers are not central to the legislative process to the extent that they are to the judicial process.[200]

Furthermore, elected state supreme court justices rely on lawyers for the bulk of their campaign contributions,[201] and bar associations or groups of lawyers regularly are involved in assessing the faculties and performance of judges.[202] Legislators would be more than happy to accept lawyer donations, but they are open to lobbying and contributions from all comers and have no natural reason to expect or rely particularly on the bar for political support.

In comparison to the all-lawyer state supreme courts, approximately fifteen percent of state legislators are lawyers.[203] Interestingly, this number is shrinking, from twenty-two percent in 1976 to fifteen percent in 1995.[204] Accordingly, a much smaller number of

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judiciary. For a full discussion of these special advantages, see *supra* notes 67-117 and accompanying text.

[199] Remember that justices have a powerful incentive to raise entry standards. As entry barriers rise and the profession on average is populated by higher qualified members, the work of judges in researching the law and processing and deciding cases becomes easier. *See supra* notes 83-85 and accompanying text.

[200] This is especially true for state legislatures where staff members (legal or otherwise) are few and at a premium. *See* ERIC M. USLANER & RONALD E. WEBER, PATTERNS OF DECISION-MAKING IN STATE LEGISLATURES 24, 24 (1977) (comparing state legislative staff with congressional staff and concluding that "individual office space and staff [is] more the exception than the rule" in state legislatures). State legislative staffs have grown recently, but still lag behind congressional resources. *See* EUGENE W. HICKOK, JR., THE REFORM OF STATE LEGISLATURES AND THE CHANGING CHARACTER OF REPRESENTATION 51-53 (1992) (describing increases in state legislative staff and office space since 1960s).

[201] *See supra* notes 113-17 and accompanying text.

[202] *See* Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1064-65 (2002) (describing use (and abuse) of bar polls in judicial elections).

[203] NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATORS' OCCUPATIONS 11 (1996) [hereinafter LEGISLATORS' OCCUPATIONS].

[204] *See id.* Lawyers were 20%-30% of state legislators for most or all of the twentieth century. A 1949 study showed that 22% of state legislators were lawyers. *See* Duane Lockard, *The State Legislator*, *in* STATE LEGISLATURES IN AMERICAN POLITICS 98, 106

legislators than judges will be members of the state bar association. Fewer legislators will have the institutional mindset of lawyers, *i.e.*, the heuristics and world view that law school and years of practice create. Quite simply, lawyers have fewer naturally sympathetic ears in state legislatures.

Lastly, lawyers are not particularly popular among the public or most legislatures. Law reviews, bar publications, and newspapers are filled with anecdotal and statistical evidence displaying the public's low esteem for the legal profession,[205] and politicians have responded to those sentiments.[206] Insofar as legislators are

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(Alexander Heard ed., 1966) ("The 1949 occupational distribution of all state legislators . . . showed that 22 per cent were lawyers, 23 per cent were engaged in business, and 4 per cent were physicians and teachers."). A 1979 study showed 20%. *See* WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS 117 (7th ed. 1989) (indicating that 20% of all state legislators were lawyers in 1979). In 1954, it was "a fair estimate that the legal profession has provided about one-fourth of the total number of state legislators since 1900." ALBERT P. BLAUSTEIN & CHARLES O. PORTER, THE AMERICAN LAWYER 97, 97 (1954); *see also* George C. Brown, *Lawyers as Legislators*, 74 WIS. LAW., Sept. 2001, at 3 ("[S]ince the 1950s, the number of attorneys serving in the state Legislature has dropped by more than 50 percent."). Part of the recent decrease in lawyer-legislators may be a reaction to anti-lawyer sentiment among voters, while part of the decrease may be the rise of full-time legislators. From 1976 to 1995, full-time legislator has grown from 2.7% to 14%. LEGISLATORS' OCCUPATIONS, *supra* note 203, at 11. A 1997-98 survey of nonincumbent state legislator candidates supports the hypothesis that fewer lawyers are running for the state legislature. Only ten percent of the nonincumbent candidates surveyed listed their occupations as "attorney." *See* GARY F. MONTCRIEF ET AL., WHO RUNS FOR THE LEGISLATURE? 34 (2001) (listing top occupations as "business employee: 16%," "retired: 15.4%," "business owner: 13.7%," and "attorney: 10.4%"). Moreover, the lawyers who go on to become politicians are less likely to be "lawyers' lawyers" in the way that judges are. Judges, especially those chosen or evaluated under a merit system, are presumably selected from among the lawyers who have flourished under the current system. There is no similar selection process for the lawyers who go on to become politicians. The lawyers who run for office would likely be successful (read wealthy), however, because of the substantial financial commitment it takes to run for office. *See* MONCRIEF ET AL., *supra*, at 7-8 (describing "the high and ever-increasing cost" of running for state legislatures).

[205] *See, e.g.*, W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 368-70 (1999) (citing *Atlanta Journal-Constitution* poll reporting that only minority of Americans felt that lawyers were honest and Gallup poll that ranked honesty of lawyers only slightly higher than that of televangelists and used car salesmen); Victor H. Lott, Jr., *A State Bar President's Views on Professional Ethics*, 23 J. LEGAL PROF. 115, 115 (1999) (offering historical perspective on "the unpopularity of lawyers"); Terry Morrow, *New TV Judge Is Kinder, Gentler*, KNOXVILLE NEWS-SENTINEL, Apr. 23, 2002, at E5 ("As bad of a reputation as lawyers have in our community—they are somewhere above a used-car salesman and below an encyclopedia peddler—the public is still fascinated by stories of the law.").

[206] Consider, for example, Dan Quayle's ongoing criticisms of the legal profession. *See*

responsive to their constituents, lawyers will have a more difficult time obtaining preferential legislation.

b. Accessibility to the Public. Again, interest-group theory predicts that the public at large will have a hard time organizing to oppose the interests of concentrated groups in the lawmaking and enforcement process.[207] Nevertheless, in an institutional comparison with state supreme courts, legislatures appear more accessible to the public.

Under interest-group theory, legislators are happy to deal with any group that can provide votes or campaign contributions.[208] While lawyers are currently among lobbying groups, many other powerful constituencies are involved, including groups that clash with lawyers, such as accountants, business associations, real estate agents, and disgruntled citizens who dislike lawyers. The battle over tort reform is an excellent example of how various powerful constituencies can unite to pressure legislatures over issues of direct economic value to lawyers (or particular groups of lawyers).[209]

Carla Marinucci, *This Time in S.F., Quayle Blames the Lawyers; But His Speech Lacks Punch of Murphy Brown*, S.F. CHRON., May 20, 1999, at A1. Consider also the advice of political consultants that "[i]t's almost impossible to go too far when it comes to demonizing lawyers." See White, *supra* note 202, at 1075 & n.101 (quoting "Luntz Research Company"); *see also* Michael D. Kimerer, *A Presence in the Legislature*, ARIZ. ATT'Y, Mar. 1996, at 8 ("Our current negative public image exacerbates [the need for lobbyists] by spawning legislation that is detrimental not only to our profession but to the public's interest."). State legislatures have, in fact, recently passed a number of lawyer-unfriendly statutes. *See infra* notes 287-92 and accompanying text.

[207] *Cf.* CITIZENS CONFERENCE ON STATE LEGISLATURES, LEGISLATIVE OPENNESS: A SPECIAL REPORT ON PRESS AND PUBLIC ACCESS TO INFORMATION AND ACTIVITIES IN STATE LEGISLATURES 69-73 (1974) (outlining need for greater state legislative openness to public).

[208] *See supra* notes 41-48 and accompanying text.

[209] The battle over tort reform has been waged in the United States Congress and almost every state's legislature. *See, e.g.*, Reed Branson, *Miss. Leaders Sit While Tort Debate Taints State Image*, THE COMM. APPEAL, May 14, 2002, at B5 (reacting to United States Chamber of Commerce's public declaration that Mississippi's failure to pass tort reform makes state dangerous locale for businesses); Greg Hitt, *Terrorism Insurance Bill Stalls*, WALL ST. J., May 1, 2002, at A4 (describing battle in Congress over tort reform during aftermath of September 11 attacks); Lisa Grace Lednicer, *Vote 2002: Politicians Push Hard to Survive*, PORTLAND OREGONIAN, May 16, 2002, at A1 (reporting on Oregon's most expensive state senate primary race in which Oregon trial lawyers supported one candidate and business groups supported another); John Tierney, *In Tort City, Falling Down Can Pay Off*, N.Y. TIMES, Apr. 15, 2000, at B1 (positing that New York State's legislative "[a]ttempts at tort reform in Albany have been successfully resisted by trial lawyers"). The two main interest groups are various state and national groups of trial lawyers on one side, and various business and manufacturing groups on the other. *See* Joe Follick, *Lobbyists Engage in Costly Arms Race*, TAMPA TRIB.,

Compared to the judiciary, legislatures are open by design. Logistically, all legislators make at least some effort to be open to constituent contact and comment. Successful legislators generally pay great attention to constituent services and listen to the citizens who care enough to contact their offices. By contrast, a judge's chambers are essentially closed to the public.

Institutionally, the difference may be even more pronounced. Justices, along with all judges, are steeped in the American mythology surrounding judicial independence.[210] Judges, above all, are meant to eschew public opinion and follow the correct legal course. The ethos of the legislature, by contrast, generally includes following the will of the electorate (if not outright pandering and vote-buying). The legislative openness to lobbying also blunts the judicial problem of informal lawyer lobbying, in that legislators are rarely informally lobbied because a savvy legislator recognizes every contact with a constituent or business group as an opportunity to curry votes or solicit campaign contributions.

In comparison to public knowledge of state supreme courts and their role in lawyer regulation, people generally are more aware of who their elected legislators are, and what they do (*e.g.*, regulate industries and occupations). Although elections for state legislatures are typically lower salience than federal elections,[211] state

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Mar. 25, 2001, at 1 (describing "Florida's two biggest lobbying forces—trial lawyers and business groups" as "the Hatfields and McCoys" and "Capulets and Montagues").

[210] *See generally* Henry J. Abraham, *The Pillars and Politics of Judicial Independence in the United States*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 29-36 (Peter H. Russell & David M. O'Brien eds., 2001) (describing structural nature of American judicial independence); Symposium, *Judicial Independence*, 29 FORDHAM URB. L.J. 791 (2002) (discussing independent nature of judicial branch of government).

[211] *See* MALCOLM E. JEWELL, REPRESENTATION IN STATE LEGISLATURES 166-68 (1982) (delineating public awareness of state legislators, and concluding that name recognition and awareness of state legislators runs at about 50% of name recognition of federal legislators); Stephen E. Bennett, *"Know-Nothings" Revisited: The Meaning of Political Ignorance Today*, 69 SOC. SCI. Q. 476, 483-88 (1988) (presenting evidence that over one-third of American adults are "know-nothings" lacking even most minimal political knowledge); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 416-19 (1998) (summarizing evidence of widespread voter ignorance). Of course, an institutional analysis based primarily on American voter ignorance likely would result in a disheartening deadlock between political institutions about which voters could not care less. There is a burgeoning academic literature on the hows and whys of the phenomenon of "rational voter ignorance." *See, e.g.*, MUELLER, *supra* note 56, at 268 (describing conditions of voter ignorance, as follows: any individual vote is unlikely to affect outcome of election, and details of policy are costly for voters to acquire).

legislative elections are certainly higher salience than judicial elections.[212] These elections also do not suffer from the ethical dilemmas of judicial races. There is no legislative ethic against pronouncing how a candidate would decide any particular issue. To the contrary, legislators are compelled to run on platforms and issues.[213]

The legislature's relative openness to lobbying is tempered, however, by the difficulties any voter faces in censuring a lawmaker over a particular piece of unwanted legislation. Even those voters who have the time, energy, and inclination to punish a legislator for a particularly harmful vote may have difficulty convincing or organizing other voters to focus on one legislative vote among the many others.[214] Similarly, voters may not want to vote against a justice who is a good judge and a bad attorney-regulator. Nevertheless, it is easier to punish state legislators than justices, because voters attempting to censure the legislator are acting upon the legislator's primary responsibility of passing laws.

2. Institutional Capacity and Character. State legislatures have some relative advantages and disadvantages to courts in their institutional capacity. On the one hand, they are more accustomed

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See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 235-59 (1957) (coining term and concept of rational voter ignorance).

[212] There are no known comparative studies of election salience for state supreme court and state legislative races. The evidence establishing voter ignorance in judicial elections, however, is much more striking than in state legislative elections.

[213] The effect of rational voter ignorance means that politicians have an incentive in certain circumstances to hide or cloud their stances on controversial issues, or to produce laws that are so complex that it would require a substantial investment of time and energy by the public to decipher the law. *See* Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 578 (2001):

> Applied to the tobacco context, rational ignorance suggests that some legislators who could not safely vote for a cigarette tax increase could safely vote for a statute that would have the same effect as a tax increase precisely because the details of all this would be too confusing for most voters to follow.

Id.; David M. Schizer, *Realization as Subsidy*, 73 N.Y.U. L. REV. 1549, 1608 (1998) ("The relevant audience for a politician is the average voter, as opposed to the average tax practitioner or law review reader. It usually is not worthwhile for voters to understand the tax law except as it applies (narrowly) to them—a phenomenon known as 'rational ignorance.'").

[214] *See supra* notes 45-46 and accompanying text.

to legislating, delegating, and supervising delegation. On the other hand, because they are populated mostly by nonlawyers, they may lack some of the natural expertise of state supreme courts.

a. Institutional Characteristics. Obviously, a legislature's primary job is legislating,[215] so a legislature would seem to have a natural advantage in regulating lawyers. Virtually every other licensed profession (or industry) in the United States is regulated by the state or federal legislatures. Although there are varying views on the results, it seems natural to prefer the institution that has been designed for, and is practiced in, regulating rather than adjudicating.[216]

Beyond their capacity for creating legislation, state legislatures also are much more experienced in delegating enforcement authority to agencies and overseeing their delegations. State legislatures have multiple oversight tools at their disposal, the power of the purse, oversight hearings, and the power to withdraw their delegation.[217] The great majority of state legislatures also utilize

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[215] The physical process of legislating is radically different from the process of deciding cases. *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 3 (2000) ("The process of statutory creation is not a highly proceduralized adversary system of argument by lawyers culminating in a discursive opinion . . . . Rather, the legislative process is an often-chaotic process."); *cf.* LON L. FULLER, THE MORALITY OF LAW 177-81 (1964) (contrasting "[t]he two fundamental processes of decision that characterize a democratic society . . . decision by impartial judges and decision by the vote of an electorate or a representative body").

[216] Again, depending on one's view of the efficacy of legislatures or the insalubrity of most legislation, one might disagree with this point. Interest-group theorists have, for example, called for increased judicial review of legislative enactments. *See supra* notes 56-58 and accompanying text. Nevertheless, even the boldest interest group theorists have not suggested that judges fully usurp the legislative function. In general, the boldest suggestions include judicial correcting for interest group bias, not wholesale legislating. *See, e.g.*, William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. Rev. 275, 278-79 (1988) (suggesting heightened judicial review as counterweight to influence of interest groups); Thomas W. Merrill, *Does Public Choice Theory Justify Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219, 219-30 (1997) (arguing that in market for "law change" public choice theory supports judicial activism). Furthermore, even if such a usurpation were defensible from an interest group theory perspective, surely regulation of lawyers—a subject which creates so many other interest group problems for judicial regulation—should not be the area chosen.

[217] *See* LOUIS FISHER, SHARED POWER 71-91 (4th ed. 1998); KEEFE & OGUL, *supra* note 193, at 342-44, 355-58; JAMES Q. WILSON, BUREAUCRACY 237-44 (1989); Marilyn F. Drees, *Do State Legislatures Have a Role in Resolving the "Just Compensation" Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 FORDHAM L. REV. 787, 810-11 (1997); Harold J. Krent, *Turning Congress Into an Agency: The Propriety of Requiring Legislative Findings*,

sunset acts that require agencies periodically to review their performance and assess whether the agency is still necessary.[218] State legislatures also rely much more heavily than Congress on "rules review" procedures, whereby a committee in the legislature or a separate body reviews some or all administrative rules before they go into effect.[219]

Nevertheless, there have been persistent and growing criticisms of American legislative delegation. Some argue that the initial delegations are chronically overbroad,[220] and others argue that the

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46 CASE W. RES. L. REV. 731, 756 n.137 (1996); Arthur MacMahon, *Congressional Oversight of Administration: The Power of the Purse*, *in* LEGISLATIVE POLITICS U.S.A. 269-81 (Theodore J. Lowi ed., 1962); Craig Volden, *Delegating Power to Bureaucracies: Evidence from the States*, 18 J.L. ECON. & ORG. 187, 187-88 (2002); *cf.* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1363-86 (1988).

[218] *See* KEEFE & OGUL, *supra* note 193, at 350 (describing sunset laws as "most spectacular technique for legislative oversight," and asserting that they are in use in 75% of states with mixed results). For descriptions of how sunset reviews work on an agency level, see Matthew F. Archbold, *Board of Behavioral Sciences*, 16 CAL. REG. L. REP. 18, 18-19 (1999) (describing sunset review process for California Board of Behavioral Sciences); *State Bar Sunset Review Underway*, 64 TEX. B.J. 962, 962 (2001) (delineating process of sunset review for Texas Bar Association).

[219] *See* JAMES R. BOWERS, REGULATING THE REGULATORS 29-99 (1990) (covering creation, nature, and effect of rules review procedures in state legislatures); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1201-16 (1999) (providing overview of state rules review procedures). For a study on the impact of state rules review, see generally MARCUS E. ETHRIDGE, LEGISLATIVE PARTICIPATION IN IMPLEMENTATION: POLICY THROUGH POLITICS (1985). For an overview of rules review procedures, see generally NAT'L ASS'N ON ADMIN. RULES REVIEW, 1996-97 ADMINISTRATIVE RULES REVIEW DIRECTORY AND SURVEY (1996). For a description of other state legislative efforts to oversee delegation, see Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 884-911 (2000). Based upon these various tools and the structure of agency decisionmaking, some posit that delegation and oversight by Congress and other legislatures is working well. *See* David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 419-43 (2002) (making public choice case for delegation to agencies); *see also* Marla E. Mansfield, *"By The Dawn's Early Light": The Administrative State Still Stands After the 2000 Supreme Court Term (Commerce Clause, Delegation, and Takings)*, 37 TULSA L. REV. 205, 266-67 (2001) (arguing that agency activities are public-minded and reasonably well overseen by Congress); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91-99 (1985) (responding to public choice critiques of delegation and defending latter as necessary and efficient). *See generally* Spence & Cross, *supra* note 51 (making public choice case for delegation to agencies).

[220] *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 82-96 (1993) (explaining "politics of lawmaking" and incentives for overdelegation). *See generally* LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR & SPENDING (2000) (describing specific examples of congressional overdelegation).

oversight of delegation is minimal.[221] These effects are natural consequences of interest-group theory. Legislators seek maximum credit with minimum work or responsibility. By transferring broad lawmaking responsibilities to administrative agencies, legislators avoid the hard work of ironing out the details and later can conveniently blame unaccountable bureaucrats for any unpopular effects or decisions.[222]

Even under the most negative assessment of legislative capacities, however, there are reasons to believe that state legislatures would delegate less and oversee more lawyer regulation than do state supreme courts. As noted above, state legislatures have less incentive to curry favor with lawyers, and the main job of state legislatures is legislating, so control of lawyer regulation would not naturally take a back seat, as it does in the judiciary to their primary job of adjudication.[223]

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[221] *See* Christopher R. Drahozal, *Preserving the Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. R. 233, 247 (1999) (elucidating congressional difficulties in oversight and reliance on "fire alarm" oversight, *i.e.*, waiting for affected parties to raise fire alarm to legislator of agency gone awry); Wilson, *supra* note 43, at 388-89 ("By and large, the policies of regulatory commissions are not under the close scrutiny or careful control of either the White House or of Congress simply because what these agencies do has little or no political significance for either of these institutions.").

[222] *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 57-61 (1982) (enumerating legislative incentives to delegate (and overdelegate) authority to agencies); David Schoenbrod, *Delegation and Democracy: A Reply to my Critics*, 20 CARDOZO L. REV. 731, 740-41 (1999) (arguing that delegation "permits legislators to claim much of the credit for the benefits of the laws but shift to the unelected agency officials much of the blame for the inevitable costs and disappointments when the agency fails to deliver all the benefits promised"). Note that this process of "overdelegation" has been followed in the legislative approach to governing professions other than law. Most legislatures create governing boards—typically made up of members of the profession itself as well as members of the public—to oversee the nuts and bolts of regulating the profession. *See* WILBERT E. MOORE, THE PROFESSIONS: ROLES AND RULES 124-27 (1970); BENJAMIN SHIMBERG ET AL., OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 14-15 (1973).

[223] *See supra* notes 140-59 and accompanying text. Nevertheless, interest group theory predicts that legislative attention to lawyer regulation would wax and wane depending on the salience of the issues, the organization of antilawyer interests, and the existence of any entrepreneurial politicians. *See* Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 89, 89-106 (1986) (elucidating how latent preferences of unorganized voters can play important role in influencing political outcomes through entrepreneurial politicians); Wilson, *supra* note 43, at 369-70 (expatiating on circumstances that create interest-group politics in comparison to entrepreneurial politics). Thus, assigning lawyer regulation to state legislatures would not guarantee great legislative attention, and interest likely would remain relatively low.

b. Institutional Expertise. At first blush, state legislatures would appear to have a substantial disadvantage in institutional expertise. A substantial proportion of state legislators are nonlawyers. When arguing against legislative oversight, critics often stress the complexity of regulating the legal market and the substantial expertise advantage of state supreme courts.[224]

Theorists of agency capture have long noted that a lack of legislative expertise tends to result in more agency capture, because the legislature has to rely upon experts for assistance, and more often than not these experts are lobbyists who come from the regulated industry itself.[225] State legislatures, with their shortened legislative sessions and limited staff, may be especially susceptible to these difficulties.[226]

Nevertheless, there are reasons to believe that concern over legislative expertise on lawyers is overblown. First, although not a majority, many lawyers serve in state legislatures throughout the country.[227] These legislators should be able to provide some level of knowledge and expertise without relying wholly on the regulated interest.

Second, it is important to define the exact area of expertise at issue. State supreme courts certainly offer more expertise in the

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[224] *See, e.g.*, Schneyer, *supra* note 87, at 41:

> The view that legislatures and executive-branch agencies are better occupational rulemakers than either the judiciary or a peak professional association, however sound as a generalization, is not necessarily sound when it comes to setting standards for law practice. The judiciary's expertise, its interest in the integrity of the legal process, and its legitimate need for independence from the "political" branches must be considered."

Id.; MCKAY REPORT, *supra* note 11, at 1-8 (stating argument for judicial control of lawyer regulation).

[225] For a full explanation of the interaction among complexity, expertise, and public salience, see MARC ALLEN EISNER ET AL., CONTEMPORARY REGULATORY POLICY 28-31 (2000). *See also* James Q. Wilson, *Introduction*, *in* THE POLITICS OF REGULATION, at vii-viii (1980) (submitting that regulation frequently arises out of "a shadowy world of powerful lobbyists, high-priced attorneys, and manipulative 'experts' ").

[226] *See* MALCOLM E. JEWELL, THE STATE LEGISLATURE 95 (2d ed. 1969) (detailing that in state legislatures "[l]obbyists are a vital part of the process"); KEEFE & OGUL, *supra* note 193, at 296-98 ("[T]he capacity of the legislature to resist the pressures of organized interests is likely to depend on its ability to gather and analyze information independently of other sources.").

[227] *See supra* notes 203-04 and accompanying text.

legal field from the lawyers' point of view because they are all former practicing lawyers. However, state supreme courts generally lack expertise on being a client of legal services or being a participant (as a plaintiff, defendant, witness, or juror) in the legal system. These areas of expertise are equally valid and necessary in regulating the legal market. In fact, given the natural propensity for lawyers and bar associations to lobby for regulation favoring their interests, an expertise in the legal market from the consumer's point of view may be more valuable, because the organized lawyer lobby will always be present and active, and consumers are less likely to be involved.

Third, while state justices surely have expertise in regulating the activities of lawyers within the courtroom, they have no particular expertise in the work of lawyers outside the courtroom, *e.g.*, lawyers involved in transactional, tax, or trusts and estates practices. Consider the persistent cries that lawyer regulation addresses only a narrow portion of legal practice.[228]

Lastly, it is worthwhile to note that regulating lawyers is not rocket science. State legislatures certainly can handle debates over the unauthorized practice of law or the scope of lawyer confidentiality without complicated or technical explanations.[229] Therefore, the

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[228] *See, e.g.*, Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1188 (1995) ("Model Rules still represent an ethics for lawyers who are presumed to be engaged in a generic practice, with a focus on litigation—even transactional problems are analyzed with an assumption of the adversary model."); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 45-50 (1998) (arguing for separate regulation of bankruptcy lawyers because of relative inattention of lawyer regulators and inapplicability of current regulation).

[229] These issues are near and dear to lawyers' hearts, so it is natural for lawyers to claim that uncooperative legislators simply do not and cannot understand. As an example, consider Senator Arlen Specter's effort to widen lawyer disclosure requirements in the 1980s and the ABA's successful defeat of the bill, partially on grounds of institutional competence. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 713-14 (1989). Frequently a claim that a legislature does not "understand" is not really a claim of institutional competence; it is a claim of institutional antipathy. Senator Specter (himself a lawyer) surely understood the meaning of lawyer confidentiality and disclosure; he simply did not value them the way that bar associations and practicing lawyers did. Furthermore, institutional competence alone cannot determine what policies are decided by legislatures or by courts. For example, Congress and state legislatures actually do regulate areas as complex and diverse as rocket science and tax law, both subject areas that seem more challenging than lawyer regulation. Moreover,

problem of legislative competence over lawyer regulation is less acute than generally thought.

B. FEDERAL LEGISLATIVE OVERSIGHT

There have been periodic calls for federal legislative oversight of lawyer regulation.[230] Although the United States Congress shares many of the strengths and weaknesses of state legislatures as a lawyer regulator, there are some important differences.

Logistically, Congress has a much better chance of successfully displacing state supreme courts as the primary lawyer regulator. State legislatures likely would fail because state supreme courts have regularly invalidated state legislative actions regulating lawyers under the inherent powers doctrine.[231] Since the inherent powers doctrine is generally based upon state supreme court readings of state constitutions, any changes would require state constitutional amendments or a drastic reversal of interpretation by state supreme courts, which are both substantial logistical barriers. Congress, by comparison, could simply pass national legislation to regulate lawyers under the Commerce Clause[232] and remove state

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consider the process of "mystification," the legal and judicial habit of cloaking relatively simple concepts in intimidating legalese. Wolfram, *supra* note 132, at 625-30.

[230] *See* Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125, 125-27 (1991) (predicting federal regulation of lawyers); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 379-96 (1994) (arguing that Congress should take control of legal ethics). *See generally* Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on The Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473 (1995) (arguing for centralized approach to regulation of lawyers in federal system); Linda S. Mullenix, *Multiforum Federal Practice: Ethics and* Erie, 9 GEO. J. LEGAL ETHICS 89 (1995) (noting difficulties in regulating multiforum federal practice). *But see generally* H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997) (arguing against any federalization of legal ethics). These calls have resulted from frustration with the state-by-state regulation, particularly with the inconsistency within the federal courts, and not from a systematic institutional analysis.

[231] For examples of state supreme courts invalidating state legislative actions under the "inherent powers" doctrine, see Alpert, *supra* note 17, at 543-51; Carl Barr, *Judicial Activism in State Courts: The Inherent Powers Doctrine*, *in* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 129-49 (Mary Cornelia Porter & G. Alan Tarr eds., 1982); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 687 (1994).

[232] The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3.

supreme courts from the calculus under the Supremacy Clause.[233] Although such a move might not prove constitutional under the Supreme Court's current reading of the Commerce Clause,[234] it is more likely to be sustained than any state legislative forays into lawyer regulation.

The question of whether Congress would prove more or less open to lawyers or to the public is more complex. It is clearly harder and more expensive to organize to lobby Congress than a state legislature. The effect of this difficulty on the equilibrium between lawyers and the public, however, is hard to assess. Some have focused on the increased costs of congressional lobbying for the regulated industries and the relative ease of lobbying state legislatures, and theorized that interest groups run rampant and capture is more prevalent in the states.[235] Others have focused on the challenge of organizing the public before Congress and argued that capture is more prevalent on the federal level.[236]

One reason to believe that state legislatures are more open to the public on issues of lawyer regulation is the relative frequency of state legislative acts against the interests of lawyers.[237] Another

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[233] U.S. CONST. art. VI, § 1, cl. 2.

[234] A full discussion of this issue is beyond the scope of this Article, but Professor Moulton offers some insight into the potential constitutional difficulties of such a move. *See* Moulton, *supra* note 164, at 117-23.

[235] *See, e.g.*, THE FEDERALIST No. 10 (James Madison) (deriding states as subject to factionalization, and arguing that "[t]he influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other states"); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1923-24 (2001) ("State and local governments are highly vulnerable to the rent-seeking behavior of factional coalitions."); Rossi, *supra* note 219, at 1223 (noting that since time of Founding, state legislative process has been described as prone to faction, far more so than federal lawmaking process). *But see* Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 574-96 (1997) (defending factions or special interests).

[236] *See, e.g.*, Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1334 (1994) ("Private interest legislation is common today, much more so than in 1787, and more common at the national level than among the states—the opposite of Madison's belief about what would happen."); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1502-03 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 921 (1985) (arguing that, because of interest group power at federal level, Madison's solution in THE FEDERALIST No. 10 has become "Madison's Nightmare").

[237] *See infra* notes 287-92 and accompanying text.

reason to disfavor Congress is the much higher ratio of lawyer to nonlawyer legislators,[238] increasing the likelihood that Congress would be more empathetic to lawyers than state legislatures.

In addition, institutional capacity and character is difficult to assess authoritatively. As noted above, state legislatures generally have more extensive powers at their disposal for oversight of agency actions, but they also generally have fewer resources, smaller and less active staffs, and fewer legislative days to utilize their tools.[239] Nor is Congress a model of legislative oversight; the entire study of slack and agency capture was developed based on the federal bureaucracy.[240] Congress also has some advantages in institutional expertise, namely larger staffs and research capacities, and a higher percentage of lawyer-legislators. Correspondingly, however, the consumer or legal client perspective may be neglected.

IV. DEREGULATION (OR MARKET CONTROL)

An alternative to either judicial or legislative regulation and delegation is deregulation. The market would govern the provision of legal services, and common-law tort remedies would compensate victims for any injuries. Students of institutional analysis will recognize this alternative as half of the more typical comparison between legislatures and courts, which considers whether common-law courts or legislative regulation can better handle a perceived market failure.[241] These comparisons also generally contrast the

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[238] *See* KEEFE & OGUL, *supra* note 193, at 117 (stating that in 1987-88, 42% of United States Representatives and 62% of United States Senators were lawyers, in comparison to 20% state legislators in 1979).

[239] *See supra* note 226 and accompanying text. Note that state legislatures are becoming more "professional," meaning longer legislative sessions and more permanent staff. *See* ALAN ROSENTHAL, GOVERNORS AND LEGISLATURES: CONTENDING POWERS 41-46 (1990); Samuel S. Patterson, *American State Legislatures and Public Policy*, *in* POLITICS IN THE AMERICAN STATES 143-48 (Herbert Jacob & Kenneth N. Vines eds., 3d ed. 1976); Alan Rosenthal, *The State of State Legislatures: An Overview*, 11 HOFSTRA L. REV. 1185, 1187-92 (1983).

[240] For more recent assaults on Congress's lack of oversight and regular overdelegation, see FISHER, *supra* note 220, at 34-161; SCHOENBROD, *supra* note 220, at 82-96. For some of the earliest and most influential work, see LOWI, *supra* note 42, at 125-27.

[241] *See* KOMESAR, *supra* note 16, at 153-95 (comparing courts as adjudicators and legislatures as legislators on issues of food safety, tort law, and tort reform); Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1249-54 (2000) (comparing courts and legislatures on market failures in gun

efficacy of legislative *ex ante* regulation with judicial *ex post* compensation.[242] The oddity of the earlier court-to-legislature comparison is that courts and legislatures are compared as legislators; this Section considers the possibility of eliminating *ex ante* regulation and allowing the courts to regulate the market as *ex post* adjudicators.

Most economists, administrative law scholars, and political scientists begin with the assumption that an unregulated market with *ex post* liability is the norm and that *ex ante* regulation should be applied only in response to identifiable and otherwise irremediable market failures.[243] This preference is defended partially because allowing *ex post* repayment of injuries that already have occurred is easier than trying to predict and preempt injuries,[244] partially because *ex ante* regulation can be accompanied by agency capture and rent-seeking[245] and partially because *ex ante* regulation is more likely to over- or under-react to the possibility of injury.[246]

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industry). *See generally* Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591 (1998) (contrasting institutions that could govern takings).

[242] *See, e.g.*, POSNER, *supra* note 34, at 565-71 (considering efficiency of court-made rules versus legislative rules); Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1217-23 (1996) (discussing advantages of *ex ante* regulation); Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1263-81 (1998) (considering both *ex ante* and *ex post* approaches to damages caused by tobacco); Jeffrey J. Rachlinski, *Regulating in Foresight Versus Judging Liability in Hindsight: The Case of Tobacco*, 33 GA. L. REV. 813, 813-15 (1999) (same).

[243] Utilizing the market as the baseline is preferable to *ex ante* regulation for three reasons. First, there has long been a general American preference for the free market over government regulation. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 105-08 (1991). Second, even the strongest modern defenders of regulation do not argue that regulation should replace the free market on the whole. *See generally* SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA, THE REFORM OF THE AMERICAN REGULATORY STATE (1992); SUNSTEIN, *supra* note 29. Lastly, in light of the legislative difficulties raised by interest group theory, many naturally shy away from any attempts at *ex ante* regulatory solutions. *See* POSNER, *supra* note 34, at 572-75.

[244] *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 3-39 (1993) (discussing systematic difficulties involved in predicting and responding to risk); PAUL SLOVIC, THE PERCEPTION OF RISK 390-412 (2000) (same).

[245] *See supra* notes 41-52 and accompanying text.

[246] *See* W. KIP VISCUSI, RATIONAL RISK POLICY 98 (1998) (presenting examples of overreactions to risk); *see also* BREYER, *supra* note 244, at 23-28 (listing possible underreactions).

In the legal market, deregulation would involve eliminating entry regulation and conduct regulation, and relying on *ex post* legal malpractice liability to protect and recompense injured consumers. The elimination of conduct regulation—in the form of rules and codes of conduct—actually would have a surprisingly small effect on the legal market. Many of the ABA's rules are restatements of what other sources of law require, and these would be unaffected by deregulation.[247] Some of the rules are plainly aimed at decreasing competition, such as restraints on advertising,[248] client

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[247] For example, a number of proscriptions specifically refer to outside sources of law in defining a lawyer's obligations. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (1998) (stating that lawyer must not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value"); MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (1998) (stating that lawyer must not "offer an inducement to a witness that is prohibited by law"); MODEL RULES OF PROF'L CONDUCT R. 3.5(a), (b) (1998) (stating that lawyer must not "seek to influence a judge, juror, prospective juror or other official by means prohibited by law [or] communicate ex parte with such a person except as permitted by law"); MODEL RULES OF PROF'L CONDUCT R. 4.4 (1998) (stating that lawyer must not "use methods of obtaining evidence that violate the legal rights of' third person). Other regulations already may be covered by existing laws dealing with suborning perjury or obstruction of justice. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (1998) (stating that lawyer must not "offer evidence that the lawyer knows to be false"); MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (1998) (stating that lawyer must not "falsify evidence, counsel or assist a witness to testify falsely"). Still other regulations parrot court procedural rules like Rule 11. *Compare* FED. R. CIV. P. 11(b)(2) (outlining that signature on pleading certifies that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"), *with* MODEL RULES OF PROF'L CONDUCT R. 3.1 (1998) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."). For a fleshed out version of this argument, see Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO STATE L.J. 243, 255-56 (1985) (asserting that many Model Rules cover little more than what already would be required by common law covering contracts, and fiduciary and agency relationships).

[248] The ABA has a long and checkered history of utilizing ethical rules to suppress competition and control the more entrepreneurial elements in the bar. The most glaring example is lawyer advertising. The ABA initiated its lawyer regulation project with the 1908 Canons of Professional Ethics ("Canons"). *See* ABA CANONS OF PROFESSIONAL ETHICS (1956), *reprinted in* ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 311, 320 (1997) [hereinafter ABA CANONS] (providing Canon 27, which states that it is unprofessional to solicit employment through advertisements). Although the Canons were based upon an 1887 Alabama Bar Association code that allowed attorneys advertising, *see* 31 A.B.A. REP. 569 (1908), *reprinted in* Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME L. REV. 483, 496-98 (1932), the Canons explicitly barred lawyer advertising. ABA CANONS, *supra*, at 320. *Compare* 31 A.B.A. REP. 582 (1908) (printing canon barring lawyer advertising), *with* ALA. STATE BAR ASS'N CODE OF ETHICS

solicitation,[249] client referrals,[250] statements concerning lawyer credentials,[251] law firm affiliation,[252] fee regulations,[253] and bans on unauthorized practice in another jurisdiction or assisting in unauthorized practice.[254] The elimination of these rules likely would increase market competition and lower prices. As for the remaining

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(1887), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS 356 (1953) (stating that newspaper ads are proper). Canon 27 on advertising and solicitation was amended in 1937, 1940, 1942, 1943, 1951, and 1963. DRINKER, *supra*, at 25-26; Walter P. Armstrong, *A Century of Legal Ethics*, 64 ABA J. 1063, 1066 (1978). Thus, if importance is measured in redrafting, the ABA certainly considered the prohibition on advertising its most critical and beloved regulation. The only other changes were to Canon 43 in 1942 and Canon 46 in 1956. Armstrong, *supra*, at 1066. In 1977, the Supreme Court struck down a later regulatory ban on advertising, *see* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1969), in *Bates v. State Bar*, 433 U.S. 350, 359-85 (1977). Nevertheless, lawyer advertising remains highly regulated. *See* MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.2, 7.3 (1998); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1969). These rules are more stringent than the typical regulations to protect consumers from misleading advertising or fraud. *See* Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 580-81 (1998) (arguing that lawyer advertising regulation is more stringent than some other advertising restraints deemed unconstitutional by Supreme Court).

[249] MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.3 (1998); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101, 2-104 (1969).

[250] MODEL RULES OF PROF'L CONDUCT R. 7.2(c) (1998); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101, 2-103(B) (1969).

[251] MODEL RULES OF PROF'L CONDUCT R. 7.4 (1998); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-105(A) (1969).

[252] MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.3 (1998); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-102 (1969).

[253] Until 1975, some bar associations directly fixed prices with minimum fee schedules. *See* ABEL, *supra* note 8, at 118-19. The Supreme Court struck down these practices in 1975. *See* Goldfarb v. Va. State Bar, 421 U.S. 944, 973 (1975) (holding anticompetitive lawyer conduct is within reach of Sherman Act). The current Model Rule 1.5 is more circumscribed, but still allows a lawyer to consider "the fee customarily charged in the locality for similar legal services" in setting a price, MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(3) (1998); *accord* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B)(3) (1969), which sounds like an invitation to price-fix. Further, Rule 1.5 contains so many allowable variables for setting a fee that the rule actually offers little protection to clients or guidance to lawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (1998) (listing eight factors for determining whether fee is "reasonable"); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B) (1969) (same). The draft version of Rule 1.5, however, did offer clients some possible protection from excessive or unforeseen fees, and the first several drafts required a written fee agreement. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 695 (1989). Interestingly, the draft rule requiring a written fee agreement was pressed by the only nonattorney member of the Commission that drafted the Model Rules. *Id.* Following attorney objections, the standard was lowered to "preferably in writing," MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (1998), which actually offers no client protection.

[254] MODEL RULES OF PROF'L CONDUCT R. 5.5 (1998); MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101 (1969).

rules, overall enforcement is so lax that some have argued that malpractice insurers and malpractice claims are *de facto* dictating lawyer regulation.[255] Further, because the rules are increasingly being applied as proof of the minimum standards of lawyer behavior in malpractice actions,[256] much of the substance of the rules would be enforced by the courts.[257]

The biggest change would be the elimination of entry standards. While the malpractice standards for "practicing law" likely would remain the same, there would be a sea change in who was allowed to practice law. Although free market entry seems unimaginable to a society that has been steeped in a rigorous bar exam and three years of accredited law study for much of the last century, open entry with *ex post* court control was essentially the system during the nineteenth century.[258]

The advantage of such a system is obvious in light of interest-group analysis, because the organizational and political advantages of lawyers' and the public's collective action problems are minimized when the political system is much less involved. Consequently, the access equilibrium between lawyers and the public is neutralized, and policy is not set by a centralized government institution, but rather through a myriad of market transactions and the common-law courts. The question of lawyer access is not eliminated altogether, however, since courts would still judge the behavior of lawyers, and the connections between lawyers and judges still could result in conscious or unconscious favorable treatment of lawyers.

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[255] *See, e.g.*, George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 306-07 (1997); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 101-02 (1995); Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 867-68 (1996).

[256] *See* Peter A. Joy, *Making Ethics Opinions Meaningful: Towards a More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 316 & n.9 (2002) (observing that courts rely "on ethics rules for enforcing clients' rights against lawyers in motions to disqualify or professional malpractice actions"); Wolfram, *supra* note 17, at 215 & n.36 (submitting that courts have applied "newly-sharpened lawyer code rules as an appropriate measure or articulation of pre-existing but more general grounds of liability" in malpractice actions).

[257] Consider also the continuing effect that nonlegal attorney norms would play in replacing underenforced conduct regulations. *See* Wendel, *supra* note 6, at 1955-85 (describing effects of non-legal norms on attorney behavior).

[258] *See supra* notes 177-82 and accompanying text.

Consider, for example, whether the procedural peculiarities of legal malpractice actions are the result of such influence.[259] Furthermore, because filing a lawsuit is extremely expensive and risky, only the wealthy or parties who were egregiously harmed likely would bring suit.[260]

The most vociferous objection to such a system would be the theoretical harms inflicted on unsuspecting clients. Bar associations have long hailed entry regulation as a bulwark against client ignorance; without a bar examination and law school, clients could not differentiate between the good, the bad, and the shysters.[261] Nevertheless, this argument is not the show-stopper that it appears to be.[262] First, although quite difficult and expensive, current entry standards are remarkably poor indicators of any particular competence to actually practice law. Take for example, the skills that bar passage guarantees to a client.[263] Can a newly minted lawyer necessarily file a complaint and prosecute a law suit, draft a will, or defend a complex antitrust suit? Law school and bar passage

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[259] For a discussion of malpractice procedures, see *supra* notes 153-59 and accompanying text.

[260] *See* Cross, *supra* note 68, at 360-68 (describing barriers to public participation in legal system, as follows: expense of litigation, standing, and availability of precedent purchasing); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1314-22 (1999) (detailing structural and doctrinal biases of courts). If the market were deregulated, some of the expense of litigation might decline.

[261] *See, e.g.*, Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S.C. L. REV. 609, 611 (2001) ("Bar exams are used to screen out those who are not competent to practice. While not perfect, the bar exam represents the state high courts' commitment to protecting the public by requiring potential lawyers to show evidence of their legal competence."); J. Kirkland Grant, *The Bar Examination: Anachronism or Gatekeeper to the Profession?*, 70 N.Y. ST. B.J. 12, 12 (1998):

> The function of the Bar Exam is ostensibly to make sure that only competent individuals are permitted to practice law. The Bar Exam was first used as a device to determine competence in the interest of protecting consumers when virtually anyone who "studied law" could be qualified as a lawyer.

Id.; Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 774, 778 (reviewing COMM'N ON PROFESSIONALISM, AM. BAR ASS'N, IN THE SPIRIT OF PUBLIC SERVICE (1986)).

[262] This is a compressed version of a broader argument against current entry standards. *See* Barton, *supra* note 7, at 436-50 (discussing protection of public from incompetent practitioners).

[263] Client protection must be measured from the day of bar passage, but the skills and experience that most lawyers gain in practice are not guaranteed under the entry standards and are not guaranteed to any clients based upon state licensing.

guarantees a minimum of intelligence and ardor, but little in the way of concrete skills.

Second, there is little evidence that most clients are ignorant of the legal market. To the contrary, a substantial portion of legal services are purchased by savvy entities like corporations, governments, or businesses.[264]

Lastly, there are much less expensive and less obtrusive possibilities for client protection. Typically, the response to an information asymmetry is to provide more information, not wholesale regulation of the market.[265] Possibilities could include certification rather than licensing, or a public clearinghouse of complaints or suits filed against lawyers. In fact, eliminating the single (and relatively unhelpful) credential of bar passage likely would create more information for clients as lawyers struggled to differentiate themselves in a more competitive market.[266] For this reason, the need to protect the public from incompetent lawyers, while a factor in those segments of the market where lawyers offer services to individuals (*e.g.*, personal injury, criminal law,[267] and personal

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[264] *See* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 139 (2001):

> The representation of corporations alone represents a significant percentage of the work of all lawyers, and if one adds to that all the work lawyers do representing partnerships (and, more recently, limited liability companies), labor unions, formal and informal associations, governments and classes, there can be little question that the representation of entities is at the heart of what many, if not most, lawyers do.

Id.; *see also* Marc A. Galanter, *"Old and In the Way": The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1088-90 (citing raft of statistics and concluding that "[m]ore and more of the legal world is devoted to serving organizations rather than individuals").

[265] Information asymmetry denotes a situation where a buyer lacks the expertise to gauge whether a seller's product is good, bad, or dangerous. For a description of less drastic responses to information asymmetry, see Barton, *supra* note 7, at 446-47.

[266] This differentiation is already occurring via the explosion in lawyer advertising, and the move toward certifications above and beyond bar passage. *See* David A. Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 461 (1997) (postulating on effects of increased lawyer advertising); John J. Watkins, *Lawyer Advertising, the Electronic Media, and the First Amendment*, 49 ARK. L. REV. 739, 739 (1997) (commenting on growth in lawyer advertising). *See generally* Judith Kilpatrick, *Specialist Certification for Lawyers: What is Going On?*, 51 U. MIAMI L. REV. 273 (1997) (describing current state of attorney certification).

[267] See Barton, *supra* note 7, at 462-63 (responding to argument that deregulation of entry would harm indigent criminal defendants).

bankruptcy), is not an endemic problem within the market, and current entry standards do not, in fact, offer much protection.

Nevertheless, there is the following compelling reason not to eliminate entry standards altogether: courts rely on licensed practitioners with a uniform background, and at least some guaranteed skills, to file and pursue cases.[268] If the legal market were deregulated and anyone could file or maintain lawsuits before the courts, the administrative burden would be crushing, and the courts likely would grind to a halt. Courts are already leery of, and unfriendly to, *pro se* litigation.[269] Deregulation would exponentially multiply the problems involved in educating lay-people in court procedures, etiquette, and legal reasoning.[270]

A further difficulty is logistical. Remember that bar associations invariably propose more and greater entry standards as a response to any and all perceived problems within the profession.[271] The flip side of this effect explains why any occupation will fight deregulation tooth and nail. If entry barriers suddenly were eliminated or drastically eased, existing practitioners could not recoup their own

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[268] I have previously argued that the needs of the courts are the only compelling argument for entry regulation. Barton, *supra* note 7, at 450-52, 456-60. Nevertheless, current entry regulations are poorly suited to meet this justification; graduation from an accredited law school and passing the bar does not guarantee any level of proficiency in efficiently filing and pursuing lawsuits or appeals. This may explain the judicial dissatisfaction with many of the lawyers who appear before the courts. *See supra* notes 86-89 and accompanying text.

[269] *See* Adam H. Bloomenstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289, 308-09 (1988) (discussing imposition of Rule 11 sanctions against *pro se* litigants); Paul J. Liacos & Maureen McGee, *Where Does the Preservation of the Right to Justice Begin?*, 81 MASS. L. REV. 121, 127 (1996) (noting courts' "hostile attitude towards *pro se* litigants" and its effect on low income women).

[270] This assumes that the current structure of, and resources dedicated to, the courts are fixed. Although the topic is beyond the scope of this Article, a court system could be designed to minimize the judiciary's reliance on lawyers in processing legal disputes. Consider, for example, the system of administrative law judges that governs appeals of agency decisions on disability or unemployment insurance. For a description of the operations and procedures of administrative law judges, see Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571, 1573-88 (2001); F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?*, 50 BAYLOR L. REV. 65, 67-77 (1998).

[271] This is because the burden of the regulation is borne by new entrants and not existing lawyers, and (not coincidentally) current lawyers receive a windfall. Because the profession is harder to join, and existing lawyers are already members, competition is suppressed and earnings are boosted. *See supra* note 76 and accompanying text.

investment in passing the entry regulations and would suffer a substantial loss.[272] Accordingly, the political feasibility of deregulation is even more challenging than a transfer in regulatory power from the courts to legislatures because virtually all licensed attorneys would vociferously oppose free market entry.

V. PROPOSED SOLUTION

Nobel Laureate Ronald Coase has noted that the three possible institutions for organizing social relations—markets, firms, and governments—are all "more or less failures."[273] There is no selection among the judiciary, legislatures, or the markets that is going to completely overcome the public's general apathy toward lawyer regulation or eliminate the dominant power of bar associations and lawyers in the process. Nevertheless, among the various institutions considered, one may do the *least* imperfect job of governing the legal market and limiting the overweening influence of bar associations and lawyer lobbyists.

First, is regulation necessary at all? If the market could function without involving any centralized government authority, the problems associated with interest group theory could be minimized. Because of the needs of the American courts, however, some regulation of entry and conduct is necessary.[274]

The next question is which institution fares best in our two main categories, propensity for capture and institutional capacity and character. Legislatures, while typically criticized for their accessibility to organized special interests, would fare better with lawyer regulation than judiciaries. The multiple institutional, political, and personal connections between the judiciary and the lawyers they are ostensibly regulating, as well as the natural inaccessibility of judges to the public, virtually guarantees lawyers a stranglehold over every aspect of lawyer regulation.

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[272] Barton, *supra* note 7, at 443-44.

[273] Ronald H. Coase, *The Regulated Industries: Discussion*, 54 AMER. ECON. REV. 194, 195 (1964). The title of Neil Komesar's groundbreaking work on institutional analysis—*Imperfect Alternatives*—is also fitting. *See generally* KOMESAR, *supra* note 16.

[274] *See supra* notes 86-89 and accompanying text.

Legislatures also will be open to lawyer lobbying, just as they are open to lobbying by any wealthy and organized interest. Nevertheless, the unique access that lawyers enjoy before state supreme courts will be eliminated, and the opportunities for public input will be greatly magnified. On the whole, this should result in more public-spirited regulation of lawyers and limit the opportunities for lawyer rent-seeking.[275]

In addition, legislatures have an advantage in their capacity for delegation, but a disadvantage in institutional expertise. Both legislatures and state supreme courts are very busy institutions that have strong incentives to delegate as much of their work as possible, especially when a powerful interest like a bar association calls for delegation. State supreme courts, however, have an institutional aversion to broad policymaking and treat lawyer regulation as a second tier responsibility, resulting in inordinate levels of delegation and slack. Legislatures—while frequently pilloried for their efforts at delegation—are more experienced at overseeing delegation, and have more tools available to punish erring agencies.

Institutional expertise is the one area where state supreme courts have an advantage, although it is not as great as one might think. Defenders of the role of the courts in lawyer regulation regularly rely upon judicial expertise in the legal market and in the needs of the courts.[276] While it is true that judges, as former lawyers, have a better understanding of the legal market than the typical legislator, this expertise cuts both ways in that judges understand the market from two perspectives, as former lawyers and as judges. The perspectives least likely to be represented before regulators—those of clients and the public at large—are not natural areas of judicial expertise, and some students of institutional culture might argue that judges are uniquely incompetent to understand and represent these perspectives. Legislatures, by

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[275] Note the use of the word "limit," not "eliminate." Barring deregulation, there is no way to fully eliminate the organizational and political advantages that bar associations possess, and even deregulation suffers from the expense and uncertainty of using the courts to protect the public *ex post*.

[276] *See, e.g.*, Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 771-72 (2001) (describing courts' justifications for judicial control of lawyer regulation); Wilkins, *supra* note 13, at 856-57 (noting that "courts cannot function without lawyers," and therefore courts should have limited regulatory power over lawyers).

contrast, are likely to have both lawyers and clients among their ranks and will likely better represent all of the affected constituencies in the legal market.

Moreover, even the gap in expertise over the needs of the courts need not bar legislative control, because legislatures already have some control over many aspects of court operations (including their budgets) and judges can always lobby legislatures over these issues.[277] Lastly, a great portion of lawyer regulation is not concerned with the operations of the courts or the filing and maintaining of lawsuits, and, in these areas, the court's expertise is less germane.

In sum, an institutional comparison favors legislative control of lawyer regulation. The question of whether it should be state legislatures or Congress depends upon whether one believes that organized interests are more or less powerful on the state level or the federal level,[278] one's belief as to the advantages of federalism,[279] and constitutional issues.[280] Nonetheless, state legislatures appear preferable because they have fewer lawyer-legislators, more

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[277] Alternatively, if the regulation truly represents a substantial blow to the operations of the courts, it could be struck down under the inherent powers doctrine. *See* Crystal, *supra* note 276, at 771-72 (stating that courts might be compelled to act to maintain basic functions). An overly aggressive version of the inherent powers doctrine, of course, would defang any legislative efforts to reform lawyer regulation. *See* WOLFRAM, *supra* note 15, at 27-31 (explaining and critiquing most expansive versions of inherent powers doctrine).

[278] The power of organized interests vis-à-vis the public at large in either state legislatures or Congress will affect the access equilibrium, and therefore the type of regulation that results. Given the vast differentiation among the various states, the great range in the numbers of lawyers in state legislatures (the South seems to have a much higher proportion of lawyer legislators than the West, *see* LEGISLATORS' OCCUPATIONS, *supra* note 203, at 32), and the differences in regional attitudes, it is likely that there would be great variation among the states if their legislatures controlled.

[279] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 524 (1995) (extolling virtues of having many states attempting many solutions to common problems).

[280] Many state supreme courts have decided that lawyer regulation is, as a matter of state constitutional law, under the exclusive control of the supreme court, and a power transfer to the state legislature would require a change in court precedent or a constitutional amendment. *See* WOLFRAM, *supra* note 15, at 23-24 ("[A]ny attempt by a coordinate branch of government to trench on that prerogative of the judicial branch is unconstitutional."). Similarly, federal control might run afoul of the Supreme Court's recent Commerce Clause jurisprudence. *See supra* notes 232-34 and accompanying text.

legislative tools for oversight, and generally exhibit a more populist spirit.

Naturally, there are several objections to this proposal. The most obvious objection is the less than stellar job that state legislatures have done with the regulation of other professions and occupations. Walter Gellhorn, among others, has humorously criticized some of the most glaring excesses of legislative licensing schemes,[281] and many have noted that professions other than law have had great success in controlling and guiding their own regulation toward rent-seeking.[282]

Legislatures have by and large responded to organized professions exactly as interest group theory predicts; they have provided helpful and protectionist regulation to occupations up to the point where the benefits to the profession are equal to the public's potential outrage.[283] Typically, this means that professions are very successful before legislative bodies, and if state legislatures regulated lawyers, bar associations also certainly would prove successful.

The comparative question is whether bar associations and lawyers would have *more* success before legislatures than they

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[281] *See* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 10-19 (1976) ("Illinois purportedly tests a would-be barber's knowledge of, among other things, physiology, electricity, anatomy, and barber history."); *see also* JETHRO K. LIEBERMAN, THE TYRANNY OF THE EXPERTS: HOW PROFESSIONALS ARE CLOSING THE OPEN SOCIETY 14-17 (1970) (listing silly licensing schemes for manicurists, egg graders, and other occupations).

[282] *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1982) (crushing political and economic case for all types of occupational licensure); Ira Horowitz, *The Economic Foundations of Self-Regulation in the Professions*, *in* REGULATING THE PROFESSIONS 3, 4-16 (Roger D. Blair & Stephen Rubin eds., 1980) (suggesting that self-regulation increases professionals income beyond that of perfectly competitive market). As a further example, consider the initial success of accountants in fending off calls for stringent regulatory changes following the Enron debacle. *See* Stephen Labaton & Richard A. Oppel, Jr., *Enthusiasm Waning in Congress for Tougher Post-Enron Controls*, N.Y. TIMES, June 10, 2002, at A1. The lobbying power of the American Medical Association ("AMA") is, like that of the ABA, legendary. *See* Peter J. Van Hemel, *A Way Out of the Maze: Federal Agency Preemption of State Licensing and Regulation of Complementary and Alternative Medicine Practitioners*, 27 AM. J.L. & MED. 329, 338 & n.75 (2001) (outlining AMA's largely successful efforts to suppress nontraditional medical practitioners). For an overview of the AMA's legislative agenda, see American Medical Association, AMA in Washington, *at* http://www.ama-assn.org/ama/pub/category/4015.html (last visited Apr. 9, 2003).

[283] *See* S. David Young, THE RULE OF EXPERTS, OCCUPATIONAL LICENSING IN AMERICA 15-80 (1987) (arguing that occupational licensing is more responsive to licensed entities than public).

currently do before state supreme courts. Aside from the above institutional comparison, the history of legislative and judicial control of lawyer regulation suggests that legislatures would take a more populist approach to the regulation of lawyers. Consider the universal legislative slackening of entry and conduct requirements during "Jacksonian democracy" and throughout the nineteenth century, while legislatures were in control.[284] The critical role that state supreme courts, in conjunction with bar associations and the American Association of Law Schools, played in creating and maintaining the current, strict regulatory scheme is also telling.[285]

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[284] The criticism of lawyers reached a fever pitch during 1830-1860. *See* STEVENS, *supra* note 81, at 7 ("During the 1830's, the attack on the class of lawyers reached a remarkable pitch."); *see also* CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 511-12 (1966). This was partially in response to criticisms of lawyer elitism, *see* JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? 115-16 (1924); STEVENS, *supra* note 81, at 7, partially due to the influence of "Jacksonian democracy," *see* 2 CHROUST, *supra* note 178, at 156-59; POUND, *supra* note 91, at 236-37, and partially due to the rapid influx of frontier states into the Union, *see* LIEBERMAN, *supra* note 1, at 49; POUND, *supra* note 91, at 225-31; STEVENS, *supra* note 81, at 9; William R. Johnson, *Education and Professional Life Styles: Law and Medicine in the Nineteenth Century*, 14 HIST. OF EDUC. Q. 185, 187 (1974); Philip J. Wickser, *Bar Associations*, 15 CORNELL L. REV. 390, 392-94 (1930). For example, Indiana, Maine, Michigan, New Hampshire, and Wisconsin, expressly abolished any requirements for appearing in their courts. DRINKER, *supra* note 248, at 19 & n.38. Likewise, the states that maintained a bar admission requirement significantly slackened their standards. *See* POUND, *supra* note 91, at 227-28:

> In 1800 a definite period of preparation for admission to the bar was prescribed in fourteen of the nineteen states or organized territories which then made up the Union. In 1840 it was required in but eleven out of thirty jurisdictions. In 1860 it had come to be required in only nine of the then thirty-nine jurisdictions.

Id. In light of this "deprofessionalism," regulation of attorney behavior—by the courts, legislatures, or otherwise—was infrequent. *See* Fannie M. Farmer, *Legal Practice and Ethics in North Carlina 1820-1860*, *in* THE LEGAL PROFESSION, MAJOR HISTORICAL INTERPRETATIONS 274, 350 & n.101 (Kermit L. Hall ed., 1987) (noting that "prior to 1868, no court, so far as the records show, was called upon to disbar an attorney" in North Carolina).

[285] Starting around the turn of the century, state supreme courts began to claim an inherent authority to regulate lawyers. *See* Alpert, *supra* note 17, at 536-43 (describing formulation of theory of judicial control, including restricting legislative power over lawyers). By the 1930s, it was widely understood that courts had an inherent power to regulate attorneys, and the practice was widespread enough that it inspired commentary both for and against the practice. *Compare* Charles A. Beardsley, *The Judicial Claim to Inherent Power Over the Bar*, 19 A.B.A. J. 509 (1933) (arguing against claimed inherent power of courts), *with* Dowling, *supra* note 96, at 635 (listing benefits of inherent powers doctrine). Courts used their powers to regulate both the entry and disbarment of lawyers, *see* Dowling, *supra* note 96, at 636-37, to integrate the bar, *see* MCKEAN, *supra* note 87, at 49, and even to investigate and prosecute the unauthorized practice of law, *see* Dowling, *supra* note 96, at 636-37.

Lastly, although all professions have attempted, with more or less success, to capture the occupational regulatory process, note the peerless success of lawyers in developing and maintaining a relatively undisturbed and self-contained system of "self-regulation."[286]

Moreover, state legislatures have recently passed or proposed a number of lawyer-unfriendly statutes, including Texas's passage of a sunset provision for the Texas State Bar,[287] Arizona's repeal of their unauthorized practice of law statutes,[288] Kentucky's move to allow nonlawyers to practice before administrative agencies,[289] Virginia's decision to allow nonlawyers to perform real estate closings,[290] Florida's and Michigan's consideration of a move to legislative regulatory control,[291] and the California legislature's

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[286] *See* Martyn, *supra* note 87, at 707 ("Thus, unlike other professionals, who are supervised by state regulatory agencies, lawyers remain a virtually self-regulated profession."); Nancy J. Moore, *Entrepreneurial Doctors and Lawyers: Regulating Business Activities in the Medical and Legal Professions*, *in* CONFLICTS OF INTEREST IN CLINICAL PRACTICE AND RESEARCH 171, 181-84 (Roy G. Spece, Jr. et al. eds., 1996) (discussing regulation of medical profession as compared to legal profession, and concluding that legal profession has much more latitude to self-regulate than medical profession); Moore, *supra*, note 87, at 14-16 (opining that legal profession has reached unique heights of self-regulation); Schneyer, *supra* note 87, at 37 ("Self-regulatory institutions have a firmer hold in law than in most occupations.").

[287] *See* Charles Aycock, *President's Opinion*, 63 TEX. B.J. 430, 430 (2000) (noting that Texas "State Bar faces sunset review every 12 years"). Aycock also states that improvements in "[t]he current grievance system [were] developed in response to the Legislature's dissatisfaction with the effectiveness of the disciplinary system in place at that time." *Id.*

[288] *See* Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away*, 34 ARIZ. ST. L.J. 585, 585-95 (2002) (discussing historical background of Arizona legislature's 1985 repeal of its criminal statute barring unauthorized practice of law). Despite the legislature's repeal of the statute, the Arizona Supreme Court has a rule banning the unauthorized practice of law. *See* Pamela Lopata, Comment, *Can States Juggle the Unauthorized and Multidisciplinary Practices of Law?: A Look at the States' Current Grapple with the Problem in the Context of Living Trusts*, 50 CATH. U. L. REV. 467, 478-80 & nn.63-67 (2001) (detailing Arizona's case-by-case approach to defining practice of law).

[289] The Kentucky Supreme Court ruled the statute unconstitutional. Turner v. Ky. Bar Ass'n, 980 S.W.2d 560, 560 (Ky. 1998).

[290] This statute was also ruled unconstitutional. Fears v. Va. State Bar, No. LE-1283-3, 2000 WL 249247, at *11 (Va. Cir. Ct. Mar. 1, 2000).

[291] In 1996, members of the Florida state legislature proposed removing regulation of the bar from the supreme court. *See* John A. Devault, *First, Let's Put the Lawyers Under the Legislature*, FLA. B.J., Jan. 1996, at 8 (reporting with dismay on proposal for legislative control of bar); *see also* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 194 & n.4 (noting introduction of bill in Michigan legislature for lay control of bar and defeat of this effort by bar association and

continuing tussles with its state bar.[292] Much of this legislative activity can be attributed to the overall unpopularity of lawyers[293] and the diminution of lawyer-legislators.[294]

A secondary objection applies especially to state legislatures. In presenting this argument, I have found in certain quarters an almost virulent reaction against the competence of state legislators. In some respects, this is simply a recasting of the expertise objection—state legislators have smaller staffs and shorter legislative sessions—but it seems to involve more than these logistical issues. It is an attack on the intelligence and abilities of state legislators themselves. I have come to refer to this objection as the "yokel" objection to state legislative control. In its most stringent form, this objection lays bare the strong vein of elitism and paternalism that lies behind many of the defenses of judicial control of lawyer regulation,[295] and in fact supports legislative control of lawyer regulation. Bar associations, lawyers, and even law professors rightly fear how state legislatures would handle lawyer regulation because of the animosity that much of the public, and many legislators, feel towards lawyers. Objectors attempt to frame

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state supreme court).

[292] *See, e.g.*, Lisa J. Frisella et al., *State Bar of California*, 17 CAL. REG. L. REP. 203, 203-05 (2000) (listing far-reaching effects of bar enabling statute); Tamara Hill, *Senate Bill 1413: The Answer to Senate Bill 60 Plebiscite and Its Constitutionality Under the Inherent Powers Doctrine*, 27 GOLDEN GATE U. L. REV. 601, 601-04 (1997) (describing one legislative effort to eliminate California's unified bar); Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2598-99 (1996) (noting California legislature's involvement in lawyer discipline and creation of State Bar Court).

[293] *See supra* note 205 and accompanying text.

[294] *See supra* notes 203-04 and accompanying text. Interestingly, some of this legislative activity may be due to the existence of the inherent authority doctrine, because lawyers may not bother to lobby legislatures as vigorously, instead relying on the courts to strike down any unfavorable laws. Commentators have speculated on a similar process following *Roe v. Wade*. By removing the abortion question from political debate, the Supreme Court halted the political process and deactivated pro choice voters. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 58 (1991) (suggesting that *Roe v. Wade*, 410 U.S. 113 (1973), effectively brought "to a virtual halt the process of legislative abortion reform that was already well on the way to producing" compromise statutes in United States); *cf.* UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 101-21 (1997) (describing "the competitive relationship among sources of law").

[295] At the heart of one of the primary arguments for judicial regulation of lawyers—that legislatures cannot be trusted to regulate such a complex field—is classic paternalism, or the idea that poor confused legislators and the public cannot be trusted to handle regulation of the profession and that the experts should take care of it.

this animosity in terms of legislative ignorance of the legal system. Interestingly, much of this animosity is based precisely upon knowledge of the system from the client or litigant's point of view. In fact, the strenuous objections of bar associations to legislative control,[296] and their continuing advocacy of judicial control, cast doubt on the efficacy of judicial regulation.[297]

VI. CONCLUSION

There are serious problems with lawyer regulation. The solution to these problems must begin with a top-to-bottom reassessment of the institutions in charge. An institutional analysis of the policymakers for lawyer regulation leads inexorably to the conclusion that state supreme courts should not be in charge. These justices are too busy, too connected and sympathetic to lawyers, and too inaccessible to the public to do any more than allow bar associations and lawyers almost total control of the system. Legislative control, whether by state legislatures or Congress, will not eliminate the powerful influence of lawyers, but it will allow a healthy dose of public influence to enter the picture and may begin to reform the system.

Many lawyers and bar associations will be aghast at such a suggestion, partially out of fear of regulatory changes, and partially out of allegiance to the "profession" and all that freighted term has come to mean. Paradoxically, while such a move might well begin a deprofessionalization of lawyers, it also might lift some of the

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[296] The ABA and other bar associations have continually supported judicial control of lawyer regulation. *See, e.g.*, AM. BAR ASS'N, INTERIM REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 18 (2001) ("ABA should affirm its support for the principle of state judicial licensing and regulation of lawyers."); MCKAY REPORT, *supra* note 11, at 1-6 ("Regulation of the legal profession should remain under the authority of the judicial branch of government."); Michael D. Kimerer, *A Presence in the Legislature*, ARIZ. ATT'Y, Mar. 1996, at 8 (reporting that most bar members prefer supreme court control of regulation); George A. Reimer, *Permissible Contact*, 57 OR. ST. B. BULL. 27, 29 (1997) (reaffirming "that the regulation of lawyers admitted to practice in Oregon is the province of the Oregon State Bar and the Oregon Supreme Court, and not subject to inconsistent regulation by federal authorities under the guise of administrative rules").

[297] Under interest group theory, one should be particularly wary of a regulated interest's lobbying efforts. *Cf.* Cross, *supra* note 260, at 1324-25 (expressing skepticism over judicial review of agency decisions because regulated interests lobbied for Administrative Procedures Act).

burdens lawyers have placed on themselves. Lawyers and bar associations have regularly presented themselves in a manner that no profession could realistically meet. Perhaps much of the unhappiness of lawyers, and of the public with the legal profession, stems from self-regulation itself. Like many overly eager advocates, lawyers have promised everyone—including themselves—more than they can deliver.

VII. APPENDIX: THE CURRENT STATE OF LAWYER REGULATION

The regulation of lawyers can be divided into two categories, entry regulation and conduct regulation. Entry regulation controls the state licensing of attorneys to practice law and includes the bar examination,[298] an examination of the applicant's character and

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[298] Every state requires bar applicants to pass a bar examination that consists of multiple choice and essay questions. *See* Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1214 & n.82 (2000) ("Almost every state administers essay questions in addition to the 'Multistate Bar Examination,' which is comprised of multiple-choice questions."); W. Ray Williams, *Hand-up or Handout? The Americans with Disabilities Act and "Unreasonable Accommodation" of Learning Disabled Bar Applicants: Toward a New Paradigm*, 34 CREIGHTON L. REV. 611, 620 & n.27 (2001) (explaining that test usually contains essay section and multiple-choice section). Forty-eight states require new applicants to take the Multistate Bar Examination (MBE). *See* Maureen Straub Kordesh, *Reinterpreting ABA Standard 302(f) in Light of the Multistate Performance Test*, 30 U. MEM. L. REV. 299, 305 & n.13 (2000) (listing jurisdictions that do not participate in MBE); National Conference of Bar Examiners, Multistate Examination Use, *at* http://www.ncbex.org/tests.htm (last visited Apr. 9, 2003) (giving information on multistate tests). The bar examination has been criticized as an ineffective means of consumer protection and an extraordinarily effective means of limiting competition and boosting lawyer profitability. *See* Barton, *supra* note 7, at 434-50 (comparing possible justifications for entry restrictions in legal market to determine if current system is defensible). Consider, for example, the plunge in bar passage rates during the Great Depression. *See* ABEL, *supra* note 8, at 62-66. Note that bar passage rates have been falling over the last ten years. *See* Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 929 (2001) ("[A]t least a dozen states have raised the score required to pass their bar exams during the last decade.").

fitness for practice,[299] and education requirements.[300] Entry regulation also encompasses the various statutes and court orders barring the unauthorized practice of law by nonlawyers.[301] As such,

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[299] Every state requires a bar applicant to pass a character and fitness review. *See* McChrystal, *supra* note 8, at 67 & n.1; Rhode, *supra* note 8, at 493. For a description of the processes followed by most jurisdictions, see Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 101-05 (2001). These processes originated at least partially to repress the admission of foreign-born and minority lawyers to the bar. *Id.* at 206-07 & n.403; *see also* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 125-29 (1976); Rhode, *supra* note 8, at 507-46.

[300] Forty-five states require graduation from an ABA-accredited law school in order to take the bar examination. *See* Herb D. Vest, *Felling the Giant: Breaking the ABA's Stranglehold on Legal Education in America*, 50 J. LEGAL EDUC. 494, 497 (2000) (explaining that most states now rely on ABA standards). Many states will allow graduates of unaccredited law schools to sit for the bar if they have been licensed and practiced for a certain period of time (usually five years) in another jurisdiction. *See* BAR REQUIREMENTS, *supra* note 78, at 12-13. The ABA has a plethora of requirements for accreditation, from library staff to faculty governance to curricular rules. *See generally* SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS (1999) (listing requirements for accreditation). In particular, applicants to accredited law schools must have completed three-fourths of the work required for a bachelor's degree at an accredited college and have taken an admission test (typically the LSAT). *Id.* at 55-56. Some states independently require a bachelor's degree to take the bar. *See* BAR REQUIREMENTS, *supra* note 78, at 3-4 (noting that Alabama, Delaware, Georgia, Kansas, Kentucky, Massachusetts, Ohio, Oklahoma, Pennsylvania, and West Virginia require bachelor's degrees). In order to graduate, a student must complete the equivalent of three years of continuous full-time study, and correspondence classes are specifically barred. *See* Nicolas P. Terry, *Bricks Plus Bytes: How "Click-and-Brick" Will Define Legal Education Space*, 46 VILL. L. REV. 95, 102 & nn.36-39 (2001) (noting various ABA requirements that ban correspondence law schools). These requirements have come under fire in recent years from commentators as diverse as Richard Posner and Harry Edwards. *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 281-309 (1999) (suggesting two-year J.D. program, among other reforms); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 76-78 (1992) (noting that regulatory environment has created overly theoretical and impractical legal education). *See generally* Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035 (2001) (arguing that ABA accreditation is illegal constraint on competition); George B. Sheperd & William G. Sheperd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998) (offering exhaustive history of accreditation and criticizing it as overbroad and anticompetitive); Herb D. Vest, *Felling the Giant: Breaking the ABA's Stranglehold on Legal Education in America*, 50 J. LEGAL EDUC. 494 (2000) (opposing ABA accreditation).

[301] *See* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense*, 1980 AM. B. FOUND. RES. J. 159, 161-201 (detaining historical development of restrictions on practice of law); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6-33 (1981) [hereinafter *Unauthorized Practice*] (detailing history of unauthorized practice prohibitions and current state of enforcement); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS

entry regulation controls both who is *in* (licensed lawyers) and who is *out* (everyone else, from title companies to real estate agents to accountants). State supreme courts are nominally in charge of entry regulation in almost every state,[302] but generally have delegated their authority to unified state bar associations[303] or to a separate agency.[304]

Conduct regulation controls the behavior of lawyers once they are licensed. All fifty states regulate lawyer conduct primarily through written rules, typically adapting the ABA's Rules of Professional Conduct or Code of Professional Responsibility.[305] These rules are primarily enforced through bar disciplinary authorities or separate

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209, 211 (1990) (discussing different state approaches to defining unauthorized practice of law). These limitations have been criticized as the clearest example of self-serving and anticompetitive lawyer regulation. *See* Barton, *supra* note 7, at 452, 456 (questioning whether there is need for protection for public from substandard lawyers); Rhode, *Unauthorized Practice*, *supra*, at 301 (describing survey of public that holds that many activities could be handled by nonlawyers). There is no single understanding of what it means to engage in the "practice of law." *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 454 (1999).

[302] In forty-two states, the supreme court alone controls admission to the bar. BAR REQUIREMENTS, *supra* note 78, at 3-4. In seven of the remaining states, the authority is split between the legislature and the supreme court. *Id.* For example, in Massachusetts, there is a legislative statute granting authority to the supreme court. *Id.* In Virginia, the legislature controls entry requirements with the assistance of the Board of Bar Examiners. *Id.* For a general overview of current bar admission requirements, see generally *id.*; INST. OF JUDICIAL ADMIN., BAR ADMISSION RULES AND STUDENT PRACTICE RULES (Fannie J. Klein ed., 1978).

[303] *See supra* notes 140-59 and accompanying text.

[304] Typically, this agency is known as the Board of Bar Examiners. For example, in Delaware, bar admission is delegated to the Board of Bar Examiners of the Delaware Supreme Court; in Colorado, to the Supreme Court Board of Law Examiners; and in Illinois, to the Illinois Board of Admissions to the Bar. BAR REQUIREMENTS, *supra* note 78, at 43-46.

[305] *See* AM. BAR ASS'N LAWYERS MANUAL ON PROFESSIONAL CONDUCT, at 01:3 to 01:63 (2000) (listing state ethics rules); Gregory C. Sisk, *Iowa's Legal Ethics Rules—It's Time to Join the Crowd*, 47 DRAKE L. REV. 279, 283-85 (1999) (discussing history of legal ethics codes). Forty-two states presently apply the Model Rules of Professional Conduct (with slight local variations). AM. BAR ASS'N, REPORT OF THE COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, at xi (2000). California has not adopted the Rules or Code *per se*, but has borrowed heavily from both in designing its regulations. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 5 (5th ed. 1998). Typically, federal courts simply adopt "the rules of professional ethics adopted by the highest court of the state in which the district court sits, and these rules are interpreted by reference to state court decisions." Philip K. Lyon & Bruce H. Phillips, *Professional Responsibility in the Federal Courts: Consistency is Cloaked in Confusion*, 50 ARK. L. REV. 59, 60 (1997); *see also* Moulton, *supra* note 164, at 97-98 ("[T]he majority of federal district courts incorporate by local rule the conduct of the state in which they sit.").

administrative agencies of the state supreme courts.[306] Lawyer conduct is also regulated by common-law legal malpractice claims[307] and informal norms of lawyer conduct.[308]

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[306] *See* Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 212-13 (1996) ("In some states, including some of the largest, the disciplinary process is primarily a state bar association responsibility. . . . The current trend, however, is for lawyer disciplinary enforcement functions to be performed by government bodies rather than by the bar."); Christopher D. Kratovil, *Separating Disability from Discipline: The ADA and Bar Discipline*, 78 TEX. L. REV. 993, 995-96 (2000) (noting that state supreme courts have largely delegated to state bar associations duty of enforcing conduct).

[307] *See* Leubsdorf, *supra* note 6, at 101-02 (describing nature of malpractice claims and their effect upon lawyer behavior); Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client is Safe*, 47 FLA. L. REV. 1, 22 (1995) (reporting on study of prevalence of attorney malpractice actions). The tort of lawyer malpractice controls attorney behavior by forcing errant attorneys to pay injured clients. *See* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2601 (1996) ("Legal Malpractice [is], by far, the predominant way in which lawyers are regulated."); Gary N. Schumann & Scott B. Herlihy, *The Impending Wave of Legal Malpractice Litigation—Predictions, Analysis, and Proposals for Change*, 30 ST. MARY'S L.J. 143, 151-55 (1998) (examining attorney as defendant). Malpractice insurance also has a significant effect. *See* Cohen, *supra* note 255, at 307-46 (describing nature of insurance and role of malpractice insurance in regulating attorney conduct); David A. Hyman, *Professional Responsibility, Legal Malpractice, and the Eternal Triangle: Will Lawyers or Insurers Call the Shots?*, 4 CONN. INS. L.J. 353, 355-80 (1997) (examining malpractice insurers as attorney regulators).

[308] *See* Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 802 (2000) (arguing that for lawyers "social organization and, in particular, community norms are almost always more important influences on individual conduct than formal rules"); Marianne M. Jennings, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative*, 1996 WIS. L. REV. 1223, 1251-54 (arguing that following few simple norms would eliminate need for Rules of Professional Conduct); Wendel, *supra* note 12, at 1955-85 (describing importance of social norms on attorney behavior).