15

Rethinking "Our Bar Federalism"

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It's hard to look at the current structure of American legal services regulation and not conclude that "Our Bar Federalism," as Justice Black might have put it, has outlived its usefulness.[1] Fifty states maintain their own rules and their own regulatory apparatus in overseeing a legal profession and a legal services industry that are now demonstrably national and even multinational in scope. Worse, the American civil justice system is in the grips of an access-to-justice crisis, and the state-by-state regime of restrictive rules that props up the lawyers' monopoly is plainly a core cause. Worse still, bar federalism's duplicative and inequality-fueling outputs will only grow more outmoded in the years to come as new legal services delivery models proliferate in the age of AI.[2] Indeed, the current balkanized, fifty-state scheme will increasingly look downright provincial and retrograde as new technologies remake the legal services industry and offer robust and scalable ways to serve the millions of Americans who, facing debt collections, evictions, divorce, child custody battles, small business struggles, and end-of-life decisions, navigate a complex legal system alone. Rosy invocation of "laboratories of democracy," among other federalism values that perennially feature in American politics, rings increasingly hollow in an embattled civil justice system that sits on the cusp of some of its most significant change in a century.

In this chapter, we argue that the time has come to rethink "Our Bar Federalism." We do so in three steps. First, we ask how we got here by stepping through the mix of path dependencies, political economy, and competing constitutional doctrines that created bar federalism in the first place and then made it

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[1] Though the term "our federalism" has appeared dozens of times in the US Supreme Court's decisions, the capitalized and more breathless version ("Our Federalism") was first used by Justice Black in Younger v. Harris, 401 U.S. 37, 44 (1971).

[2] *See generally* David Freeman Engstrom, Ed., Legal Tech and the Future of Civil Justice (2023).

stick. Second, we examine bar federalism in a changing world and argue that bar federalism *should* and, just as important, *could* change. Third, we ask *how* the system might change. Weighing tradeoffs across four possible futures for bar federalism, we settle on a "hybrid" state and federal approach, with state bars continuing to regulate lawyers but federal regulators overseeing the rest, as the best way to move to a system that better aligns with the present and future realities of the American civil justice system.

15.1 HOW DID WE GET HERE? BAR FEDERALISM'S ORIGINS

The regulation of legal services has always been, from colonial times to postindustrial America, a state and even local endeavor. Why so? Three factors have bequeathed us the current system of bar federalism: (1) simple colonial-to-state path dependencies, (2) a lawyer political economy with a markedly small-firm and solo-practitioner skew, and (3) the constitutional limbo resulting from competing federalism doctrines and norms. The first of these helped set into place the basic state-centered model that exists today. The second and third ensured that it stuck.

15.1.1 *Path Dependencies and Patchworks*

A running start at explaining bar federalism's origins is simple colonial-to-state path dependencies. Each colony had its own governance systems, its own courts, and its own understandings of English and local law. Lawyers were trained in common law (save in Louisiana), but common law was not so common. Instead, colonies featured their own blend of common, customary, local, and statutory law. As the legal profession grew in size and importance alongside the economy, colonies devised similarly kaleidoscopic ways to admit lawyers to practice, and also vested different authorities, from individual courts to royal governors to legislatures, with the power to oversee those admissions.[3] A decentralized approach to regulating legal services made sense where substantive law, procedure, and institutions varied so dramatically. When colonies became states, these differences persisted.

Bar associations emerged within this patchwork in the seventeenth century. Importantly, however, the arc of legal services regulation did not always bend toward the current lawyers' monopoly. After the Revolution, then gaining momentum during the Jacksonian era, many states actively *deregulated* the bar. Fueled by distrust of England-trained specialists, the role of lawyers in postwar debt collection,

[3] Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 Buffalo L. Rev. 525, 531–32 (1983) (describing the "hodgepodge" of authorities that regulated the colony-to-state and post-Revolutionary legal profession); Benjamin H. Barton, The Judge-Lawyer Bias in the American Legal System 110 (2011) (same).

and anti-elitist fear of an insurgent class of oligopolists,[4] states stripped bar admission requirements of education or training components,[5] and some entirely eliminated requirements for appearing in court.[6]

The professionalization projects of the latter part of the nineteenth and early part of the twentieth centuries would reverse this deregulatory trend, but the checkerboard of laws, rules, and institutions inherited from two centuries of colony-by-colony and state-by-state evolution helped to establish, then reify, bar federalism in two ways. First, state and local variation fueled arguments – still in circulation today – that state-overseen licensure, testing, and discipline are needed to ensure competency.[7] Particularly in an era before electronic research and modern communications and travel, state control over entry and discipline seemed the best way to assure familiarity with state and local law and practice. Second, the state-by-state checkerboard created vested interests in each state's constellation of rules and approaches – and thus potent political headwinds for any effort to alter them. By the early twentieth century, as newly powerful state bar associations came to dot the American legal landscape, the basic pattern was set – and, with it, a distinctive state-centered bar politics that has proven highly resistant to change.

15.1.2 *Bar Politics and the Political Economy of Legal Services*

As the nation industrialized and emerged from the Civil War, lawyers began to think beyond locality and consider the benefits of professional organization.[8] It was only after 1870 that bar associations – a "definite and permanent organization of lawyers for purposes of the profession" – emerged as organizations that could also

[4] Roscoe Pound, The Lawyer from Antiquity to Modern Times: With Particular Reference to the Development of Bar Associations in the United States 179–82, 225–41 (1953) (explaining how fear of oligopoly, among other arguments, fueled bar deregulation); *see also* Richard L. Abel, American Lawyers 40 (1989) (explaining how the egalitarian ideology of the Jacksonian era "was hostile to state-supported monopolies, as it was to all forms of inequality").

[5] Pound, *supra* note 4, at 5, 179–81 (cataloging the lack of entry requirements and noncredentialed status of many bar entrants).

[6] Barton, *supra* note 3, at 111 (canvassing states and noting that Maine, Wisconsin, and Indiana removed all requirements for appearing in state courts).

[7] *See* Abel, *supra* note 4, at 117, 124 (noting continuing use of nonreciprocity in some states, justified, at least in part, on competence grounds); Michael J. Thomas, *The American Lawyer's Next Hurdle: The State Based Bar Examination System*, 24 J. Legal Prof. 235, 244 (2000) (noting continued opposition to a national bar exam based in "familiarity with local law"). For a recent case law example, see Nat'l Ass'n for the Advancement of Multijurisdiction Prac., (NAAMJP) v. Simandle, 658 F. App'x 127, 137 (3d Cir. 2016) (crediting "familiarity with state law" as a rationale for rule limiting federal court admission to attorneys licensed to practice in state court).

[8] Philip J. Wickser, *Bar Associations*, 15 Cornell L. Rev. 390, 404 (1930).

regulate the legal profession.[9] Within a decade, some 126 localities had bar associations.[10] States also created bar associations, and, though many started as "paper organizations,"[11] they steadily gained support and authority because of their usefulness, from the high-minded promotion of "effective administration of discipline" and jurisprudential excellence[12] to the low-minded aim of keeping out "undesirable" elements, including immigrants and Black Americans.[13] By 1923, every state had an active bar association, with a set of powers that reflected each state's unique path and politics.[14]

But now, it was too late to fathom anything but bar federalism because a distinct political economy of lawyering had emerged around professionalization. Its first feature was a convergence of big- and small-state incentives around restrictions on lawyer mobility. Large states such as New York wanted to control entry and restrict admission and vigorously resisted surrendering that authority.[15] Smaller ones wanted to restrict competition from big-city lawyers, particularly out-of-state ones.[16] As professionalization unfolded, bar protectionism was not so much about managing the threat posed by nonlawyers – though there was plenty of that[17] – but rather managing the threat posed by out-of-state lawyers.

[9] Pound, *supra* note 4, at 253–54.

[10] *Id.* at 254, 259–69 (cataloging the development of local bar associations).

[11] Wickser, *supra* note 8, at 403; *see also* Abel, *supra* note 4, at 46.

[12] Margaret Canary, Note, *The Importance of Lawyers' Control over Regulation of the Legal Profession: A History of Self-Regulation, from the Long Parliament of 1641 to the Alabama State Bar*, 46 J. Legal Prof. 309, 319–20 (2022); Frank E. Atwood, *Objectives and Methods of Bar Integration*, 20 ABA L. J. 203 (1934) (advocating an integrated bar because state bars could "expose[] unworthy applicants" to the courts for disbarment, advance jurisprudence through "meetings, periodicals, [and] conferences," and promote the economic welfare of lawyers).

[13] Alpert, *supra* note 3, at 544.

[14] Pound, *supra* note 4, at 272.

[15] *See* Wickser, *supra* note 8, at 10 (describing how the New York City Bar Association was "definitely cold toward any project of federation"); William E. Flowers, *The Practice of Law by Out-of-State Attorneys*, 20 Vand. L. Rev. 1276, 1302 n.17 (1967) ("New York first recognized office practice as forbidden to other than admitted attorneys in 1919 by statutory construction.").

[16] *See, for example*, John W. Oliver, Kan. City Bar, *Big City or Country – Where to Start to Practice*, 4 J. Mo. B. 113, 126 (1948) (expressing concern about competition from "city law schools" and from "Harvard, Michigan and other outstate schools"); *see also* Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 42–43, 97 (1977) (describing how early restrictions on attorney advertising and educational requirements were designed to disfavor urban lawyers).

[17] In 1870, Bar Associations began to focus on legal work outside the courts, which featured competitors like insurance companies, collection agencies, banks, accountants, and more. Abel, *supra* note 4, at 112. As a result, between 1905 and 1940, 400 state and local bar associations created committees on the UPL. *Id.* at 113. External competition to the bar began to pose material economic threats as early as 1880, particularly in the fields of real estate transactions, debt collection, and trusts and estates. James Willard Hurst, The Growth of American Law: The Law Makers 319–20 (1950); *see also* Ronen Shamir, *Professionalism and Monopoly of Expertise: Lawyers and Administrative Law, 1933–1937*, 27 Law & Soc'y Rev. 361, 371–74 (1993) (providing examples of legislation against UPL).

The second feature of an emerging political economy of legal services was a pronounced small-firm and solo-practitioner skew. In 1872, only fourteen law firms nationwide boasted more than three lawyers, the largest only six.[18] Even by 1914, a little more than 200 firms claimed 4 or more lawyers in the nation's ten largest cities. And as late as 1948, a stunning 61 percent of American lawyers remained solo practitioners,[19] and fewer than 5 percent of firms had eight or more lawyers.[20]

The small-firm and solo-practitioner skew of the American legal profession first fueled, then sustained, bar federalism. Rules requiring that out-of-state lawyers hire local ones and that those lawyers "meaningfully" participate in representations created a profitable cottage industry of "local counsel."[21] The profession's small-firm skew also translated into substantial power within bar associations. Armed with arguments about the value of state-specific legal knowledge and the extra-legal benefits of a robust local bar,[22] the profession's journeymen – solo and small-firm practitioners – have controlled bar associations and even the ABA's House of Delegates, which has consistently blocked proposals for a more open and mobile profession.[23] Ironically, state bar associations have become the monopoly feared by Jacksonian critics, but more the yeoman than the oligarchical sort.[24]

[18] Benjamin H. Barton, Glass Half Full: The Decline and Rebirth of the Legal Profession 23, 25 (2015).

[19] Robert L. Nelson, *Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 Case W. Res. L. Rev. 345, 370 (1994).

[20] Barton, *supra* note 18, at 26.

[21] Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in A Global Age*, 48 San Diego L. Rev. 489, 522 (2011) (noting requirement under Rule 5.5(c)(1)).

[22] Stephen Gillers, *Lessons from Multijurisdictional Practice Commission*, 44 Ariz. L. Rev. 685 (2002).

[23] On the ABA's early domination by smaller firms and solos, see James R. Silkenat & Harvey B. Rubenstein, *Small Firm Lawyers: An ABA Opportunity*, GPSolo (Jan./Feb. 2011), at 7, https://www.americanbar.org/content/dam/aba/publications/gp_solo_magazine/2011/full_issue_2011_january_february_28_1.pdf ("In its early days, the American Bar Association (ABA), like most law-related organizations, was composed primarily of solo and small firm practitioners."); Richard L. Abel, *The Transformation of the American Legal Profession*, 20 Law & Soc'y Rev. 7, 10 (1986) (describing solo practitioners as the dominant kind of lawyer from the 1940s through 1960s). On House of Delegates opposition to reforms promoting openness and mobility, see Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702, 715–16 (1977) (describing the House of Delegates' amendment to rules on lawyer advertising, whose "effect is to preserve the balkanization of practice characteristically found today and to protect the small town practitioner from attempted inroads from his or her big city cousin"); Abel, *supra* note 4, at 12 ("Solo and small firm practitioners are most deeply affected by competition from new entrants, who engage in advertising and price cutting."); Henry S. Drinker, *Legal Specialists: Specialized Legal Service*, 41 A.B.A. J. 690, 692 (1955) (discussing the House of Delegates' rejection of a rule that would allow a lawyer to advertise his services to other lawyers); Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 Geo. J. Legal Ethics 383, 383 (1988) (describing the House of Delegates' rejection of a rule that would allow nonlawyers to have managerial roles at law firms).

[24] *See, for example*, Abel, *supra* note 4, at 114–15 (concluding that efforts to reform UPL rules were a minority view and of limited success); *see also* Robert W. Gordon, *Lawyers, the Legal*

15.1.3 *Federalism's Ambiguities*

If simple path dependencies created a patchwork of approaches with a set of vested interests to match, then a final force ensured that bar federalism stuck: Bar federalism has long sat in a kind of constitutional limbo, held in place by competing dictates of vertical and horizontal federalism.

On one side of this limbo, two constitutional doctrines have, however shakily, bolstered bar federalism. First, regulation of the bar, the Supreme Court has repeatedly said, sits squarely at the center of state police powers, and perhaps even *exclusively* within such powers.[25] State bar regulation aims, according to a representative court formulation, "to protect the public against imposition and incompetence of persons professing to be qualified to practice law,"[26] "maintain[] high professional standards among those who practice law within its borders,"[27] and "preserve respect for the administration of justice."[28]

The further notion that bar regulation might rest *exclusively* with states has come in more tentative packaging. Perhaps the strongest statement is *Leis v. Flynt*, in which the Supreme Court described regulation of the bar as a power "left exclusively to the States."[29] In *Leis*, the court thus stated what was only implied in *Konigsberg v. State Bar of California* two decades earlier, when Justice Harlan cautioned his colleagues to be "reluctant and slow" to intervene in state bar regulation on account of federalism sensitivities.[30] This may explain why, as would be consistent with Tenth Amendment doctrine, federal incursions into state bar regulation have been largely limited to remedying constitutional violations – for instance, the *Bates* Court's invalidation of prohibitions on attorney advertising on

Profession & Access to Justice in the United States: A Brief History, 148 DAEDALUS 177, 186 (2019) (describing current challenges to UPL rules).

[25] *See* United Mine Workers v. Ill. State Bar, 389 U.S. 217, 222 (1967) ("That the States have broad power to regulate the practice of law is, of course, beyond question."); Bradwell v. Illinois, 83 U.S. 142 (1872) (Bradley, J., concurring) (arguing that the regulation of professions, including the legal profession "fairly belongs to the police power of the State"); Bates v. State Bar of Arizona, 433 U.S. 350, 361 (1977) ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public.").

[26] Bd. of Comm'rs Miss. State Bar v. Collins, 214 Miss. 782, 800 (1952).

[27] NAACP v. Button, 371 U.S. 415, 456 (1963) (Harlan, J., dissenting); Bates, *supra* note 25, at 361 (recognizing that "the regulation of the activities of the bar is at the core of the State's power to protect the public").

[28] United Mine Workers, *supra* note 25, at 223.

[29] 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.").

[30] *See* 353 U.S. 252, 276 (1957) (Harlan, J., dissenting); *see also* Schware v. Bd. of Bar Exam., 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring).

First Amendment grounds,[31] or preemption of state regulation by the Sixth Amendment right to counsel.[32] Dicta though they might be, language in *Leis*, *Konigsberg*, and elsewhere[33] has provided something of a protective shield against federal incursions on state authority.

The second constitutional buttress is the notion, worked out over time by state supreme courts under the banner of "inherent powers," that regulating the legal profession is solely the province of courts. Before 1870, state legislatures and courts "rarely fought over the control of the legal profession."[34] Legislatures could set general requirements for admission, but courts had inherent powers to disbar specific lawyers.[35] That changed in the 1870s when states, concerned with the state of legal practice and the resistance of state legislatures to enact higher standards, began to justify the idea of courts' *exclusive* regulation of the legal profession.[36] In the absence of an "express grant" of regulatory authority by a state constitution, state courts asserted, authority over the bar must "be exercised by the department to which it naturally belongs."[37]

[31] *See* Bates, *supra* note 25, at 350–84; *In re* Summers, 325 U.S. 561, 570–71 (1925) (noting that only a bar decision "which violated a federal right secured by the Fourteenth Amendment would authorize our intervention").

[32] *See* Spanos v. Skouras Theaters, 364 F.2d 161 (2d Cir. 1966); U.S. v. Bergamo, 154 F.2d 31 (3d Cir. 1946).

[33] *See*, *for example*, Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, at 292 (1985) (Rehnquist, J., dissenting)

> Certain aspects of legal practice are distinctly and intentionally *nonnational*. ... Put simply, the State has a substantial interest in creating its own set of laws responsive to its own local interests, and it is reasonable for a State to decide that those people who have been trained to analyze law and policy are better equipped to write those state laws and adjudicate cases arising under them

Mason v. Florida Bar, 208 F.3d 952, 956 (11th Cir. 2000) (noting that states have "both a general interest in protecting consumers, as well as a special responsibility to regulate lawyers").

[34] Alpert, *supra* note 3, at 533.

[35] *Id.* at 534.

[36] Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation – Courts, Legislatures, or the Market*, 37 GA. L. REV. 1167, 1173 (2003); *see also* BARTON, *supra* note 3, at 113–19 (explaining that, under the inherent powers doctrine, some state supreme courts invalidated bar integration statutes and instead integrated by judicial order); Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 374–75 (1998) (compiling cases).

[37] *See*, *for example*, *In re* Integration of Neb. State Bar Ass'n, 133 Neb. 283, 275 N.W. 265, 266 (1937). Because lawyers were "historically ... 'officers of the courts,'" their regulation by the court was proper. Goldfarb v. Va. State Bar, *supra* note 33, at 792; *see also* Schware v. Bd. of Bar Exam., *supra* note 30, at 248 ("In the United States the courts exercise ultimate control."); *In re* Griffiths, 413 U.S. 717, 732 (1973) (Burger, J., dissenting) ("The role of a lawyer as an officer of the court predates the Constitution; it was carried over from the English system and became firmly embedded in our tradition."). *See generally* Alpert, *supra* note 3, at 538–39 (explaining that, to push for greater professionalization, courts "us[ed] the traditional characterization of

Some acrobatics are required to get from "inherent powers" to bar federalism. The first step is that, if regulating legal services is solely a judicial responsibility, Congress can no more do it than state legislatures. Step two excludes federal courts from the menu of possible bar regulators by applying Article III's limiting of federal judicial power to "cases and controversies." Two steps later, only state courts remain standing. The end result is hardly an ironclad shield, and litigants and legislatures have made gradual inroads against a self-claimed judicial monopoly, moving some states toward something more like shared powers.[38] Even so, and as we'll see, the combination of *Leis* and "inherent powers" has been influential as bar federalism has beaten back efforts at nationalization.

On the other side of the constitutional limbo are horizontal federalism constraints, particularly limits on state-on-state discrimination under the Privileges and Immunities Clause and Dormant Commerce Clause. A pivotal moment came in *Supreme Court of New Hampshire v. Piper*, where the Court held that New Hampshire's rule rejecting a bar applicant who lived just beyond state lines violated the Privileges and Immunities clause.[39] *Piper* thus completes the constitutional limbo within which bar federalism sits. When "inherent powers" and the possibility in *Leis* and elsewhere that legal services regulation is an *exclusively* state power are combined with *Piper*'s horizontal federalism limits, bar federalism emerges as at once mandatory and illegal – an exclusive state preserve, and yet constitutionally troubled in many of its particular applications.

Bar federalism's ambiguous legal status, of course, is hardly an ironclad barrier to federalization. It is also worth noting that legal limbo's contours may be shifting. Growing concerns about access to justice – a topic we turn to below – are spurring new legal challenges to lawyer regulation that could further limit state power. As Genevieve Lakier notes in Chapter 14, nonlawyer legal services providers have begun to mount 1st Amendment challenges against state "unauthorized practice of law" (UPL) rules, reviving a legal battle last fought in the 1960s over the provision of "group legal services." The other new legal entrant is antitrust, which was the site of protracted battles between LegalZoom and state attorneys general in the 1990s, but is

lawyers as officers of the court and then claim[ed] that [legislative] interference with these officers in turn interfered with the functioning of the judicial branch") (citing *Ex Parte Burr*, 22 U.S. 529, 531 (1824)).

[38] Alpert, *supra* note 3, at 551–52; *see also* BARTON, *supra* note 3, at 139.

[39] Supreme Court of New Hampshire v. Piper, *supra* note 33, at 275. On *Piper*'s wider importance, see Linda Greenhouse, *Business and the Law: Competition and Lawyers*, N.Y. TIMES (Dec. 25, 1984), https://www.nytimes.com/1984/12/25/business/business-and-the-law-competition-and-lawyers.html (last accessed Feb. 1, 2025). The Court's post-*Piper* decisions have steadily grown even more skeptical of state bar regulation of law practice. *See, for example*, Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) (striking down a Virginia bar rule authorizing admission "on motion" but only for permanent Virginia residents); Barnard v. Thornstenn, 489 U.S. 546 (1989) (rejecting the claims of the Virgin Islands that special circumstances attendant to the geography and context of legal practice in that territory warranted a rule outright prohibiting nonresident attorneys from bar admission).

resurfacing again as a way to exert pressure on state bars to open up an increasingly lawyerless civil justice system to new legal services providers.[40] At least for the moment, however, neither of these developments has yet shifted the core of bar federalism's legal limbo, which continues to enervate federal-level reforms.

15.1.4 *Federalizing Feints*

Each of these forces has been on full display as bar federalism has turned back challenges to the authority of states and state bar associations by consumer advocates, national bar associations, and federal agencies.[41] For instance, the American Bar Association (ABA) has repeatedly fallen short in its efforts to nationalize self-regulation, whether through its efforts, beginning in 1908, to establish a national Canon of Ethics,[42] or its failed attempts to unify membership with state bar associations, which arguably only served to empower states via the creation of the House of Delegates with robust state representation.[43] Only the grueling thirty-year effort by the National Conference of Bar Examiners to create the multistate bar exam achieved its full aim.[44] In countering these attempts at ABA expansionism, state bars have proven adept at proactively adopting self-regulation to assuage concerns or lobbying Congress, leaving the ABA mostly a font of recommended rules.[45] Even the ABA's role as accreditor of law schools relies upon the acquiescence by (most, but not all) state authorities in their decisions to tie bar admission to ABA approval.

Perhaps the most revealing struggle came in the late 1970s when the Federal Trade Commission (FTC) explored a direct regulatory role in legal services as part of wider investigations into how state regulation might be inhibiting competition in the professions. First up were pharmacists, but soon the agency launched a preliminary investigation into legal services, covering licensing requirements, UPL, advertising, restrictions on forms of practice, and "restrictions on the development of

[40] As an example, the Antitrust Division of the U.S. Department of Justice recently sent a "letter of interest" to the North Carolina legislature in aid of its consideration of a proposal to loosen the state's UPL rules to permit qualified nonlawyer representatives to offer limited legal services, reminding legislators of DOJ's work on the "competitive effects of restrictions on the practice of law," including "undue restrictions on competition between lawyers and nonlawyers that are not necessary to address legitimate and substantiated harms to consumers or are not sufficiently narrowly drawn to minimize anticompetitive effects." Letter from Maggie Goodlander, Deputy Assistant Attorney General, to North Carolina General Assembly (Feb. 14, 2023).

[41] Michael J. Powell, *Developments in the Regulation of Lawyers: Competing Segments and Market, Client, and Government Controls*, 64 Soc. Forces 281, 293–94 (1985); Alpert, *supra* note 3, at 548.

[42] Fred C. Zacharias, *Federalizing Legal Ethics*, 73 Tex. L. Rev. 335, 338 (1994).

[43] Powell, *supra* note 41, at 291–92.

[44] John Eckler & Joe E. Covington, *The New Multistate Bar Examination*, 57 ABA J. 1117, 1118 (1971).

[45] *Id.* at 293–94; Alpert, *supra* note 3, at 548.

alternative systems for delivery of legal services."[46] Only the investigation into those restrictions went forward, but even that yielded a violent response, including a resolution from the Southern Conference of Bar Presidents as the General Accounting Office neared clearance of a questionnaire to be sent out to state bars, which called for the FTC to forego any further action until Congress could consider its jurisdiction over the professions.[47] Other bar associations encouraged lawyers to "respond to this intrusion by contacting directly [their] elected representative[s] and expressing [their] personal as well as general indignation at the outrage being perpetrated upon the profession."[48] These fire alarms worked, and Senators introduced amendments that prohibited the FTC's use of funds for investigating the legal profession.[49] That response amounted to a clear shot across the bow, and a clear sign, Stanford Law's Bill Baxter reported, that the FTC had taken on one of the "sacred cows" of American politics and run afoul of powerful bar associations with "real political clout."[50]

The State Bar of Texas was particularly hostile, establishing in 1982 a twenty-one-person standing committee on federal laws and regulations affecting the bar.[51] The committee's chief activity was to appear before congressional committees to oppose FTC's authority to regulate professionals. Texas bar president Orrin Johnson, channeling bar federalism's constitutional limbo, observed that "the instrusion [sic] of the Federal Trade Commission violated the historic relationship between state and federal governments . . . [T]hat members of the bar were regulated by the judicial branch of the government of Texas and were therefore a part of the very fabric of the judicial system of Texas."[52]

[46] Marc A. Comras, *Are We Heading toward Federal Regulation of the Legal Profession?*, Docket Call, ABA (Spring 1979).

[47] *FTC Future Discussed as Lawyer Probe Renews*, LawScope, ABA J. (Sept. 1980).

[48] B. M. Westberry, *FTC Seeks Control of Legal Profession*, 43 KY. Bench & B. 8 (1979); *see also Hearing on FTC Activities Concerning Professionals before the S. Comm. on Com., Sci., and Transp.* 97th Cong. 51 (1981) (statement of Mark White, Att'y Gen. of Texas) ("[T]he State of Texas requests Congressional legislation which will clearly instruct the FTC that it has no power to investigate or regulate agencies of the State such as the State Bar of Texas"); *see also id.* at 62 (statement of Robert Van Vooren, Board member, Iowa State Bar Association)

> ("[T]he Iowa State Bar Association considers the pending inquiry by the FTC, and any rulemaking activities by the FTC incident to the regulation of the practice of law in Iowa, to be an unnecessary and unconstitutional intrusion by the Federal Trade Commission into the affairs of State government that traditionally have been adequately handled by the supreme court of Iowa under the express mandate of the constitution of the State of Iowa.").

[49] *FTC "Profession-Probes" Under Fire in Senate*, 65 ABA J. 1618, 1618 (1979).

[50] *FTC Future Discussed as Lawyer Probe Renews*, *supra* note 47.

[51] *See Lawyers Seek a Loophole*, Newsweek at 11 (Aug. 1, 1983); *FTC Chairman Vows to Fight on Lawyer Regulation*, Hous. Post at 10A (Aug. 1, 1983).

[52] Philip Wilson, *Federal Laws and Regulations Affecting the Bar*, 46 Tex. B.J. 857, 858 (1983).

In short, a mix of path dependencies, politics, and law explains how we arrived at the current system of bar federalism, and why it has stuck. The next section explains why it may be time to move in another direction, and why it just might be possible.

15.2 WHY COULD AND SHOULD WE CHANGE NOW? BAR FEDERALISM IN THE TWENTY-FIRST CENTURY

If powerful forces created and then sustained bar federalism, any call for reform must answer some obvious questions: Why change now? And supposing we wanted to, is change even possible? This section argues that change is indeed possible because of two tectonic shifts in the American legal landscape: (1) a rapidly evolving legal services industry and (2) a deepening access-to-justice crisis. Together, these shifts have eroded the conditions that have long held bar federalism in place while simultaneously exposing the flaws of a balkanized, fifty-state approach to legal services regulation. Our analysis thus builds upon and supports the larger case for reforming American legal services regulation in order to bring it into line with the twenty-first-century realities of an embattled civil justice system.

15.2.1 *A New Political Economy of Lawyering*

Among the changes making it possible to rethink bar federalism, few are more important than the changing structure of the legal profession and the legal services marketplace. As previously noted, the American bar has been, for most of its history, a small-scale affair. But the bar's localist skew has changed dramatically since the postwar period. In 1948, nine out of ten American lawyers were private practitioners, and two-thirds of them – and a stunning 61 percent of all US lawyers – were solo practitioners.[53] But by 1960, only 46 percent were solo practitioners,[54] and the best recent evidence (from 2000) puts the number at one in three.[55]

Much of this change has come through steady growth in the size and reach of law firms. In the late 1950s, only thirty-eight firms reported more than fifty lawyers, half of those in New York City. By the mid-1980s, more than 500 firms could make that claim.[56] Firm size has only increased from there, spurred on by mergers beginning in the 1990s.[57] In 1980, 17 percent of practitioners were in offices with just 2 lawyers, and only 7 percent were in offices of 100 or more. But fast forward three decades and

[53] Nelson, *supra* note 19, at 370.

[54] *Id.*

[55] Gerard J. Clark, *American Lawyers in the 2000: An Introduction*, 33 SUFFOLK U. L. REV. 293 (2000).

[56] Mark Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990).

[57] Albert Yoon, *Competition and the Evolution of Large Law Firms*, 63 DEPAUL L. REV. 697, 713 (2014); William D. Henderson & Marc Galanter, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1882–83 (2008).

those numbers flip: In 2006, only 12 percent of practitioners were in offices of 2 lawyers, while fully 33 percent were in firms of more than 100 lawyers.[58]

An important consequence is that law practice has become increasingly multi-jurisdictional.[59] But firm growth is not the only reason. Fissuring, disaggregation, and unbundling of legal services have also widened multi-jurisdictionality by growing the ranks of specialized providers.[60] Technology, from virtual courts to computerized research, has also made it much easier to practice nationally, and continuing advances in AI will no doubt further lower multi-jurisdictional barriers.[61] Once limited to a few superfirms and a finite set of regional ones, law firm operations now regularly spill across state borders. Indeed, by 2004, 57 percent of lawyers worked in "multi-office firms," and more than 10 percent of lawyers worked at firms with at least ten offices.[62]

Another consequence of firm growth is subtler. There was a time when American lawyers were nearly all independent practitioners, answerable only to themselves. Now most lawyers work in entities (for instance, large firms organized as limited liability partnerships), and most are employees of one sort or another. Put differently, the growing entities that increasingly populate the American legal services industry have introduced significant bureaucratic complexity to law practice. Hierarchy has intensified – a predictable result of increases in the size, internal differentiation, stratification, and geographic dispersion of firms.[63] Growing bureaucratic complexity has, in turn, steadily eroded the hegemony of private practice. Unlike days of yore, most American lawyers are buried deep within complex bureaucracies, answerable to higher-ups – rainmaker partners, executive committees, compensation committees – not merely their clients.

Taken together, these changes have eroded two features of the political economy of lawyering that had sustained bar federalism since colonial times. First, as the

[58] Clara N. Carson & Jeeyon Park, Am. Bar Ass'n, The Lawyer Statistical Report: The U.S. Legal Profession in 2005 6 (2005).

[59] *See* Zacharias, *supra* note 42, at 335 (noting "increasingly national character of the legal profession"); Henderson & Galanter, *supra* note 57, at 1882–83 (noting the emergence of the "national law firm").

[60] Milton C. Regan & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 Fordham L. Rev. 2137 (2010).

[61] *See generally* Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society*, The Practice (Mar./Apr. 2023), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/ (last accessed Feb. 1, 2023).

[62] George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. Rev. 1635, 1662–63 (2006). Among the 100 largest US firms, the number of lawyers based in "branch offices" increased some sixfold between 1978 and 1987. Abel, *supra* note 4, at 10. By then, the 100 largest law firms maintained an average of five branch offices. Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. Tex. L. Rev. 715, 727 (1995).

[63] Abel, *supra* note 4, at 10.

localist skew of the American bar has receded, the balance of power within bar associations, including the ABA, has tilted away from its yeoman roots.[64] Second, the decline of solo practitioners and the increasing entity orientation of the American legal profession has worked a subtle but critically important change in lawyers' professional standing. Professional independence – a concept at the core of lawyer self-regulation and the "inherent powers" doctrine – is more shibboleth than reality when most lawyers belong to a large entity. Similarly, law's claim as a public-regarding profession rather than a brute business is wearing thin in a world of rampant firm consolidations, obsessive focus on per-partner profits, and free-agent movement between firms.[65]

A second tectonic force is also changing the political economy of lawyering, and it is a grim one: After decades of neglect, access to justice has roared onto legal and political radars, fueled by a growing realization that the civil justice system is in crisis. In some three-quarters of the twenty million civil cases filed in state courts each year, one side lacks a lawyer.[66] Most of these cases are highly consequential, if low-dollar, matters: debt collections, evictions, mortgage foreclosures, and certain types of family law, such as child support enforcement. And these are only the cases – and the litigants – that are visible on dockets. Beneath them lie tens of millions more Americans who have genuine legal problems but never make it to court at all.[67]

A crisis on this scale has many causes, consequences, and potential cures.[68] But for present purposes, an important effect has been to erode American lawyers' claim as guardians of the public interest. Indeed, many see the access-to-justice crisis as, at

[64] *See, for example*, Silkenat & Rubenstein, *supra* note 23, at 7 (discussing dwindling presence and influence of solo practitioners in the ABA); *ABA Body Approves Contentious Guidelines*, 1 J. OF BUS. at 25, 34 (Mar. 16, 2016) (describing House of Delegates' approval of rules for nontraditional legal services over the protests of smaller firms). Interestingly, now disadvantaged in competition, small firms and solos have begun to *favor* rules that would open the profession. *See, for example*, Russell G. Pearce, *A Cautionary Tale from the Multidisciplinary Practice Debate: How the Traditionalists Lost Professionalism*, 72 TEMP. L. REV. 985, 994 (1999) (discussing small firm and solo practitioner support and endorsement of Multi-Disciplinary Practices [MDPs]).

[65] *See* Tyler J. Replogle, *The Business of Law: Evolution of the Legal Services Market*, 6 MICH. BUS. & ENTREPRENEURIAL REV. 287 (2017) (tracking key changes in the business orientation of law firms); Gillers, *supra* note 22 (noting that weakening local bars reduces lawyers' ability to serve as local leaders, community organizers, and benefactors).

[66] For the 75 percent figure, see NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015).

[67] *See generally* Rebecca L. Sandefur, *What We Know and Need to Know about the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016). The most recent national survey found that only 14 percent of legal problems "involved courts." *Id.* at 448. This fact indicates that, although the pro se crisis is itself a national disgrace, that crisis represents only the visible tip of a much larger iceberg.

[68] *See* David Freeman Engstrom & Nora Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. ONLINE 145 (2024).

least in part, the result of lawyer protectionism. Nor has the legal profession done itself any favors in this regard by blocking even limited reforms designed to increase access to legal help. Fueled by leading scholars and key idea entrepreneurs, a movement is afoot to relax the usual rules that say that only lawyers can practice law (UPL) or own law firms (Rule 5.4 and state equivalents) in order to welcome new providers into the system, whether human or software.[69] First up in 2020 was Utah, which created a "regulatory sandbox" within which new legal services providers can seek waivers of UPL and Rule 5.4. Soon after, Arizona unfurled reforms of its own, authorizing paraprofessionals (think nurse practitioners for law) and erasing Rule 5.4 by allowing legal services providers to seek status as "alternative business structures" (ABSs) and thus tap nonlawyer capital and talent to drive innovation. A critical mass of other states are considering, or have considered, similar ways to reconfigure regulation of legal services.[70]

The verdict remains out on these reforms, which, at three years old, have only just begun to generate empirical evidence about what types of innovation can result.[71] The important point is that American lawyers are not distinguishing themselves in their reflexive opposition to even the *suggestion* of reform. In 2022, a California State Bar working group tasked only with *studying* reform options was unceremoniously shut down by the state legislature's judiciary chairs when the plaintiffs' bar complained.[72] At the national level, the ABA House of Delegates, a mere two years after specifically calling for experimentation, passed a resolution reaffirming Model Rule 5.4 and insisting that nonlawyer ownership of law firms is dangerous.[73] Reflexive bar opposition to reforms of this sort, even when designed to operate in the civil justice system's lower precincts and so posing little threat to lawyers' bottom lines, has not won lawyers new admirers and is deepening public perception that law has become more guild than profession.

[69] The first of these restrictions takes the form of prohibitions, present in all fifty states, on "unauthorized practice of law," or UPL. The second restriction comes in the form of the prohibition on fee-splitting in Rule 5.4 of the Rules of Professional Responsibility and state-level equivalents.

[70] Sam Skolnik, *By the Numbers: 10 States Allowed Non-Lawyers to Offer Services*, Bloomberg (Dec. 28, 2023 5:00AM EST), https://news.bloomberglaw.com/business-and-practice/by-the-numbers-10-states-allowed-non-lawyers-to-offer-services (last accessed Feb. 20, 2025).

[71] David Freeman Engstrom et al., Legal Innovation after Reform: Evidence from Regulatory Change (Sept. 2022).

[72] David Freeman Engstrom & Nora Freeman Engstrom, *Why Do Blue States Keep Prioritizing Lawyers over Low-Income Americans?*, Slate (Oct. 17, 2022), https://slate.com/news-and-politics/2022/10/blue-states-legal-services-lawyers-fail.html (last accessed Feb. 20, 2025).

[73] In August of 2022, the ABA House of Delegates adopted Resolution 402, reaffirming long-standing policy (dating from 2000) advocating opposition to nonlawyer investment in law firms. See *American Bar Association's House of Delegates Adopts Resolution on Nonlawyer Ownership of Law Firms and Sharing Legal Fees with Nonlawyers, Which Was Sponsored and Proposed by the Illinois State Bar Association*, Ill. State Bar Ass'n (Aug. 9, 2022), https://www.isba.org/barnews/2022/08/americanbarassociationshouseofdeleg (last accessed Feb. 20, 2025).

15.2.2 *Regulatory Mismatch, Legal Innovation, and Access to Justice*

Tectonic shifts in the political economy of lawyering are thus powerful reasons why bar federalism *could* change. But a fast-changing legal services industry also provides good reason for why the current system of bar federalism *should* change. Indeed, bar federalism will be increasingly costly in both resource and innovation terms – and it will look outmoded and downright retrograde in an increasingly entity- and tech-based, multi-jurisdictional legal services industry.

A useful starting point for thinking about bar federalism's costs is the so-called values of federalism – a set of principles lurking in the background as the Framers negotiated the Constitution's specific enumerations of power.[74] As summarized by the Supreme Court in *Gregory v. Ashcroft*, federalism:

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[75]

Cutting across these benefits is a kind of covering principle for distributing power among government tiers: subsidiarity. That principle maintains that policymaking authority should be sited at the lowest level of government that can internalize all costs and benefits.[76] The result is something like a rebuttable presumption in favor of decentralization: Push policy authority down whenever possible to maximize preference satisfaction, opportunities for democratic participation, and experimentation, except where sufficiently large inter-jurisdictional spillovers or other defects compel a federal response.[77]

Viewed through the lens of subsidiarity, bar federalism is a costly scheme that is increasingly ill-adapted to the realities of the twenty-first-century legal services industry. Some of the thinking about bar federalism's costs is not

[74] Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987).

[75] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[76] *See, for example*, Neil S. Siegel & Robert D. Cooter, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan. L. Rev. 115 (2010) (summarizing a body of theory built atop assumptions that local residents have better information about the costs and benefits of policies and stronger incentives to hold officials accountable for policy choices); McConnell, *supra* note 74, at 1507 (reviewing Raoul Berger, Federalism: The Founders' Design and offering a classic synthesis).

[77] Federalism debates have always been in part functional and utilitarian, steeped in the language of costs, benefits, and externalities and the disciplining effects of mobility, in part democratic, steeped in the language of civic republicanism, and in part de-ontological, built upon rights talk and preservation of individual liberties. *See* Roderick Hills, *Federalism and Public Choice*, *in* Law and Public Choice (D. Farber & A. O'Connell eds., 2009).

new.[78] State-by-state rules have long been thought to impose steep compliance costs on increasingly multi-jurisdictional legal practice. Disparate and "splintered" rules around confidentiality, lawyer obligations to third parties and courts, advertising, and supervision of nonlawyers all bring significant compliance costs for jurisdiction-straddling practitioners – costs that are then passed on to consumers.[79] Because many legal markets span states, conflicting rules may particularly affect advertising costs.[80] This is significant for a legal profession that already spends most of its time, perhaps as much as two-thirds, drumming up business.[81]

Systemic costs are also high. Among them are sovereignty costs, where the state with the most restrictive standard calls the tune.[82] Bar federalism is also costly *itself* to maintain. Funding fifty different regulators to oversee an industry that increasingly spans jurisdictions is a needless drain on the public fisc. Without appropriate coordination, a fifty-state balkanized set of enforcement regimes needlessly duplicates regulatory efforts and squanders valuable social resources while generating "minimal gains."[83]

An even more compelling argument than simple costs may be that the current system of bar federalism is simply not equipped to regulate twenty-first-century legal services. As David Wilkins's field-shaping exposition long ago explained, American legal services regulation primarily takes three forms: (1) "disciplinary controls," via rule enforcement overseen by state supreme courts and bar associations;[84] (2) "liability controls," enforced via private lawsuits asserting legal malpractice claims; and (3) "institutional controls," as vested in institutions where lawyers work, such as court- or SEC-imposed sanctions under Federal Rule of Civil Procedure 11 or SEC Rule 2(e), respectively.[85] None of these approaches, however, fits well with the new wave of tech-fueled, entity-based, and jurisdiction-spanning legal services. Even without regulatory reform relaxing restrictive rules, "legal tech" companies are growing fast and providing "unbundled" services, such as document assembly,

[78] *See generally* Zacharias, *supra* note 42; *see also* Charles Silver, *What We Don't Know Can Hurt Us*, 43 Akron L. Rev. 1009 (2010); Wald, *supra* note 21, at 501.

[79] *See* Zacharias, *supra* note 42, at 346; *see also* Wald, *supra* note 21, at 494–512 (collecting arguments and evidence).

[80] For discussion that advertising is increasingly internet-based (or at least cross-border), see Zacharias, *supra* note 42, at 348.

[81] *See* Gillian K. Hadfield, *Legal Markets*, 60 J. Econ. Literature 1264, 1293 (2022).

[82] *See* Zacharias, *supra* note 42, at 346 (noting "lowest common denominator" effect).

[83] David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799, 873 (1992); *see also* Wald, *supra* note 21, at 512.

[84] These take at least two forms, including traditional bar disciplinary systems and California's modified approach, with a formally independent Bar Court. Cal. Bus. & Prof. Code § 6086.5 (creating Bar Court and the State Bar Discipline Monitor).

[85] *See* Wilkins, *supra* note 83, at 835–47. For more on "federalization through contextualization" via court and agency rules, see Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics through Legislative, Court, and Agency Regulation*, 48 San Diego L. Rev. 123, 126 (2011).

directly to consumers. One need not be a dreamy futurist to think that, going forward, legal services will less and less resemble the one-to-one, encompassing attorney-client relationship that has prevailed to this point.[86] Instead, it seems likely and perhaps even inevitable that a large proportion of legal services will be delivered at scale by entities in a one-to-many model using a mix of lawyers, nonlawyers, and software.

As this new world unfolds, the current duplicative, fifty-state approach is likely to grow even more expensive and outmoded. Regulation of legal services will look different in at least three ways. First, regulation of legal services will increasingly be entity-based, with regulatory oversight and enforcement focused not on "individual lawyer impropriety" within the confines of a particular attorney–client representation but rather on the full set of organizational procedures, routines, and systems new entity-based providers use to deliver legal services.[87] A second difference follows: Regulatory oversight will largely focus not on gross and even spectacular individual-level failures, as in the current attorney disciplinary system, but rather what Wilkins, albeit in a different era, referred to as "low-level negligence."[88] That is, effective oversight will often require unearthing coding problems, bias, or flawed user interfaces that cause individually small but collectively large harms to clients in systems operating at scale, not just gross, individual-level shortfalls in legal knowledge or violations of legal ethical rules. Third, all this means that regulation of legal services will be a highly technical process, because judging the quality of new modes of representation and types of outputs will often require regulators to understand a provider's design, implementation, and oversight of software or other technical systems that produced these outputs. It also likely means deploying data and data analytics, which may be the only way to identify and weigh the significance of system design and implementation choices that generate low-level negligence.

A final difference is that much regulatory oversight will be regular, not episodic, performed through audits or other resource-intensive and technocratic ways of evaluating systems. A fifty-state, balkanized system designed around individual-level, ex-post disciplinary controls – controls that, even in the best of circumstances, can capture only the most egregious conduct[89] – will lack the resources and the technical capacity to do any of this well.[90]

[86] Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)corporate Practice of Law*, 38 Int'l Rev. L. & Econ. 43, 53 (2014).

[87] *See* William D. Henderson, *Legal Market Landscape Report*, State Bar of Calif. 27 (July 2018), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf (last accessed Feb. 24, 2025).

[88] Wilkins, *supra* note 83, at 848.

[89] David Wilkins, *Legal Realism for Lawyers*, 104 Harv. L. Rev. 468, 493 (1990).

[90] For development of this argument, see David Freeman Engstrom & R. J. Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 72 DePaul L. Rev. 171 (2023).

The argument that bar federalism suppresses innovation is trickier. The question that has hung over "legal tech" in recent decades is why there is not more of it. A particular puzzle is why there is so little direct-to-consumer legal tech that serves the millions of self-represented litigants within the system.[91] At least three explanations have risen to the top. The first is insufficiently advanced technology: Automated tools, including sophisticated AI-based ones, cannot perform the all-important translational work – cutting through legalese and explaining options and outcomes in plain language – that is necessary when serving unsophisticated lay clients.[92] A second theory is that, looking across some 14,000 court jurisdictions in the United States, one sees a checkerboard of court technology systems and data infrastructures. The resulting technological Babel defeats the scale necessary to induce tech providers to invest time and capital in developing and then maintaining robust and user-friendly systems that serve individuals with very limited ability to pay.[93]

Neither of these explanations indicts *bar* federalism specifically, but a third one does: The current balkanized, fifty-state approach to legal services regulation stymies innovation because one of its chief products is regulatory uncertainty. Innovation in legal services delivery models requires investment in research and development to create new products and processes. Innovation also requires new organizational forms, developed by private entities in the shadow of extant governmental institutions and current rules of the road. Embarking on new forms and models of legal service delivery is expensive and risky in a system of fifty different rules.[94] Worse, bar federalism is murky even by conventional regulatory standards. For starters, separation-of-powers struggles around "inherent powers" mean that the *location* of regulatory authority is uncertain in many states. Exclusively courts? Shared powers between courts and legislatures? State bar organizations operating under delegated power? Yet even in states where court authority is clear, judicial rulemaking is, as Hadfield has put it, "unsystematic and opaque."[95] Rules that operate on lawyers are often elaborated either via bar disciplinary proceedings or court-promulgated rules that are not subject to public hearings or the notice-and-comment process that are the norm, or even required, in the political branches. The end result is a political

[91] Rebecca Sandefur, *Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies*, Am. Bar Found. (2019), https://www.americanbarfoundation.org/resources/legal-tech-for-non-lawyers-report-of-the-survey-of-us-legal-technologies/ (last accessed Feb. 1, 2025); Rebecca L. Sandefur et al., *Seconds to Impact?: Regulatory Reform, New Kinds of Legal Services, and Increased Access to Justice*, 84 Law & Contemp. Probs. 69 (2021).

[92] John Armour & Mari Sako, *Lawtech: Leveling the Playing Field in Legal Services?*, *in* Legal Tech and the Future of Civil Justice (David Freeman Engstrom ed., 2023).

[93] This is the theory of change of the Filing Fairness Project, launched in 2022, at Stanford Law School. *See* Filing Fairness Project, *Deborah L. Rhode Center on the Legal Profession*, https://law.stanford.edu/filing-fairness-project/ (last accessed Mar. 27, 2024).

[94] Hadfield, *supra* note 86 at 55.

[95] *Id.*

and policy catch-22. To gain traction, reforms that aim to relax the rules and open up the system need proof of concept. But in the current system, at least, no demonstration of success is possible.

In sum, we are at a critical point in the access-to-justice struggle because legal services regulation is balkanized in ways that resist change – a resistance that is out of whack with the realities of the civil justice system. Bar federalism will bring steadily increasing regulatory costs in a world of digitally provided, one-to-many legal services provided at scale. And though bar federalism's effect on innovation remains less than fully understood, all signs point away from maintaining "Our Bar Federalism." In the final section, we explore some preliminary ideas about how to move the access-to-justice needle forward.

15.3 A WAY FORWARD FOR REGULATING LEGAL SERVICES

The story told thus far is persistent bar federalism, the result of stakeholders following patterns set long ago by state bar authorities and judges, and a regulatory scheme that is increasingly ill-adapted to the twenty-first-century realities of a changing legal services industry and civil justice system. In short, we see the conditions as ripe for rethinking. In this section, we thus bracket arguments about whether bar federalism could or should change. Instead, we ask: Accepting that some degree of change is needed, what is the best way to achieve it?

Consider, as a start, three possible futures for American legal services regulation. The first continues the current trajectory: A state-by-state muddling through in the hope that reform experiments in Utah, Arizona, and elsewhere might push us to a new and better equilibrium as we learn what works and what doesn't. While we should not be naive in supposing that evidence and analysis will move those who have interests in opposing reform, the past year or two gives at least some reason to believe in the capacity of reform-minded stakeholders to take what we are learning through clear-headed, data-driven scrutiny and build mechanisms of change. A second option is that states might instead forge regional compacts using the process prescribed by Article 1, section 10, of the Constitution.[96] The subject matter of these compacts might include reciprocity in the admission of lawyers and nonlawyers to practice, common standards of training and discipline, and shared mechanisms of enforcement as a way to share benefits and burdens and enable a more frictionless scheme of lawyering and legal services. A third, and very different, possibility is to excavate bar federalism root and branch and move to full-scale federalization.[97] This would likely mean a federal agency, whether already established or a new and purpose-built one, to oversee lawyers and new nonlawyer service providers and enforce new federal standards for admission,

[96] *See generally* Cong. Rsch. Serv., Interstate Compacts: An Overview (Aug. 15, 2022).
[97] For earlier versions of this proposal, see Zacharias, *supra* note 42; Wald, *supra* note 21.

discipline, and "unauthorized practice of law," whether articulated by Congress or the agency itself.

We favor a fourth option: a federal-state hybrid. There are several ways to hybridize legal services regulation by allocating some authority at the federal level and some at the state level.[98] Our proposal divides labor by maintaining current state authority over traditional "role" regulation, while vesting federal regulators, whether in an existing or new agency, with responsibility for "entity" regulation. Put another way, a hybrid approach would retain the current state-level system of ex-post disciplinary and liability controls for conventional, one-to-one delivery of legal services by lawyers and paraprofessionals. But one-to-many service models, delivered by entities at scale using a mix of lawyers, nonlawyers, and software, would come within the jurisdiction of a new federal regulatory authority.

Hybridizing legal services regulation would, in our view, combine many of the virtues of the other reform possibilities while avoiding some of their vices. By preserving state control over "role" regulation, a hybrid approach would retain some of subsidiarity's virtues, capturing local knowledge while facilitating continued experimentation among states. Leaving regulation of conventional lawyering in the hands of state authorities also acknowledges that one-to-one interactions, however complex as a matter of adjudication as law and legal process become more complex themselves, still involve at their core professional relationships between lawyers and clients. Where, however, legal services are delivered on a one-to-many basis, the professional relationship is less about the lawyer behind the desk and the client opposite and more about service delivery on a wider and commoditized scale. Borders become impediments and the fifty disparate regulatory regimes impose tremendous and unnecessary transaction costs. When software risks eating the world, as the saying goes, it behooves us to think of structural solutions that meet technology and globalization where they are, rather than where parochial visions of a legal profession long past might want them to be.

Many questions, and many details, remain to be worked out. As already noted, a puzzle that hangs over the legal tech world is why, even as AI has galloped ahead, direct-to-consumer legal technologies that might assist millions of self-represented litigants have remained a relatively small part of the legal tech ecosystem. If the answer to that question is restrictive rules, then federalization could pay potentially large dividends: A single set of rules, and rules designed with one-to-many legal service models in mind, could unlock new and innovative ways to provide legal help that are chilled in the current fifty-state system. If the answer instead is that the checkerboard of technology and data infrastructures across 14,000 court jurisdictions

[98] Different from our hybrid approach, Wald proposed an "intermediary approach" in which the federal government relaxes the prohibition on multi-jurisdictional practice in Rule 5.5, allowing lawyers to practice nationally, but states retain control over admission, licensing, and discipline. Wald, *supra* note 21, at 531.

defeats the scale tech providers need to invest in robust, user-friendly platforms, then centralizing and standardizing the rules may not accomplish much.

There are other risks, too. Critics might object that, by reducing regulatory uncertainty, a hybrid model might indeed spur at least some innovation among legal tech providers, but only at the cost of valuable state-level experimentation as to the optimal mix of regulation needed to spur innovation while also placing guardrails around it. This concern is worrying, but it is hardly fatal. For starters, the "laboratories of democracy" idea, while a venerated one, has taken a beating of late, raising questions about the ability of any decentralized system to generate useable information about policy interventions.[99] Innovation in Utah and Arizona, while promising, is surely different from what one might expect in very different legal markets in California or Texas. The larger blind spot in this critique, as hinted at above, is that state courts currently lack much technical capacity – and, perhaps more importantly, they lack the power of the purse to change that fact. These shortcomings raise significant questions about the current fifty-state system's ability to perform the job in the first place, let alone drive a flowering of ideas about how to do it well. Put alternatively, even if states were, in theory, promising sources of innovation, capacity constraints make it highly improbable they could carry out this promise. Finally, recall that legal tech providers need scale to justify investment in services designed to reach consumers who, almost by definition, have limited ability to pay. Unless the regulatory uncertainty that defines the current system can be reduced at scale, across states, there may not be much new legal tech innovation for the current fifty-state system to use as an experimental testbed.

A second concern is that a new federal role could provide defenders of the current lawyer-dominated status quo with a one-stop-shop for exerting influence, yielding federal rules that are as stringent as, or even more stringent than, the current fifty-state approach. A version of this concern comes from Ben Barton, who worries that new regulatory schemes might end up imposing more restrictive rules than at present, particularly in the lower precincts of the system, where lawyers' bottom lines are less threatened, leaving a salutary zone of independence.[100] On this view, a new federal regulatory role might end up spurring less, not more, innovation in legal services relative to the present.

Here, too, the concern is worth considering but hardly fatal. To begin, lawyers may not prove nearly so efficacious in defending their monopoly. As already noted,

[99] *See, for example*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 924 (1994) (questioning whether decentralized experiments will generate useful information); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593, 615–16 (1980) (arguing that policy innovation will be an underproduced public good because risk-averse politicians will free-ride rather than risk failed innovation).

[100] Benjamin H. Barton, *The Future of American Legal Tech: Regulation, Culture, Markets*, in Legal Tech and the Future of Civil Justice (David Freeman Engstrom ed., 2023); *see also* Zacharias, *supra* note 42, at 379.

lawyers are fast losing the moral high ground in a civil justice system in the throes of an access crisis that they have presided over. Moreover, once the regulatory debate is pushed into a data-driven consumer protection framing, lawyers' claims to expertise lose some of their force. Even the argument, just noted, that legal tech enjoys significant latitude in the part of the civil justice system where so few have lawyers may not be quite right. Legal tech entrepreneurs say otherwise, claiming a substantial chilling effect because of the mere possibility of UPL enforcement. And all of this ignores the fact that many innovations, particularly technology-based ones, start in mainstream consumer markets and then work their way down. Like the smartphone, new one-to-many legal services models may start in areas such as divorce, with many middle-class clients in need of low-cost services, and only then work their way to eviction or debt collection, once the myriad components of a winning business model have been refined.

This only scratches the surface of the many challenges and critiques of a new hybrid federal-state role. While we leave such detail for another day, we note, in summary, that a hybrid approach presents a potentially more balanced and also more achievable approach. Reducing the balkanization of legal services provides concrete benefits, and we suggest the hard work of thinking about reforms that move in this direction while preserving what is best, or at least tenable, in intrastate regulation.

15.4 CONCLUSION

We would do well to rethink "Our Bar Federalism." The way in which it is configured has the worst elements of federalism's theory and architecture without the best elements. As a consequence, we cannot confront in a systematic, constructive way the many flaws in our scheme of lawyering and legal services regulation. And we cannot ensure that the settling of certain contentious matters by smart regulation will be implemented across the nation, thereby ensuring a more efficient, efficacious interstate flow of human capital of lawyers and legal service providers.