

# ECONOMISTS ON DEREGULATION OF THE AMERICAN LEGAL PROFESSION: PRAISE AND CRITIQUE

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## TABLE OF CONTENTS

INTRODUCTION.....	493
I. ECONOMISTS ON THE REGULATION OF THE PROFESSIONS .....	495
A. <i>Wealth of Nations</i> .....	495
B. <i>Capitalism and Freedom</i> and the Current Critique .....	496
C. Application of This Framework to Lawyers.....	498
II. LET’S DEREGULATE ALL THE LAWYERS .....	499
A. Strengths of the Economic Approach.....	501
B. Weaknesses—Policy Arguments Disguised as Empirical Arguments .....	503
III. THE INSIDE/OUTSIDE PERSPECTIVE—WHAT ECONOMISTS TEND TO GET RIGHT AND WHAT ECONOMISTS MISS.....	506
A. Advantage Outsiders .....	506
B. Disadvantage Outsiders.....	507
CONCLUSION .....	511

## INTRODUCTION

The outstanding essays and articles in this symposium and our discussions at the conference itself raise a critical policy question: whether the time has come to take deregulation of the American legal profession seriously. David Barnhizer argues that we should abandon our “Unethical Sys-

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tem of Legal Ethics.”<sup>1</sup> Jack Guttenberg likewise asserts that the current system of lawyer regulation is based upon outdated assumptions about the nature of the profession and the practice.<sup>2</sup> Renee Knake challenges the constitutionality of the American Bar Association (ABA) and state bar associations’ ban on corporate ownership of law firms.<sup>3</sup> Paul Paton describes some of the regulatory changes in the U.S. and elsewhere and argues that regulatory change is inevitable.<sup>4</sup> John Flood shares his experience of the U.K.’s large-scale deregulatory experiment.<sup>5</sup>

Taken together, these papers suggest that the American legal profession is facing a period of extraordinary strain and change and that deregulation in part or in whole may finally be a realistic possibility. The U.K. perspective offers a vision of a different, and less regulated, market for American legal services. Flood’s work makes clear that substantial deregulation of the market for legal services is not incompatible with a high-functioning and fair common-law justice system. To the contrary, the U.K. experience suggests that some parts of the American system might be fairer if deregulatory measures were considered.

This symposium’s papers are a critical part of a broader academic discussion of deregulating the American legal profession. For example, the legal blog *Truth on the Marketplace* recently held an online symposium entitled *Unlocking the Law: Deregulating the Legal Profession*.<sup>6</sup> I have similarly argued in the past that the current regulation of American lawyers is exactly backwards—entry regulations are indefensibly high (suggesting that they are more useful to protecting existing lawyers than consumers) and conduct regulations are grossly under-enforced (suggesting that protecting existing lawyers is more important than protecting clients).<sup>7</sup>

There is a parallel discussion occurring on the same topic in a different field of study: economists are building their own argument for deregulation

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1. David Barnhizer, *Abandoning an “Unethical” System of Legal Ethics*, 2012 MICH. ST. L. REV. 347.

2. Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give*, 2012 MICH. ST. L. REV. 415.

3. Renee Newman Knake, *Democratizing the Delivery of Legal Services: On the First Amendment Rights of Corporations and Individuals*, 73 OHIO ST. L.J. 1 (2012).

4. Paul D. Paton, Professor, University of the Pacific, McGeorge School of Law, Panel at the Michigan State Law Review Symposium: Lawyers as Conservators (Sept. 8-9, 2011).

5. John Flood, *Will There Be Fallout from Clementi? The Repercussions for the Legal Profession After the Legal Services Act 2007*, 2012 MICH. ST. L. REV. 537.

6. *Unlocking the Law Symposium*, TRUTH ON THE MARKET, <http://truthonthemarket.com/unlocking-the-law-symposium/> (last visited Feb. 8, 2012).

7. See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 436-63 (2001) [hereinafter *Economic Analysis*]; BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 140-59 (2011) [hereinafter *LAWYER-JUDGE BIAS*].

of the legal profession and presenting their own empirical studies. The most notable example is a new book by three economists, Clifford Winston, Robert Crandall, and Vikram Maheshri, entitled *First Thing We Do, Let's Deregulate All the Lawyers*.<sup>8</sup> Their work follows in the path of previous economic studies of the market for legal services.<sup>9</sup>

It is unfortunate that these two discussions have been happening simultaneously, but separately. This Article seeks to (very briefly and selectively) introduce the legal audience to the work of the economists, to discuss what parts of the economists' case for deregulation are most, and least, persuasive, and how these two discussions can be enriched by mutual recognition and interaction. Part I offers a very brief overview of the orthodox economic take on occupational licensing and its application to American lawyers. Part II uses *Let's Deregulate* to elucidate the strengths and weaknesses of the economists' take on lawyer deregulation. Part III continues this discussion by noting the special advantages and disadvantages economists bring to this project as outsiders—they can easily identify and disregard our professional shibboleths, but they also miss some important nuances in the nature of the profession and our regulation. The Article concludes by noting that more cross-pollination between economists and lawyers on this topic could prove extraordinarily helpful.

## I. ECONOMISTS ON THE REGULATION OF THE PROFESSIONS

As a general rule, economists have expressed a longstanding hostility to occupational regulation. The two most famous (and persuasive) examples come from Adam Smith's *The Wealth of Nations* and Milton Friedman's *Capitalism and Freedom*.

### A. *Wealth of Nations*

The *Wealth of Nations* was first published in 1776 and is one of the foundational works in classical economics, as well as one of the most powerful and lasting defenses of the superiority of free markets.<sup>10</sup> One of Smith's main targets in *The Wealth of Nations* was the European policy allocating an "exclusive privilege of an incorporated trade," what we now

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8. CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, *FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS* (2011) [hereinafter *LET'S DEREGULATE*].

9. See, e.g., Mario Pagliero, *Licensing Exam Difficulty and Entry Salaries in the US Market for Lawyers*, 48 BRIT. J. INDUS. REL. 726 (2010); B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53 (1977) [hereinafter *Market for Lawyers*].

10. ADAM SMITH, *THE WEALTH OF NATIONS* (Modern Library Paperback ed. 2000) (1776).

refer to as occupational regulation/licensing.<sup>11</sup> In pre-industrial revolution Europe this regulation was generally accomplished by professional guilds, which limited admission to those who had served as apprentices. The guilds also limited the total number of apprentices and the length of apprenticeship, effectively restraining the number of entrants into any regulated profession.<sup>12</sup>

Smith lays out three ills associated with this occupational regulation:

First, by restraining the competition in some employments to a smaller number than would otherwise be disposed to enter into them; secondly, by increasing it in others beyond what it naturally would be; and, thirdly, by obstructing the free circulation of labour and stock, both from employment to employment and from place to place.<sup>13</sup>

Smith's argument includes both a moral/libertarian element and an explicitly economic one. On a moral level, occupational regulation violates the "property which every man has in his own labour"; this property "is the original foundation of all other property, so it is the most sacred and inviolable."<sup>14</sup> On a purely economic level, these regulations reduce competition and are meant to prevent a "reduction in price, and consequently of wages and profit, by restraining . . . free competition."<sup>15</sup>

Smith likewise denies the necessity for the regulation, arguing that the "institution of long apprenticeships can give no security that insufficient workmanship shall not frequently be exposed to public sale."<sup>16</sup> Lastly, Smith states quite pithily how and why these regulations arise: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."<sup>17</sup>

In short, roughly 235 years ago Adam Smith stated the basic critique of occupational regulation with great prescience and clarity. The later economic critiques all bear the basic imprint of Smith's work.

## B. *Capitalism and Freedom* and the Current Critique

Chapter Nine of Milton Friedman's *Capitalism and Freedom* is the other foundational text<sup>18</sup> for the economic critique of occupational licens-

11. *Id.* at 136.

12. *Id.* at 137-41.

13. *Id.* at 136.

14. *Id.* at 140.

15. *Id.* at 142.

16. *Id.* at 140.

17. *Id.* at 148.

18. Note that this is an extremely condensed recap. Other foundational texts include Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 966-67 (1963); Keith B. Leffler, *Physician Licensure: Competition and Monopoly*

ing.<sup>19</sup> Like *The Wealth of Nations*, *Capitalism and Freedom* is a forceful and readable defense of free markets and a powerful critique of government regulation in general.

Like *The Wealth of Nations*, Friedman launches his critique with an explicit libertarian appeal to freedom of labor and a rebuke of the medieval guild system, arguing that the “overthrow of the medieval guild system was an indispensable early step in the rise of freedom in the Western World” and that the “retrogression” back to licensure in the twentieth century has been enormously harmful.<sup>20</sup>

Before attacking the economic effects of licensure, Friedman notes a disturbing “common feature”<sup>21</sup> of licensure: “the legislation” establishing licensure is generally “enacted on behalf of [the] producer group”<sup>22</sup> and then governed by the group itself.<sup>23</sup> The regulation eventually ossifies into powerful barriers to entry and monopoly rents for the licensed profession, with little or no accompanying benefit to the public.<sup>24</sup> Friedman argues against licensing physicians,<sup>25</sup> with sideswipes at barbers<sup>26</sup> and lawyers<sup>27</sup> along the way.

Economists have built upon these arguments to present a powerful case against occupational licensing.<sup>28</sup> The case begins with the logic of collective action: concentrated groups that have a large per capita stake in gov-

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*in American Medicine*, 21 J.L. & ECON. 165, 185-86 (1978) (examining economic perspectives of physician licensure); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 13-17 (1971) (describing licensing and the collective political power of an occupation); OCCUPATIONAL LICENSURE AND REGULATIONS (S. Rottenberg ed., 1980) (collecting a number of other important economic works on licensure).

19. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 137-60 (1982) [hereinafter *CAPITALISM AND FREEDOM*]. Friedman actually wrote his dissertation on occupational licensing, so Chapter Nine of *Capitalism and Freedom* is a greatly condensed version of his thoughts on the topic. See MILTON FRIEDMAN & SIMON KUZNETS, *INCOME FROM INDEPENDENT PROFESSIONAL PRACTICE* (1945) (Friedman’s dissertation).

20. *CAPITALISM AND FREEDOM*, *supra* note 19, at 137.

21. *Id.* at 139 (“The common feature of these examples, as well as of licensure, is that the legislation is enacted on behalf of a producer group.”).

22. *Id.*

23. *Id.* at 140.

24. *Id.* at 140-60.

25. *Id.* at 149-60.

26. *Id.* at 142-43.

27. *Id.* at 153.

28. For studies showing higher costs to consumers from occupational licensing, see AM. ASS’N OF RETIRED PERS, CONSUMER AFFAIRS SECTION, UNREASONABLE REGULATION = UNREASONABLE PRICES (1986) (considering optometry, dentistry, hearing aid sales, and funeral sales); Alex Maurizi, *Occupational Licensing and the Public Interest*, 82 J. POL. ECON. 399 (1974). See generally Simon Rottenberg, *Introduction*, in OCCUPATIONAL LICENSURE AND REGULATION 1, 3 (Simon Rottenberg ed., 1980); J. Howard Beales, III, *The Economics of Regulating the Professions*, in REGULATING THE PROFESSIONS: A PUBLIC POLICY SYMPOSIUM 125, 135 (Roger D. Blair & Stephen Rubin eds., 1980).

ernment regulation tend to do much better than diffuse groups with low per capita costs, even if the second group is much larger than the first and even if the aggregate cost to society is quite high.<sup>29</sup> 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, or through suppression of competing industries.<sup>30</sup>

Professions are the quintessential concentrated interest group, so they tend to triumph in both the political and regulatory processes. Barriers to entry, which make it harder for new competitors to enter the market and thus inflate the wages of current practitioners, are the prime example.<sup>31</sup>

### C. Application of This Framework to Lawyers

The Smith/Friedman story about the nature of occupational licensure has been applied to lawyers. Economists<sup>32</sup> and law professors alike have argued that the many barriers to entry to the legal profession—the requirement of undergraduate education, the law school requirement (and the various American Bar Association sub-requirements involving law libraries, faculties, etc.), the character and fitness process, and the bar exam (and other MPRE type exams)—are unjustifiably high and harmful to the public.<sup>33</sup>

29. The classic statement of this effect is MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 22-52 (1965) (describing the dominance of small groups over large groups in the political and regulatory process).

30. For another seminal work in the area, see George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 6 (1971) (“Crudely put, the butter producers wish to suppress margarine and encourage the production of bread.”).

31. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 59-60 (1982).

32. See *Market for Lawyers*, *supra* note 9, at 80-81 (concluding that law schools have undersupplied lawyers for market demand, and that lawyer wages have been inflated as a result); B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1 *AM. B. FOUND. RES. J.* 51 (1978) [hereinafter *Number and Earnings*]; D. S. LEES, *ECONOMIC CONSEQUENCES OF THE PROFESSIONS* 35-45 (1966) (examining the British legal market). *But see* Malcolm Getz et al., *Competition at the Bar: The Correlation Between the Bar Examination Pass Rate and the Profitability of Practice*, 67 *VA. L. REV.* 863 (1981) (concluding that bar exam pass rates do not have an effect on the salaries of lawyers).

33. For some of my work on the subject, see *Economic Analysis*, *supra* note 7, at 434-63; *see also* LAWYER-JUDGE BIAS, *supra* note 7, at 140-54. For seminal works by others, *see, e.g.*, Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 97-98 (1981) (arguing against the restrictions on the unauthorized practice of law); DAVID LUBAN, *LAWYERS AND JUSTICE, AN ETHICAL STUDY* 269 (1988) (proposing “to deregulate, wholly or partially, the market for routine legal services—wills, probate, real estate closings, uncontested divorces, and so forth—by allowing non-lawyers and paralegals to perform them”); W. Clark Durant, *Maximizing Access to Justice: A Challenge to the Legal Profession*, in GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 432, 437 (2d ed. 1988).

The argument against lawyer regulation is both theoretical and historical. As a historical matter, as of the middle of the nineteenth century, deregulation of the legal profession was widespread,<sup>34</sup> and bar associations largely defunct.<sup>35</sup> Beginning in the 1870s, lawyers began to form organized bar associations,<sup>36</sup> including the nascent ABA.<sup>37</sup> From the outset, the new bar associations had a regulatory mission, to punish the “activities of a notorious fringe of unlicensed practitioners”<sup>38</sup> and require higher qualifications for admission to practice.<sup>39</sup>

A brief review of the current barriers to entry establishes the success of this project: new entrants must generally complete at least three years of undergraduate education (and many states and law schools require a degree), must graduate from an ABA accredited law school, and must pass a particular state’s bar examination and character and fitness examinations.<sup>40</sup> These entry barriers are expensive monetarily and temporally, and there is ample evidence that the expense to the public is not worth the benefit. The easiest way to demonstrate this point is consideration of the skills of the newest members of the bar. Query what legal tasks, if any, we could guarantee that a lawyer could perform on the day she is sworn in.<sup>41</sup>

## II. LET’S DEREGULATE ALL THE LAWYERS

*Let’s Deregulate* is the most recent application of the economic argument for occupational deregulation to the American legal profession.<sup>42</sup> The

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34. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 227-28 (1953) (“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.”).

35. Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 461 (2008) [hereinafter *Judges*].

36. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 648-52 (2d ed. 1985) [hereinafter *HISTORY OF AMERICAN LAW*].

37. ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 207-08 (1921). ABA founded in 1878 in Saratoga, New York, by “seventy-five gentlemen from twenty-one jurisdictions, out of approximately 60,000 lawyers then practicing in the United States.” *Id.* at 208.

38. See *HISTORY OF AMERICAN LAW*, *supra* note 36, at 650.

39. See W. Hamilton Bryson & E. Lee Shepard, *The Virginia Bar, 1870-1900, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 171-72 (Gerald W. Gawalt, ed. 1984).

40. *LAWYER-JUDGE BIAS*, *supra* note 7, at 121-22.

41. For a much fuller version of this argument, see Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1190 & n.80 (2003).

42. See *LET’S DEREGULATE*, *supra* note 8.

book argues that lawyers earn an inflated wage through two different types of government regulations.

First, lawyers have pushed for high barriers to entry, thus restricting the overall supply of lawyers and keeping many new competitors out of the profession.<sup>43</sup> This argument is familiar and dates back to at least Adam Smith. Nevertheless, the book offers a powerful new addition to the argument; it offers the most thorough and rigorous empirical demonstration of a measurable earnings premium for lawyers.<sup>44</sup> These sections of *Let's Deregulate* are discussed in Section II.A below.

Second, lawyers have pushed to affect the demand for legal services by lobbying for complicated laws and regulations in “contentious policy areas,” like “environmental standards governing pollution emissions and discharges” or “the resolution of intellectual property disputes” or “class-action liability suits.”<sup>45</sup> This portion of the analysis states a newer critique of the legal profession; the bulk of the study of government regulation and lawyer incomes has focused on barriers to entry. The relationship of lawyer income to legal complexity is, in fact, a burgeoning and fascinating topic of study.<sup>46</sup> Nevertheless, this part of the analysis is weaker because the causal link between the behavior of lawyers as an interest group and the allegedly harmful government regulation is much weaker. These sections of *Let's Deregulate* are discussed in Section II.B.

The comparison of these two different grounds helps establish the special strengths and weaknesses that economists bring to the debate over the regulation of lawyers. *Let's Deregulate* offers a clear view of the valuable contributions that economists can make to the discussion of deregulating the legal profession. Most notably, economists are able to estimate the costs and benefits of licensure.<sup>47</sup> This adds empirical meat to the bones of the common sense argument against licensure made by Smith and Friedman.

Of course the devil is in the details and what exactly one counts as a cost and a benefit of lawyer licensure determines how the balance comes out. As a result, it is particularly important that an argument for deregulation be conservative (small “c” conservative) and built on generally agreed to principles.

Unfortunately, the second half of *Let's Deregulate's* argument suffers from gross over-reach. It is one thing to extrapolate from demonstrably true propositions, for example, the requirements for entering the legal profession

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43. *Id.* at 9-14.

44. *Id.* at 24-56.

45. *Id.* at 14-15.

46. My thoughts on the nature of legal complexity and the roles that lawyers and judges play in creating and maintaining that complexity can be found in LAWYER-JUDGE BIAS, *supra* note 7, at 259-83.

47. See LET'S DEREGULATE, *supra* note 8, at 73-75.

are very expensive<sup>48</sup> or that more people would like to enter the legal profession than are allowed to (limiting the supply of legal services and increasing the cost).<sup>49</sup> It is a different matter to argue that lawyers have successfully lobbied for complex regulations in an effort to drive up their salaries.<sup>50</sup> The causes, costs, and benefits of environmental regulation are too varied and complicated to boil down to just their effect on the legal profession. Moreover, the idea that lawyers are the prime movers behind these regulations is, to put it kindly, a challenging empirical proposition.<sup>51</sup>

#### A. Strengths of the Economic Approach

The best part of *Let's Deregulate* (and the economic approach in general) is also the most straightforward. The authors demonstrate that barriers to entry result in fewer lawyers and that this reduced supply likely results in higher salaries for lawyers. First, the authors succinctly describe how expensive it is to become a lawyer and how the barriers to entry constrain the number of lawyers.<sup>52</sup> The authors correctly identify law schools as the primary bottleneck:

Given that 95 percent of people who enroll in an ABA-accredited law school eventually pass a state bar examination, the primary factor that limits the supply of lawyers in the United States is clearly the number of available spaces in [law] schools. Indeed, the number of applicants to U.S. law schools has risen more than 50 percent since 1976, while total enrollments have increased only 26 percent.<sup>53</sup>

Existing law schools have failed to expand to meet the demand out of concern for the *U.S. News and World Report* rankings and a desire to maintain the highest quality student pool.<sup>54</sup> The ABA has suppressed the creation of new schools through the expensive and intensive accreditation process.<sup>55</sup>

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48. See generally *id.* at 9-14 (noting that the cost to attend a three-year program at some institutions to exceed \$150,000).

49. *Id.* at 11-12 (noting that from 1997 to 2004 approximately 50% of law school applicants were not admitted to any law school).

50. *Id.* at 14-16.

51. See *infra* Section II.B.

52. LET'S DEREGULATE, *supra* note 8, at 9-14.

53. *Id.* at 12.

54. *Id.* at 12-13; see also *Market for Lawyers*, *supra* note 9, at 60-61 (noting that non-profit, high quality law schools have little incentive to expand to meet increased student and market demand); MICHAEL SAUDER & WENDY ESPELAND, FEAR OF FALLING: THE EFFECTS OF *U.S. NEWS & WORLD REPORT* RANKINGS ON U.S. LAW SCHOOLS 11-14 (2007), available at <http://www.lsac.org/lsacresources/Research/GR/GR-07-02.pdf> (describing effects of the rankings on admissions criteria and decisions).

55. LET'S DEREGULATE, *supra* note 8, at 12-14.

As a result, approximately fifty percent of the potential entrants to the market are deterred each year.<sup>56</sup>

Next, *Let's Deregulate* demonstrates how reduced supply results in higher wages. American lawyer salaries are compared to other licensed and unlicensed jobs, and lawyers are found to enjoy a significant salary premium (second only to doctors).<sup>57</sup> This premium increased between 1975 and 2004.<sup>58</sup>

An earlier study of lawyer salaries by Sherman Rosen posited that the bulk of this premium was due to the skills and/or abilities of lawyers.<sup>59</sup> *Let's Deregulate* seeks to rebut this concept by noting that the average LSAT and GPA of entering law students has not changed significantly over the studied period (suggesting that lawyers themselves have remained intrinsically similar) and that the salary premium of lawyers has grown over time, while other skill intensive professions like engineers or doctors have experienced relatively stable premiums (suggesting that the increased lawyer premium is not the result of the acquisition of specialized skills).<sup>60</sup>

*Let's Deregulate* concludes that “the United States is spending \$170 billion a year on lawyers (in 2005 dollars)” and the “2004 lawyers’ earnings premiums amounted to \$64 billion—or an eye-popping \$71,000 per practicing lawyer—and that those premiums were widely shared among the legal profession.”<sup>61</sup> The authors provide extensive data to support this conclusion.<sup>62</sup> Even if the absolute figure is rejected, the conclusion that barriers to entry have raised lawyer salaries is patent and inescapable.

There are some points in the analysis that are worth quibbling with. Notably, a great deal of the study covers the years 1974-2004,<sup>63</sup> which is a somewhat inopportune set of years, as the late 1970s and early 1980s were a particularly challenging time for legal profession earnings in comparison to the 1960s or the late-1980s.<sup>64</sup> The current period (from 2005-2011) has likewise been rougher than 1984-2004.<sup>65</sup> The time period matters because

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56. *Id.* at 11 (dating from 1997 to 2004 roughly half of the 800,000 applicants to American law schools were not admitted to any law school).

57. *Id.* at 37, 39.

58. *See generally id.* at 30-56.

59. Sherwin Rosen, *The Market for Lawyers*, 35 J. L. & ECON. 215, 216-18 (1992).

60. *See generally* LET'S DEREGULATE, *supra* note 8, at 45-55.

61. *Id.* at 55.

62. *See generally id.* at 24-55.

63. *See id.* at 16-22.

64. Rosen, *supra* note 59, at 234-38.

65. *See, e.g.,* *Salary Distribution Curve for the Class of 2009 Shows Relatively Few Salaries Were Close to the Mean*, NAT'L ASS'N FOR LAW PLACEMENT (July 2010), <http://www.nalp.org/startingsalarydistributionclassof2009>; *Starting Salary Distribution for Class of 2008 More Dramatic than Previous Years*, NATIONAL ASSOCIATION FOR LAW PLACEMENT (June 2009), <http://www.nalp.org/08saldistribution?s=starting%20salary%20distribution%20for%20class%20of%202008>.

some of the argument is based on an increase in the salary premium over time, so choosing a relative trough to start the analysis and a relative peak to end it makes the analysis weaker than if it had covered a longer and more inclusive period of time.<sup>66</sup>

Nevertheless, the book is the most comprehensive and authoritative empirical argument about the costs of entry regulation for lawyers to date. It is thus of a piece with the best of the economic scholarship on this topic: it uses the available data and statistical analysis to support an otherwise common-sense hypothesis—restricting entry raises prices unjustifiably.

### B. Weaknesses—Policy Arguments Disguised as Empirical Arguments

Two of the authors of *Let's Deregulate*, Clifford Winston and Robert Crandall, have proven controversial figures in the past—famously arguing in 2003 “that the current empirical record of antitrust enforcement is weak” and as a result, enforcement actions should be limited to “only the most egregious anticompetitive violations.”<sup>67</sup> Opposing scholars accused Winston and Crandall of overreach and harshly criticized the paper’s empirical and policy bases.<sup>68</sup>

I am not in a position to dispute their conclusions about antitrust, but can report that half of the argument in *Let's Deregulate* is unsustainable as an empirical matter. The authors’ argument on the supply side of the equation (there are fewer lawyers than there would be otherwise due to entry barriers) is quite persuasive. The authors’ demand side argument that government regulation is a significant source of inflated lawyer salaries and that lawyers as an interest group have successfully lobbied for increased regulation, is off the mark.

*Let's Deregulate* argues that “the demand for lawyers in the public and private sector has experienced continual growth, thanks in part to government policies that require private firms to retain legal counsel or encourage them to engage in litigation.”<sup>69</sup> The authors “focus on a subset of the most important and contentious policy areas that help generate greater de-

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66. For example, Pashigian’s studies started in the 1920s and continued to the publication date. See *Market for Lawyers*, *supra* note 9, at 63-67; *Number and Earnings*, *supra* note 32, at 67-77.

67. Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSPS. 3, 3-4 (2003).

68. See, e.g., Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSPS. 27 (2003); Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook*, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES (Apr. 2004), available at <http://aei.brookings.org/admin/authorpdfs/page.php?id=933>.

69. LET’S DEREGULATE, *supra* note 8, at 14 (emphasis omitted).

mand for attorneys and their services.”<sup>70</sup> These include “environmental standards governing pollution emissions,” “the resolution of intellectual property disputes,” “class-actions suits,” and state “consumer protection acts.”<sup>71</sup>

The authors’ frontal assault on much of the recent law and regulation protecting consumers and the environment is obviously controversial and less empirically demonstrable. Nevertheless, in order to connect their policy attack on this regulation to lawyers, the authors are required to “double down” on their shaky foundation with two further logical leaps.

First, they must argue that the costs associated with these policies outweigh the benefits.<sup>72</sup> This is enormously problematic, because any argument against government regulation or consumer protection lawsuits is a complicated one that will not garner general agreement on either the costs or benefits, let alone their effect on a totally separate area of the economy (the demand for legal services). This is a topic that has been widely debated among the public and economists<sup>73</sup> and is not suitable to a brief overview as part of ninety-nine page book.<sup>74</sup>

Second, in order to connect these regulations into the legal profession, the authors attempt to prove that as an interest group the legal profession has successfully lobbied hard for these regulations and others.<sup>75</sup> *Let’s Deregulate* does admit that “[i]t is difficult to provide systematic quantitative evidence of lawyers’ influence in generating or maintaining specific inefficient public policies that are solely or partly intended to benefit them,” but then goes on to provide “circumstantial evidence,” in the form of a collection of anecdotes about lawyers lobbying legislatures.<sup>76</sup>

It is certainly true that the ABA and the various state bar associations are powerful lobbying entities.<sup>77</sup> It is likewise true that the ABA played a large role in the legislative successes the authors describe as well as many

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70. *Id.*

71. *Id.* at 14-16.

72. *See id.* at 67-72.

73. *See, e.g.,* Jane S. Shaw & Richard L. Stroup, *Do Environmental Regulations Increase Economic Efficiency?*, 23 REG. 13 (1990); Lisa Heinzerling & Fred Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, GEO. ENVIRO. L. POL’Y INST. (2002), available at <http://ase.tufts.edu/gdae/publications/c-b%20pamphlet%20final.pdf>; Robert Stavins, *Is Benefit-Cost Analysis Helpful for Environmental Regulation?*, ROBERT STAVINS BLOG (July 8, 2009), available at <http://www.robertstavinsblog.org/2009/07/08/is-benefit-cost-analysis-helpful-for-environmental-regulation/>.

74. LET’S DEREGULATE, *supra* note 8, at 65-81 presents this argument.

75. *Id.* at 75-81.

76. *Id.*

77. *Id.*

others they overlook.<sup>78</sup> It is a completely other matter to argue that policies as diverse as environmental regulation or consumer protection are in any way “caused” by lawyers. These sorts of policies are inevitably the result of large and shifting political alliances, not any single group.

Further, previous economic scholarship and some of the authors’ own data fails to support their contentions. Prior to *Let’s Deregulate* a trio of articles by Peter Pashigian were the authoritative statement on the main impetus for the rise in lawyer salaries.<sup>79</sup> Pashigian agrees with *Let’s Deregulate* that as a result of entry barriers lawyer salaries are higher than would otherwise be expected.<sup>80</sup> Pashigian, however, expressly rejects the hypothesis that increased regulation increases lawyer earnings.<sup>81</sup> Pashigian concludes that increases in real gross national product drive both the quantity and remuneration of lawyers, not increases in regulation.<sup>82</sup> Pashigian does conclude that regulatory changes may drive the allocation of lawyers, but not the absolute quantity or payment.<sup>83</sup>

Likewise, *Let’s Deregulate* actually makes an unwitting case against the effect of regulation upon lawyer salaries. First, doctors consistently earn a greater and more consistent income premium than lawyers over the study period.<sup>84</sup> There is no reason to believe that doctors are influenced or helped by increased regulation. To the contrary, it seems likely that doctors’ earnings have been dampened by government regulation.<sup>85</sup>

Second, economists have seen a similar rise in salary premiums to lawyers.<sup>86</sup> The authors attempt to connect this rise to “economists’ growing interactions with the legal profession.”<sup>87</sup> This assertion comes with little

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78. Much of my scholarship has focused on the power of the ABA and state bar lobbying efforts. See, e.g., BARTON, *supra* note 7, at 105-59.

79. See *Number and Earnings*, *supra* note 32; *Market for Lawyers*, *supra* note 9; B. Peter Pashigian, *Regulation, Preventive Law, and the Duties of Attorneys*, in THE CHANGING ROLE OF THE CORPORATE ATTORNEY 3 (William J. Carney, ed. 1982) [hereinafter *Duties of Attorneys*]. These studies were reprised and updated by symposium participant Thomas D. Morgan in 1994. See Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625 (1994).

80. See *Market for Lawyers*, *supra* note 9, at 80-85 (concluding that law schools have undersupplied lawyers for market demand, and that lawyer wages have been inflated as a result).

81. See *Number and Earnings*, *supra* note 9, at 77-81; *Market for Lawyers*, *supra* note 32, at 70-73.

82. See *Number and Earnings*, *supra* note 9, at 77-81; *Market for Lawyers*, *supra* note 32, at 70-73.

83. See *Duties of Attorneys*, *supra* note 79, at 41-42.

84. See LET’S DEREGULATE, *supra* note 8, at 37-39.

85. Consider, for example, the various cuts to Medicare and Medicaid payouts. For the most recent round of cuts, see Robert Pear, *Obama Proposes \$320 Billion in Medicare and Medicaid Cuts over 10 Years*, N.Y. TIMES, Sept. 20, 2011, at A14.

86. LET’S DEREGULATE, *supra* note 8, at 61-65.

87. *Id.* at 65.

empirical evidence to suggest that the rise in the salaries of economists has been as a result of working for lawyers, rather than the likelier explanation: economists are now performing more lucrative work in the private sector rather than teaching.<sup>88</sup> The brief section where the authors discuss the rise in economist salaries (a phenomenon likely to be near and dear to the authors' hearts) and treat it as a side effect of the regulatory imbalances in the legal profession is particularly unfortunate and telling: the authors seem unwilling to consider any data points that disagree with their analysis, especially when arguing the insalubrious effects of government regulations.

### III. THE INSIDE/OUTSIDE PERSPECTIVE—WHAT ECONOMISTS TEND TO GET RIGHT AND WHAT ECONOMISTS MISS

Economists have the advantages and disadvantages of being outsiders when considering the legal market. The outsider advantage allows them to disregard some sacred cows that lack empirical foundation. The disadvantage to outsider status is that economists miss some underlying nuances.

#### A. Advantage Outsiders

Economists offer an outside and generally unbiased view of the legal profession, unencumbered by professional jargon or mythology. Having presented my argument for deregulation to many legal audiences over the years, I can report that lawyers, law professors, and judges are quite insistent that barriers to entry need to rise, not lower, because of the poor practice they regularly witness and as a protection against the potential horrors for clients from the unauthorized practice of law or multidisciplinary practice.<sup>89</sup> These propositions are typically offered with only anecdotal empirical support.

An outsider is able to cut through these arguments more quickly and cleanly than a fellow lawyer. *Let's Deregulate*, for example, offers a brisk and concise six-page refutation of the policy justifications for entry barriers. The author's note that "no evidence exists to justify the ABA's initial accreditation policies" and that the "weak discipline on lawyers' conduct"

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88. *Id.* at 65.

89. Milton Friedman tells an illustrative anecdote. A fellow economist was arguing to a group of lawyers that entry barriers were too high and used an analogy from the automotive industry. Would it not, he said, be absurd if the automobile industry were to argue that no one should drive a low quality car and therefore that no automobile manufacturer should be permitted to produce a car that did not come up to the Cadillac standard. One member of the audience rose and approved the analogy, saying that, of course, the country cannot afford anything but Cadillac lawyers! This tends to be the professional attitude.

CAPITALISM AND FREEDOM, *supra* note 19, at 153.

calls “into question much of the justification for licensure regimes.”<sup>90</sup> They further note that based on the admissions profile of the students denied admission to any school there are qualified applicants being denied admission.<sup>91</sup> Most importantly, the purchasers of the complicated legal services that are most likely to require special training or abilities tend to be either the government or law firms, and these purchasers are especially well qualified to sort the substandard from the excellent practitioners. This is especially so in light of the current high level of information on individual lawyers.<sup>92</sup> Given the authors’ earlier strong description of the costs of the system, their evisceration of the benefits is particularly effective.

### B. Disadvantage Outsiders

There are three main nuances that *Let’s Deregulate* and other economic studies of the legal profession tend to miss. First, it makes intuitive sense that as the law grows more complex the demand for lawyers will rise, as firms will be forced to pay more *ex ante* to comply with the law and more *ex post* to defend law suits or government prosecutions based on violations of unclear legal standards.<sup>93</sup> These claims are difficult to prove empirically (partially because “complexity” itself is a tricky and potentially immeasurable attribute), but have a theoretical appeal.<sup>94</sup> I have likewise argued that legal complexity is a tremendous advantage to the legal profession in terms of both work creation and job satisfaction.<sup>95</sup>

Nevertheless, the insider view of complexity includes the recognition that *judges* are prime actors in the drama and that lawyers and judges work together in a common-law, precedential system to create layers upon layers of complexity on top of regulations, statutes, and the existing common

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90. LET’S DEREGULATE, *supra* note 8, at 83-84.

91. *Id.* at 84-85.

92. *Id.* at 86-88.

93. Gillian Hadfield’s work in this area has been particularly strong. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

94. Humorously, the various scholars who have addressed legal complexity frequently come up with relatively convoluted definitions of complexity itself. For example, Peter Schuck describes legal complexity across four axes—density, complexity, institutional differentiation, and indeterminacy. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 4 (1992). Deborah Paul uses three criteria – complication, intractability, and incoherence. Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. REV. 151, 157-62 (1997). Richard Epstein offers a definition that defines complexity in terms of the public and private costs of compliance with any rule. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 25-26 (1995).

95. BARTON, *supra* note 7, at 259-83.

law.<sup>96</sup> Both *Let's Deregulate* and earlier discussions of the effects of regulation on the legal profession focus solely on legislative action and regulation by agencies acting under legislative authority.<sup>97</sup> This puts *Let's Deregulate* in the awkward position of trying to link lawyer regulation, bar associations, and the legislation itself into a causal chain. The authors miss, however, a much easier and clearer causal chain: the way that judges and lawyers work together to create complexity in case law. When trying cases, lawyers do not have to lobby unsympathetic legislators for added complexity, they simply need to convince like-minded appellate judges who have their own reasons to favor complexity.<sup>98</sup>

Second, *Let's Deregulate* makes a similar error in describing the history of lawyer regulation; it assumes that the history of the growth in entry regulations has been as a result of ABA lobbying of state legislatures.<sup>99</sup> This understanding of how professions generate entry barriers is correct, of course, for every profession except lawyers. The difference for lawyers is that state supreme courts have taken the leading role in regulation as a constitutional matter.<sup>100</sup> This has resulted in quite a different story of self-serving regulation, because lawyers have an easier time lobbying state supreme court justices (and the public is virtually barred from lobbying them) and because by definition these justices are all former lawyers themselves, and thus naturally more sympathetic.<sup>101</sup> This oversight is more than just a lost nuance; it shows a fundamental misunderstanding of the nature of the regulation itself, which weakens the entire project.

Lastly, *Let's Deregulate* fails to notice that there are currently two different legal professions in the United States and that deregulation would likely affect one much more than the other. Take a look at this graph that shows a bimodal distribution of lawyer incomes:<sup>102</sup>

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96. *Id.*

97. See *Market for Lawyers*, *supra* note 9, at 53-54; LET'S DEREGULATE, *supra* note 8, at 59-67.

98. Judges have powerful incentives to favor complexity as well: they enjoy the process and it allows them freedom to follow their internal preferences while still appearing to follow precedent. BARTON, *supra* note 7, at 271-77.

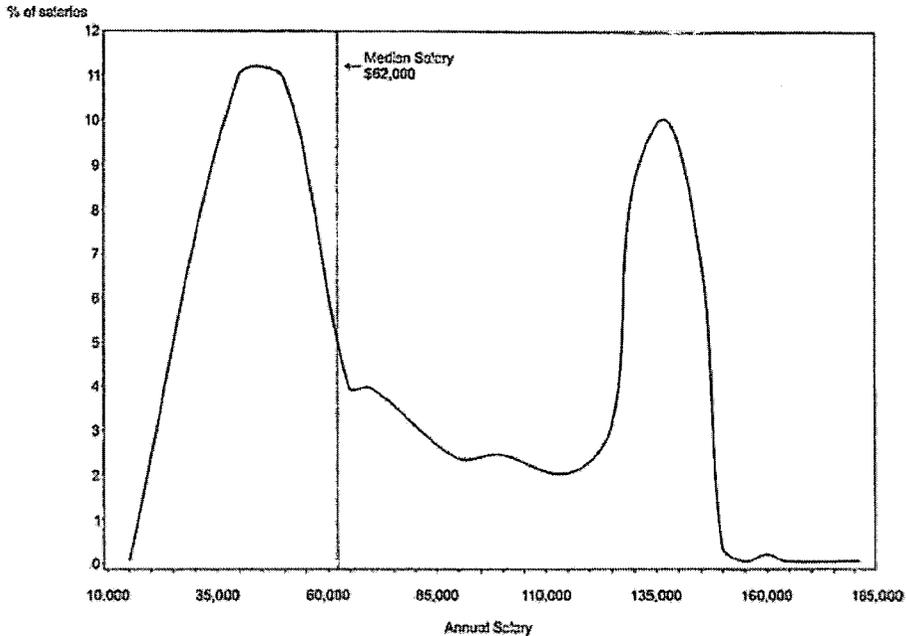
99. LET'S DEREGULATE, *supra* note 8, at 2-3; see also CAPITALISM AND FREEDOM, *supra* note 19, at 151-52 (asserting that lawyers have been less successful in generating entry barriers than doctors because many state legislators were graduates of night law schools).

100. *Judges*, *supra* note 35, at 461-65.

101. See BARTON, *supra* note 7, at 132-40 (providing a longer version of this argument).

102. Bill Henderson reprints this graph on the Empirical Legal Studies Blog as part of an exceptionally helpful and perceptive post. See Bill Henderson, *Distribution of 2006 Starting Salaries: Best Graphic Chart of the Year*, EMPIRICAL LEGAL STUDIES (Sept. 4, 2007, 3:29 PM), [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2007/09/distribution-of.html?cid=138813146](http://www.elsblog.org/the_empirical_legal_studi/2007/09/distribution-of.html?cid=138813146).

### Distribution of Full-Time Salaries



Note: The graph is based on 22,685 salaries. A few salaries above \$200,000 are excluded for clarity. The first peak in this graph reflects salaries of both \$40,000 and \$50,000 (each about 11% of reported salaries). The second peak reflects salaries of \$135,000 (10% of reported salaries) and \$145,000 (7% of reported salaries)

The traditional graph for a labor market is a bell curve, with the median salary at the top of the curve.<sup>103</sup> A bimodal distribution is unusual and speaks volumes about the current nature of the U.S. legal market—there are in fact two separate legal professions, high-end law firm work on the right side of the graph and government and small firm work on the left side of the graph.

Because of the salary valley between the two types of practice, it is unlikely that deregulation of entry would change much for large law firm practices.<sup>104</sup> This is partially because the market for these services is already very competitive and crosses international borders.<sup>105</sup> There is also signifi-

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103. See Greg Mankiw, *Bimodality*, GREG MANKIW'S BLOG (July 10, 2008), <http://gregmankiw.blogspot.com/2008/07/bimodality.html>.

104. Although the pressures of globalization and the recession are a different matter altogether. For a masterful (and short) description of these changes, see William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, A.B.A. J. (July 1, 2011, 3:40 AM CST), [http://www.abajournal.com/magazine/article/paradigm\\_shift/](http://www.abajournal.com/magazine/article/paradigm_shift/).

105. For some studies of the internationalization of big firm practice, see J.V. Beaverstock et al., *Geographies of Globalization: United States Law Firms in World Cities*, 21

cant competition among lawyers and law students to join these firms. As such, it is unlikely that even if entry deregulation allowed an influx of new lawyers into the practice that these (presumably less qualified) lawyers would displace current big firm lawyers or in house counsel.<sup>106</sup> Deregulation of multidisciplinary practice and allowing lawyers, economists, accountants, and management consultants to work together, however, might result in lower salaries for lawyers in these firms, as lower paid non-lawyers swallowed some of the most lucrative work,<sup>107</sup> but this may be occurring regardless.<sup>108</sup>

In fact, the authors' insistence on connecting the salary of lawyers to the amount and nature of government regulation may be an attempt to answer to this critique—the salaries at the top end of the distribution scale (which show the largest earnings premiums) will be unlikely to be affected by a flood of low-end entrants into the market.<sup>109</sup> As such, the best way to explain the salaries at the top end of the distribution scale is to point to government regulation rather than concluding that those salaries are a fair result of global competition and/or the intrinsic skills/attributes of these lawyers.<sup>110</sup>

Nevertheless, *Let's Deregulate* glosses over a simpler answer. In a global legal marketplace clients are willing to pay a premium for the best representation in high stakes corporate or litigation matters. They are especially willing to pay top dollar for that rarest of legal commodities: genuine insight.<sup>111</sup> As long as these skills and abilities are valued, changes in entry barriers would be unlikely to affect the salaries of the big firm lawyers and in-house counsel.

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URB. GEOGRAPHY 95 (2000); Andrew Jones, *More than 'Managing Across Borders?' The Complex Role of Face-to-Face Interaction in Globalizing Law Firms*, 7 J. ECON. GEOGRAPHY 223 (2007); Barney Warf & Chand Wije, *The Spatial Structure of Large U.S. Law Firms*, 22 GROWTH & CHANGE 157 (1991).

106. *Let's Deregulate* does recognize this possibility, but argues that deregulation would be beneficial regardless. LET'S DEREGULATE, *supra* note 8, at 97.

107. See Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1717-27 (2008).

108. See Henderson, *supra* note 102.

109. Cf. LET'S DEREGULATE, *supra* note 8, at 40-41 (noting that the income premiums in the top quartile are the highest and are harder to explain as a result of entry barriers).

110. *Id.* at 59-71.

111. Cf. Jay Shepherd, *Competing by Raising Prices*, TIMELESSLY (May 25, 2010), <http://www.clientrevolution.com/in-house-counsel/> (noting that new pricing schema for lawyers does not necessarily mean lower prices, clients will pay more for especially valuable or insightful legal advice).

CONCLUSION

Hopefully this discussion of the strengths and weaknesses of the economists' argument for lawyer deregulation brings home the importance of cross dialogue on this topic. Economists bring a special set of tools to the problem and the strength of few pre-conceived notions. Lawyers bring a nitty-gritty, insider knowledge of the subject that can enrich the economists' view. Hopefully more cross-pollination will occur as the argument for deregulation broadens and reaches both legal and general interest audiences.

