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## Toward National Regulation Of Legal Technology: A Path Forward For Access To Justice

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## ARTICLES

# TOWARD NATIONAL REGULATION OF LEGAL TECHNOLOGY: A PATH FORWARD FOR ACCESS TO JUSTICE

*Drew Simshaw\**

*Legal technology can help close the access-to-justice gap by increasing efficiency, democratizing access to information, and helping consumers solve their own legal problems or connecting them with lawyers who can. But, without proper design, technology can also consolidate power, automate bias, and magnify inequality. The state-by-state regulation of legal services has not adapted to this emerging technology-driven landscape that is continually being reshaped by artificial intelligence-driven tools like ChatGPT. Confusion abounds concerning whether use of these technologies amounts to unauthorized practice of law, leads to discrimination, adequately protects client data, violates the duty of technological competence, or requires prohibited cross-industry business structures. Despite widespread calls for regulatory reforms that respond to these uncertainties, few jurisdictions have acted, as little data exists about the use, benefits, and harms of rapidly emerging legal technologies.*

*This Article argues that, in light of these problems, regulatory reform processes should be explored at the national level, where expertise, as well as empirical benefits and economic advantages, would yield more informed and impactful reforms aimed at balancing consumer protection and access to justice. The Article provides a comprehensive proposal for an opt-in national legal services “sandbox”—a regulatory reform mechanism that carefully tests innovative services through temporary safe harbors and data generation that leads to more informed regulatory decision-making.*

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*Although legal services are traditionally regulated at the state level, other industries have benefited from licensing individuals locally while regulating the technologies they use nationally, and state bars already rely on national entities to help with other regulatory functions, like drafting rules of professional conduct. Legal technology's potential to help close the justice gap—a national crisis—warrants a similar national response.*

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## INTRODUCTION

Technology is transforming virtually every industry<sup>1</sup> and aspect of society.<sup>2</sup> In most cases, the laws and regulations that govern those areas do not—at least at first—adequately steer responsible design, adoption, and use of the new technology as it is emerging.<sup>3</sup> In many industries, though, lawmakers and regulators have recognized the challenges and opportunities that technologies present for regulated entities, professionals, and the public, and they have reformed or adopted new laws and regulations in response. For example, many sectors have responded to data privacy concerns resulting from new technologies, including in the healthcare,<sup>4</sup> education,<sup>5</sup> and consumer settings.<sup>6</sup> Technological advancements in transportation, such as driverless cars, have also led to new policies and proposed laws addressing

1. See, e.g., Jared Hecht, *How Technology Is Driving Change in Almost Every Major Industry*, FORBES (Nov. 30, 2018), <https://www.forbes.com/sites/jaredhecht/2018/11/30/how-technology-is-driving-change-in-almost-every-major-industry/> [<https://perma.cc/LQL6-5SRH>].

2. See, e.g., *The Impact of Digital Technologies*, UNITED NATIONS, <https://www.un.org/en/un75/impact-digital-technologies> [<https://perma.cc/YS5H-Q3MZ>] (last visited Sept. 3, 2023) (analyzing the future of work, data, social media, and cyberspace in an era of emerging digital technologies).

3. See, e.g., *Regulation and Legislation Lag Behind Constantly Evolving Technology*, BLOOMBERG L. (Sept. 27, 2019), <https://pro.bloomberglaw.com/brief/regulation-and-legislation-lag-behind-technology/> [<https://perma.cc/9F5X-QM92>] (explaining how “the technology landscape is evolving so quickly that governments are struggling to implement effective laws to protect consumers and ensure data is being used in reasonable ways”).

4. See, e.g., *The HIPAA Privacy Rule*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html> [<https://perma.cc/4YDH-E3BM>] (last visited Sept. 3, 2023) (describing the Health Insurance Portability and Accountability Act (HIPAA)’s “national standards to protect individuals’ medical records and other individually identifiable health information” and outlining recent updates and modifications to HIPAA and the HIPAA Privacy Rule); *Your Patient Privacy Rights: A Consumer Guide to Health Information Privacy in California*, OFFICE OF ATT’Y GEN. OF CAL., <https://oag.ca.gov/privacy/facts/medical-privacy/patient-rights> [<https://perma.cc/BDU6-T4YP>] (last visited Sept. 3, 2023) (describing California’s state healthcare privacy laws in addition to national regulations).

5. See, e.g., *Student Privacy at the U.S. Department of Education*, U.S. DEP’T OF EDUC., <https://studentprivacy.ed.gov/> [<https://perma.cc/SGP5-88EG>] (last visited Sept. 3, 2023) (describing the Family Educational Rights and Privacy Act and the Protection of Pupil Rights Amendment); *Student Privacy Laws*, PARENT COAL. FOR STUDENT PRIV., <https://studentprivacymatters.org/state-legislation/> [<https://perma.cc/Z6S6-A2CY>] (last visited Sept. 3, 2023) (describing the hundreds of bills introduced at the state level from 2014 to 2017 addressing student data privacy, approximately 100 of which became law).

6. See, e.g., *Protecting Consumer Privacy and Security*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/protecting-consumer-privacy-security> [<https://perma.cc/8VCC-VYED>] (last visited Sept. 3, 2023) (describing federal data privacy laws and enforcement mechanisms, including the Children’s Online Privacy Protection Act).

novel challenges at the state and national levels.<sup>7</sup> Similarly, the safety of complex, internet-connected medical devices has led the U.S. Food and Drug Administration (FDA) to account for new considerations, such as cybersecurity risks, in its approval processes for such devices.<sup>8</sup> These and other efforts are not always pretty; in fact, they can be downright contentious<sup>9</sup> and, in some cases, failures.<sup>10</sup> But in many instances, the efforts of lawmakers and regulators are leading to improvements to otherwise outdated regulatory approaches.

The same cannot be said for the legal services industry. Like in other industries, technology is presenting challenges and opportunities for legal service providers and those with legal needs.<sup>11</sup> But unlike in other industries, regulators of legal services have not responded with regulatory reforms to address these challenges and maximize opportunities.<sup>12</sup> Of course, the regulation of legal services is unique in many ways that necessitate rules and processes that differ from many other industries.<sup>13</sup> Even so, this does not excuse the industry's failure to respond to new legal technology. This is especially true in light of the potential for legal technology, if effectively regulated, to help close the access to justice gap—a national crisis that currently has no end in sight.

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7. See, e.g., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FEDERAL AUTOMATED VEHICLES POLICY: ACCELERATING THE NEXT REVOLUTION IN ROADWAY SAFETY (2016), <https://www.transportation.gov/AV/federal-automated-vehicles-policy-september-2016> [<https://perma.cc/736B-YCQB>] (addressing safety, privacy, and liability concerns associated with autonomous vehicles); *Autonomous Vehicles State Bill Tracking Database*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 15, 2023), <https://www.ncsl.org/research/transportation/autonomous-vehicles-legislative-database.aspx> [<https://perma.cc/JB9T-PHGU>] (providing “information about autonomous vehicle bills that have been introduced in the 50 states and the District of Columbia”).

8. See *Cybersecurity*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/medical-devices/digital-health-center-excellence/cybersecurity> [<https://perma.cc/2EWP-3443>] (May 1, 2023) (describing how “[t]he FDA clears, authorizes, and approves devices to be marketed when there is a reasonable assurance that the devices are safe and effective for their intended use” and acknowledging the role of cybersecurity threats resulting from internet-connected devices).

9. See Lauren Feiner, *Lawmakers Kick the Can Down the Road on Discussing the Most Contentious Issues of Privacy Legislation*, CNBC (Feb. 9, 2020, 4:34 PM), <https://www.cnn.com/2020/02/08/lawmakers-postpone-discussing-contentious-privacy-legislation-issues.html> [<https://perma.cc/M7D7-MF2Z>].

10. See, e.g., Editorial, *Enough Failures. We Need a Federal Privacy Law*, WASH. POST (Mar. 30, 2022), <https://www.washingtonpost.com/opinions/2022/03/30/congress-must-pass-federal-privacy-law/> [<https://perma.cc/8LP4-L9XE>].

11. See *infra* Part I (describing the opportunities presented by legal technology); *infra* Part II (describing the risks of a technology-driven two-tiered system of legal services).

12. See *infra* Part III (describing the inadequate local regulatory responses to date).

13. See Karis Stephen, Soojin Jeong & Margaret Sturtevant, *Regulating the Legal Profession*, REGUL. REV. (Feb. 5, 2022), <https://www.theregreview.org/2022/02/05/saturday-seminar-regulating-legal-profession/> [<https://perma.cc/BKS9-XW7L>] (explaining how the “United States lacks a nationwide structure for regulating lawyers,” that, “[r]ather, in conjunction with state bar associations, state supreme courts regulate attorneys who are licensed to practice,” and the unique role that ethical principles play in the construction of lawyer regulation).

According to research from the Legal Services Corporation, “[l]ow-income Americans do not get any or enough legal help for 92% of their substantial civil legal problems.”<sup>14</sup> The COVID-19 pandemic has only increased unmet demand for legal assistance. One in three low-income Americans experienced one or more COVID-19-related civil legal problems during a twelve-month period early in the pandemic,<sup>15</sup> all while “data suggest that income disparities in the justice gap between low- and higher-income Americans are exacerbated for pandemic-related civil legal problems.”<sup>16</sup>

Traditional forms of legal aid have been insufficient in responding to these justice gap trends: “[F]or decades, the United States has sought to bridge this [access-to-justice] gap through incremental improvement, such as volunteerism (i.e., pro bono work) and legal aid.”<sup>17</sup> But, as the American Bar Association (ABA) Commission on the Future of Legal Services has noted, “[d]espite sustained efforts to expand the public access to legal services, significant unmet needs persist,” and “[m]ost people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.”<sup>18</sup> State bar reports have echoed these conclusions.<sup>19</sup> Accordingly, the Georgetown Law Center on Ethics and the Legal Profession declared in 2020 that “closing this [access-to-justice] gap requires both incremental improvement and breakthrough change.”<sup>20</sup>

Recently, and especially over the last decade, a narrative has emerged that technology could be the game-changing key to finally making inroads into closing the access-to-justice gap in the United States.<sup>21</sup> Technology-driven

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14. LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7 (2022), <https://justicegap.lsc.gov/resource/2022-justice-gap-report/> [<https://perma.cc/BR7D-PW8A>].

15. *See id.* at 11 (listing income maintenance, education, and housing issues as examples).

16. *Id.*

17. Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148 DAEDALUS 177, 177–78 (2019).

18. COMM’N ON THE FUTURE OF LEGAL SERVS., AM. BAR. ASS’N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 11–14 (2016), [https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WEB.pdf](https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf) [<https://perma.cc/9E88-42F8>].

19. *See, e.g.*, TASK FORCE ON THE DELIVERY OF LEGAL SERVS., ARIZ. SUP. CT., REPORT AND RECOMMENDATIONS 8–9 (2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf> [<https://perma.cc/4SUY-DUTC>] (“[A]lthough subsidized and free legal services, including low bono and pro bono legal services, are a key part to solving this access to justice gap, they are insufficient.”); OR. STATE BAR FUTURES TASK FORCE, OR. STATE BAR, THE FUTURE OF LEGAL SERVICES IN OREGON 7 (2017), [http://www.osbar.org/\\_docs/resources/taskforces/futures/futuresstf\\_summary.pdf](http://www.osbar.org/_docs/resources/taskforces/futures/futuresstf_summary.pdf) [<https://perma.cc/MWN2-6V59>] (“Subsidized and free legal services . . . are a key part of solving the access-to-justice gap, but they remain inadequate to meet all of the civil legal needs of low-income Oregonians.”).

20. CTR. ON ETHICS & THE LEGAL PRO., GEORGETOWN L. CTR., 2020 REPORT ON THE STATE OF THE LEGAL MARKET 2–3 (2020), <https://www.law.georgetown.edu/news/fundamental-shifts-are-disrupting-the-legal-market-2020-report-on-the-state-of-the-legal-market-from-georgetown-law-and-thomson-reuters-legal-executive-institute/> [<https://perma.cc/B2UR-PPJZ>].

21. *See, e.g.*, Raymond H. Brescia, Walter Alan McCarthy, Ashley M. McDonald, Kellan Burton Potts & Cassandra Rivais, *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 553–54

tools and services for lawyers and consumers have been heralded for their power to increase efficiency<sup>22</sup> and help consumers solve their own legal problems<sup>23</sup> or connect them with licensed professionals who can.<sup>24</sup> But, without proper design, technology can also consolidate power, automate bias, and magnify inequality.<sup>25</sup> Whereas many industries have made progress in responding to technology's challenges and opportunities, the legal services industry, regulated at the state level, has not.<sup>26</sup> All the while, platforms like ChatGPT—a generative artificial intelligence that can draft human-like writing—are emerging rapidly and raising serious practical and ethical questions.<sup>27</sup>

In the absence of state reforms to laws and rules governing legal services, confusion abounds concerning whether the use of these technologies amounts to unauthorized practice of law (UPL), leads to discrimination,

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(2015) (describing how “technological innovation . . . can serve to widen access to justice in communities desperate for legal assistance”); TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 9 (“Considering the large market for legal services left unserved by lawyers, technology-based and artificial intelligence platforms have stepped in to serve clients.”); Kristen Sunday, *Tech-Enabled A2J: From Text to Machine Learning, How Legal Aid Is Leveraging Technology to Increase Access to Justice*, THOMSON REUTERS (Feb. 4, 2020), <https://www.thomsonreuters.com/en-us/posts/legal/tech-enabled-a2j-legal-aid/> [https://perma.cc/359J-2YSK] (“[T]here is no doubt that these [legal tech] tools, when applied correctly, will make meaningful strides in the way clients actually access justice.”).

22. *See, e.g.*, Agnieszka McPeak, *Disruptive Technology and the Ethical Lawyer*, 50 U. TOL. L. REV. 457, 466 (2019) (explaining how legal technology can “streamline legal-related tasks” and lead to “more accurate results, for less cost, and in a much quicker timeframe” as compared to when legal technology is not used); James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 257 (2012) (“In an age of cutbacks in funding for legal services and courts, the increased use of technology is often identified as a source of savings and efficiency.”).

23. *See, e.g.*, OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 3 (noting that some Oregonians “are bypassing the lawyer-client relationship altogether and using ‘intelligent’ online software to create their own wills, trusts, and other ‘routine’ legal documents that they believe are sufficient to meet their needs”).

24. *See* Sherley E. Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 TENN. L. REV. 347, 364 (2019) (explaining how chatbots “connect individuals to legal service providers after the program helps the individual identify their legal issue”); OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 5 (describing the development of “online service delivery models ranging from the most basic form providers to sophisticated referral networks”).

25. *See infra* Part II.A (describing the risk of a technology-driven two-tiered system of legal services).

26. *See generally* Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J.F. 228 (2022) (discussing the failure of states to address the access-to-justice crisis, including by harnessing technology-driven tools and services).

27. *See, e.g.*, Andrew M. Perlman, *The Implications of ChatGPT for Legal Services and Society* (Dec. 5, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4294197](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197) [https://perma.cc/Z22Q-ZYSH]; Amy B. Cyphert, *A Human Being Wrote This Law Review Article: GPT-3 and the Practice of Law*, 55 U.C. DAVIS L. REV. 401, 404 (2021) (explaining how, by scraping websites such as Reddit, toxic outputs can result from ChatGPT); Aimee Furness & Sam Mallick, *Evaluating the Legal Ethics of a ChatGPT-Authored Motion*, LAW360 (Jan. 23, 2023), <https://www.law360.com/articles/1567985/evaluating-the-legal-ethics-of-a-chatgpt-authored-motion> [https://perma.cc/H4GA-3ZFB].

adequately protects client data, violates the duty of technological competence, or requires prohibited cross-industry business structures.<sup>28</sup> The result of this failure has been diminished comprehension of the legal technology landscape, less competition in the legal services industry, and barriers to “calibrating” legal technology for access to justice.<sup>29</sup> The failure is not the fault of any one jurisdiction; it is a collective failure that can be linked to common regulatory process barriers and various forms of resistance that hinder even the exploration of reform.<sup>30</sup> Unless these barriers are overcome, the legal services industry could experience the same “spontaneous deregulation” that cities experienced when app-based rideshare services became so commonplace that many regulatory responses became impractical.<sup>31</sup>

This Article argues that this national failure requires a national response. As a first step, jurisdictions should opt in to a national legal regulatory sandbox—a regulatory reform mechanism that carefully tests innovative services through temporary safe harbors and data generation that leads to more informed regulatory decision-making. Legal regulatory sandboxes are starting to be launched or proposed at the state level. For example, 2,500 consumers used services offered through Utah’s legal services sandbox in its first year, including over 550 legal services delivered by software with lawyer involvement.<sup>32</sup> Initial data suggest that these services showed tremendous promise.<sup>33</sup> In 2022, the financial and logistical challenges of running the sandbox and the growing number of entities regulated by the Office of Legal Services Innovation (a grant-driven office of the Utah Supreme Court) raised concerns in some circles.<sup>34</sup> In 2023, the sandbox

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28. See *infra* Part II.B (describing regulatory uncertainty and other barriers to calibrating legal technology for access to justice).

29. See *infra* Part II.C (explaining the need for regulatory reform to address these challenges).

30. See *infra* Part III.C (explaining barriers and resistance to local legal regulatory reform).

31. See WASH. CTS. PRAC. OF L. BD., BLUEPRINT FOR A LEGAL REGULATORY LAB IN WASHINGTON STATE, VERSION 2.0, at 42 (2022), [https://www.wsba.org/docs/default-source/legal-community/committees/practice-of-law-board/practice-of-law-board\\_lab-blueprint\\_02-11-2022.pdf](https://www.wsba.org/docs/default-source/legal-community/committees/practice-of-law-board/practice-of-law-board_lab-blueprint_02-11-2022.pdf) [https://perma.cc/9NYK-H6TR] (“[T]here is the danger such services will become accepted by the public and spontaneous deregulation will occur. Some would argue this is already taking place. An example of spontaneous deregulation can be found in what happened to municipalities when ride-share and home-share services entered cities without regard to cab and zoning ordinances.”). See generally Benjamin Edelman & Damien Geradin, *Spontaneous Deregulation*, HARV. BUS. REV. (Apr. 2016), <https://hbr.org/2016/04/spontaneous-deregulation> [https://perma.cc/ZK69-XX2S].

32. Logan Cornett & Zachariah DeMeola, *Data from Utah’s Sandbox Shows Extraordinary Promise, Refutes Fears of Harm*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Sept. 15, 2021), <https://iaals.du.edu/blog/data-utahs-sandbox-shows-extraordinary-promise-refutes-fears-harm> [https://perma.cc/J9MS-DNGD].

33. See *id.*

34. See Jeffrey D. Eisenberg, *The Sandbox*, UTAH BAR J., Nov.–Dec. 2022, at 19, [https://www.utahbar.org/wp-content/uploads/2023/04/2022\\_FINAL\\_06\\_Nov\\_Dec.pdf](https://www.utahbar.org/wp-content/uploads/2023/04/2022_FINAL_06_Nov_Dec.pdf) [https://perma.cc/B6KU-MCDH] (noting that the Utah Supreme Court “recently asked the Bar to take over funding operations of OLSI”); *id.* at 24 (arguing that the Utah Sandbox “is understaffed and underfunded” and asking, “[g]iven such limited resources, can the [Office of



transitioned to being run by the state bar itself.<sup>35</sup> As some of these challenges demonstrate, the reach of local sandboxes is limited.<sup>36</sup> Even so, small early successes and proposals at the local level provide helpful models for designing a national sandbox with greater sustainability and impact. Even though national regulation is not always the answer when local jurisdictions fail to effectively regulate, there is good reason to believe that shifting these particular regulatory reform processes to the national level will help shape effective regulation of the evolving technology-driven legal services landscape.<sup>37</sup>

Part I of this Article will identify the opportunities presented by legal technology and the ways in which it can help legal service providers deliver more and better services while also helping consumers solve their own legal problems or connecting them with lawyers who can, with the ultimate goal of improving access to justice. Part II will discuss the challenges of effectively “calibrating” legal technology for access to justice and will analyze the ways in which national regulatory reform could respond to these challenges. Part III will explore the largely inadequate regulatory response of jurisdictions to date, as well as the limited successes of a small number of jurisdictions’ efforts that could inform nationally-driven regulatory reform processes. In light of these failures and opportunities, Part IV proposes shifting certain regulatory reform processes from the state level to the national level, including by launching a national legal services regulatory “sandbox” that would account for the lack of expertise, as well as empirical and economic challenges, currently faced by most jurisdictions that have failed to enact or even consider reforms. Part V will address potential challenges to and criticisms of shifting legal regulatory reform processes to the national level. It will also argue why these challenges and criticisms should not undermine this approach as a mechanism to effectively steer legal technology toward its promise and away from its peril and ultimately improve access to justice.

## I. THE OPPORTUNITIES PRESENTED BY LEGAL TECHNOLOGY

Legal technology has been heralded for its potential to improve legal problem-solving and help close the access-to-justice gap.<sup>38</sup> Its impact across

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Legal Services Innovation (OSLI) effectively design, collect, and analyze the quality of Sandbox services?”); *id.* at 26 (“OLSI has neither the manpower, the financial resources, the sufficient metrics, [n]or the regulatory structure to oversee a widely expanded legal service industry and monitor non fiduciary investors, owners, managers, and their staff.”).

35. See UTAH OFF. OF LEGAL SERVS. INNOVATION, MARCH 2023 ACTIVITY REPORT 2 (2023), <https://utahinnovationoffice.org/2023/04/27/march-2023-activity-report/> [https://perma.cc/Z3KR-E2BQ] (noting that the “[t]ransition of the Office operations to the Utah State Bar has begun”).

36. See *infra* Part III.A (describing the limited but helpful examples of local legal regulatory sandboxes).

37. See *infra* Part V (contending that common arguments against legal regulatory reform and national regulation do not undermine shifting legal regulatory reform processes to the national level).

38. See *supra* note 21 and accompanying text.

the legal services landscape is vast, from increasing efficiency in problem-solving processes,<sup>39</sup> to democratizing access to legal information for consumers,<sup>40</sup> to helping consumers solve their legal problems<sup>41</sup> or connecting them with those who can.<sup>42</sup>

Indeed, not all legal problems require the assistance of a licensed legal professional.<sup>43</sup> Assistance from “nonlawyers” for certain legal issues is in high demand.<sup>44</sup> Some self-help services are well-known. For example, DoNotPay made headlines in 2016 when its chatbot, designed by a Stanford University undergraduate student, helped 160,000 people overturn their parking tickets with a 64 percent success rate, saving those users over four million dollars in fines.<sup>45</sup> The next year its impact virtually doubled.<sup>46</sup> More

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39. See, e.g., *supra* note 22 and accompanying text.

40. See Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 6, 44–45 (2012) (describing how integrating corporations into the legal services landscape can help widely disseminate information); Emily S. Taylor Poppe, *The Future Is Bright Complicated: AI, Apps & Access to Justice*, 72 OKLA. L. REV. 185, 188 (2019) (explaining, within the context of legal AI and applications, how the “disaggregation [of legal work] creates the possibility for multiple sources of legal information and services”); TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 9 (describing how Arizona has “turned to technology to help bridge the justice gap,” including by “implementing a virtual resource center . . . with legal information sheets and legal information videos”).

41. See, e.g., OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 3 (noting that some Oregonians “are bypassing the lawyer-client relationship altogether and using ‘intelligent’ online software to create their own wills, trusts, and other ‘routine’ legal documents that they believe are sufficient to meet their needs”).

42. See Cruz, *supra* note 24, at 364 (explaining how “Chatbots” can “help[] individuals decide among their options, including whether they need further legal assistance” and “connect individuals to legal service providers after the program helps the individual identify their legal issue”); OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 5 (noting that “tech businesses, awash in venture capital, have developed online service delivery models ranging from the most basic form providers to sophisticated referral networks”).

43. See 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, 434–35 (“Not all legal work requires the personal engagement of a highly experienced specialist.”) (citing RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 90 (2008) (“[M]any lawyers exaggerate the extent to which their performance depends on deep expertise . . . . Lawyers often overstate the extent to which the content of their work is creative, strategic, and novel.”)); Amy J. Schmitz, *Measuring “Access to Justice” in the Rush to Digitize*, 88 FORDHAM L. REV. 2381, 2393 (2020) (“[M]ost justiciable issues that arise in society never get as far as consultation with a lawyer, let alone reach the courts.”); see also Bruce A. Green, *Why State Courts Should Authorize Nonlawyers to Practice Law*, 91 FORDHAM L. REV. 1249, 1274 (2023).

44. Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J.C.R. & C.L. 283, 312 (2020) (“Consumers value and purchase legal services from providers who are not fully qualified attorneys. The legal work produced by nonlawyers can be as good as—and sometimes better than—that of lawyers. The current restrictions on nonlawyer practice are unsupported by evidence about nonlawyer quality or consumer demand.”).

45. See Samuel Gibbs, *Chatbot Lawyer Overturns 160,000 Parking Tickets in London and New York*, GUARDIAN (June 28, 2016, 6:07 PM), <https://www.theguardian.com/technology/2016/jun/28/chatbot-ai-lawyer-donotpay-parking-tickets-london-new-york> [<https://perma.cc/4H34-87UA>].

46. See John Mannes, *DoNotPay Launches 1,000 New Bots to Help You with Your Legal Problems*, TECHCRUNCH (July 12, 2017, 11:56 AM), <https://techcrunch.com/2017/07/12/donotpay-launches-1000-new-bots-to-help-you-with-your-legal-problems/>

recently, in another high profile example, HelloPrenup, a startup software platform designed by a former Microsoft Corporation lawyer to help couples with prenuptial agreements, secured a \$150,000 investment on the popular television show *Shark Tank*.<sup>47</sup> Another service, LegalZoom, has become a household name, with millions of people having used its online services.<sup>48</sup> But these online platforms are just the beginning—jurisdictions have reported that many entities have followed these models of service by offering online services “covering a wide variety of legal services including family law, immigration, arbitration assistance, traffic infractions, and other civil legal matters”<sup>49</sup> and helping consumers “form businesses, register trademarks, and draft wills and other legal forms.”<sup>50</sup>

In 2021, the Washington Courts Practice of Law Board identified over fifty online legal services providing assistance to lawyers, the public, or both in Washington State alone.<sup>51</sup> As the board has noted, these services “are getting positive reviews from both the public and the press and are raising significant venture capital, which means they will continue to offer more services.”<sup>52</sup> The board further noted that these services are addressing the justice gap by enabling consumers to address their legal issues more effectively than if they were acting *pro se*, as well as by providing timely and often simplified advice at a typically less expensive cost than that of traditional legal services.<sup>53</sup>

Of course, not all legal issues are appropriate for self-help; many legal issues require the assistance of licensed legal professionals, for whom technology is fundamentally transforming traditional legal problem-solving processes at all stages.<sup>54</sup> The same chatbot technology used by DoNotPay to help consumers is also helping licensed professionals conduct client intake.<sup>55</sup>

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[<https://perma.cc/XL9X-YA3Z>] (describing how, by July 2017, DoNotPay had saved users \$9.3 million by disputing 375,000 parking tickets).

47. See Taylor Soper, *Shark Tank Deal: Founders of Prenup Company Land Cash from Mr. Wonderful and Nextdoor Founder*, GEEKWIRE (Nov. 14, 2021, 7:00 AM), <https://www.geekwire.com/2021/shark-tank-deal-founders-of-prenup-company-land-cash-from-mr-wonderful-and-nextdoor-founder/> [<https://perma.cc/S34S-6S6W>].

48. See LEGALZOOM, <https://www.legalzoom.com/> [<https://perma.cc/K36S-UKRZ>] (last visited Sept. 3, 2023) (touting “the nearly 6 million customers who have relied on us for their business and personal legal needs”).

49. See, e.g., WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 40; see also OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 7 (describing how “[f]or-profit online service providers are rapidly developing new models for delivering legal services to meet consumer demand”).

50. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 9.

51. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 40 (“Approximately 20 of these providers, such as WestLaw and CLIO, primarily provide services to legal professionals. Over 14 legal service providers, such as Avvo and LegalZoom, provide services to both legal professionals and the public, including referring people to a legal professional (generally a lawyer). Finally, over 17 legal service providers, such as FairShake and Hello Divorce, target their services to the public.”).

52. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 40.

53. *Id.* at 41.

54. See McPeak, *supra* note 22, at 461 (describing how legal technology not only is changing the way lawyers work, but also “may fundamentally alter law practice entirely”).

55. See Nicole Black, *What You Need to Know About Virtual and Chatbot Assistants for Lawyers*, ABA J. (Jan. 27, 2020, 6:00 AM), <https://www.abajournal.com/web/article/what->

E-discovery has made discovery more efficient<sup>56</sup> and accurate.<sup>57</sup> Legal research services now increasingly process questions using natural language and are generating highly individualized results for subscribers.<sup>58</sup> And “predictive coding” and “legal analytics” are helping craft legal arguments based on data extracted from past cases.<sup>59</sup>

Although the transformative power of legal technology has been identified as a promising tool for increasing access to justice, as well as expanding the scope of the legal services market more generally,<sup>60</sup> meaningful progress is not being made on all of these fronts. Part II will analyze the challenges presented by legal technology and its effective design in this landscape. It will also discuss how regulatory reform could respond to these challenges to ultimately improve access to justice.

## II. THE CHALLENGES PRESENTED BY LEGAL TECHNOLOGY AND THE NEED FOR REGULATORY REFORM

As this author has previously argued, the rosy future of technology-driven access to justice is not fully materializing and is not guaranteed to ever do so.<sup>61</sup> This section explores the different paths that the technology-driven legal services landscape could take, ultimately arguing that increasing access to justice depends in part on effective technology-conscious regulatory reform, which this Article argues should be driven at the national level.

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you-need-to-know-about-virtual-and-chatbot-assistants-for-lawyers [https://perma.cc/RS7S-WXH4] (describing how chatbots are being incorporated into client intake in law firms).

56. See Frank Pasquale & Glyn Cashwell, *Four Futures of Legal Automation*, 63 UCLA L. REV. DISCOURSE 26, 34 (2015) (noting that thanks to e-discovery, “[f]ewer young associates pore over boxes of documents to find mentions of a query term anymore,” and that “predictive coding” has been shown to “decrease time spent in discovery by 75 percent”); McPeak, *supra* note 22, at 463 (explaining how technology “dramatically alter[s] the time, effort, and mode of performing document review”); Sylvie Delacroix, *How Could AI Impact the Justice System?*, THOMSON REUTERS: LEGAL INSIGHTS EUR. (Nov. 30, 2018), <https://blogs.thomsonreuters.com/legal-uk/2018/11/30/how-could-ai-impact-the-justice-system/> [https://perma.cc/ZD68-9HB8] (describing how automated document management and discovery is “saving lawyers a lot of dull workhours”).

57. See Ed Walters, *The Model Rules of Autonomous Conduct: Ethical Responsibilities of Lawyers and Artificial Intelligence*, 35 GA. ST. U. L. REV. 1073, 1076 (2019) (describing how artificial intelligence-driven e-discovery “has been shown to surpass human review in both accuracy and recall”).

58. See *id.* at 1077; see also McPeak, *supra* note 22, at 461 (explaining how “natural language processing enables more accurate research results”).

59. See Brescia et al., *supra* note 21, at 572 (describing “the potential to create legal arguments based on predictive tools about a particular type of case”); see also McPeak, *supra* note 22, at 461–62 (describing how legal technology “is booming with the use of predictive analytics, such as judicial analytics or other predictive modeling”).

60. See Lori D. Johnson, *Navigating Technology Competence in Transactional Practice*, 65 VILL. L. REV. 159, 163 (2020) (explaining how increased technological efficiency for transactional lawyers could “improve access to representation for additional clients, including clients like non-profits, small businesses, and entrepreneurs”); Poppe, *supra* note 40, at 190 (explaining how “technology reducing the costs of legal practice [can] allow[] lawyers to expand their practices into latent legal markets”).

61. See generally Drew Simshaw, *Access to AI Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 YALE J.L. & TECH. 150 (2022).

A. *The Risk of a Technology-Driven Two-Tiered System of Legal Services*

The rise of legal technology has not corresponded to a rise in the availability of legal services.<sup>62</sup> Instead, increased reliance on and legitimization of legal technologies has led to fears of a two-tiered system of access to legal services that could exacerbate, rather than close, the justice gap.<sup>63</sup> Such a two-tiered system could take one or more of several forms, and the risk of each could be reduced with the national regulatory reform advocated for in this Article.

Under one potential two-tiered system, technology-driven legal tools and services would be accepted (or even expected) as the primary source of assistance for low-income individuals, even in situations where human-driven assistance would be more appropriate.<sup>64</sup> Such a system could emerge as the result of a decline in the availability of in-person legal assistance.<sup>65</sup> It could also occur more starkly during intake, when some consumers would be directed to licensed legal professionals while others would be directed to technology-driven solutions.<sup>66</sup> In some situations, the resulting technology-driven assistance might be “better than nothing,”<sup>67</sup> but, on the whole, still not as effective as full-service licensed legal professionals,<sup>68</sup> who have the benefit of personal connections,<sup>69</sup> have

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62. See OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 4 (noting that “[a]gainst th[e] backdrop [of new legal technology], one might think that the public is finding it easier than ever to access legal services,” and that “[i]t is startling, therefore, to learn that the increased availability of *information* about the law and legal services has done nothing to reduce the access-to-justice gap” (emphasis in original)).

63. See Simshaw, *supra* note 61, at 170–80 (summarizing the strands of literature discussing feared two-tiered systems of legal services).

64. See *id.* at 171–72.

65. See, e.g., Poppe, *supra* note 40, at 202 (describing a fear that technology innovation could lead to a decline in the availability of in-person assistance).

66. See Rebecca Kunkel, *Rationing Justice in the 21st Century: Technocracy and Technology in the Access to Justice Movement*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 366, 382–83 (2019) (describing technology’s “gatekeeping role” and the possibility that “technology would be used to determine which clients would be provided with full service by an attorney and which would be relegated to some form of self-help, technologically assisted or otherwise”).

67. See, e.g., WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 41 (noting that an advantage of online legal services is that “[p]eople using such services are likely doing better with their legal matter than simply being a pro-se litigant”); Brescia et al., *supra* note 21, at 579 (stating that technology-driven solutions “are arguably better than no services at all”); Poppe, *supra* note 40, at 201 (suggesting that, when it comes to technology-driven services, absent “the will and resources to expand access to justice in other ways, *anything* may be better than *nothing*” (emphasis in original)); Green, *supra* note 43, at 1273 (“[L]ow-income individuals, on average, might be far better served by being able to take the risks posed by nonlawyer providers of legal help rather than being denied this alternative. Given that many of those denied access to nonlawyers will get no help at all, one might ask: is the UPL cure worse than the disease?”).

68. See, e.g., WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 41 (noting that some online legal services “may not be offering accurate and complete advice”); Brescia et al., *supra* note 21, at 554, 605–06 (“[O]ne must ask the question: are these types of innovations a ‘substitute’ for true access to justice? In many respects, the clear answer is ‘no.’”).

69. See CATHY O’NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 8 (2016) (describing how those people who can

enforceable duties to their clients,<sup>70</sup> and are capable of the type of aggressive tactics that only human experience can inform and help execute effectively.<sup>71</sup> In other situations, consumers of such services might experience outright harm,<sup>72</sup> which unsophisticated consumers might not even detect.<sup>73</sup>

A different two-tiered system of access to legal services could stem from almost the opposite fear: that legal technology becomes powerful but not evenly distributed.<sup>74</sup> On one end of the spectrum, large law firms serving wealthy clients and corporations might be well-situated to integrate these technologies into their service delivery and business models.<sup>75</sup> They have greater resources to pursue emerging legal technology,<sup>76</sup> can hire in-house information technology personnel or outside consultants,<sup>77</sup> and have access to more specifically-tailored all-inclusive services.<sup>78</sup> Such firms benefit from not only these long-term relationships with vendors that reduce costs and increase efficiencies<sup>79</sup> but also the ability to harness their own data more

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afford personal services “often benefit from personal input,” such as how “[a] white-shoe law firm . . . will lean far more on recommendations and face-to-face interviews” than entities with fewer resources).

70. See Brescia et al., *supra* note 21, at 605 (“Representation by an attorney provides not just competent but zealous services rendered in a way that is unique to the needs of the individual, and those services are backed up by the disciplinary machinery that ensures they are rendered in a way that satisfies the attorney’s ethical obligations to the individual.”).

71. See *id.* at 605–06 (noting that technology-driven legal solutions, like apps, “will not empower pro se consumers to take the aggressive steps a lawyer might take . . . [which are] honed by a lawyer over years of practice and experience”).

72. See *id.* at 554 (describing claims that some “websites, mobile applications, [and] do-it-yourself programs . . . threaten the consumer, who may receive services at a discounted price, yet those services may be of such low quality that they might end up causing more harm than good”).

73. See WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 41 (noting that one disadvantage of online legal services is that “[c]onsumer harm may be going unreported”); Poppe, *supra* note 40, at 205 (asking, “[w]ill the individual know whether the legal tech has succeeded?”).

74. See Simshaw, *supra* note 61, at 174.

75. See Brescia et al., *supra* note 21, at 554 (“Many assess the impact of these disruptions on the delivery of services to wealthier clients and corporations.”); Jordan Furlong, *Reflections: The New Legal Economy: What Will Lawyers Do?*, WIS. LAW. (Feb. 11, 2020), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=2&ArticleID=27468> [<https://perma.cc/M9QJ-95LS>] (predicting that, “rich people and large in-house law departments will experience a golden age of law,” while others will not).

76. See Guttenberg, *supra* note 43, at 480–81.

77. See Melody Finnemore, *Starting Up or Starting Over: Law Firms of All Sizes Need to Consider Their Tech Options*, OR. STATE BAR BULL., Apr. 2020, at 26, <https://www.osbar.org/bulletin/issues/2020/2020April/offline/download.pdf> [<https://perma.cc/A3T7-MU7U>].

78. See *id.* (noting that, for small firms, “there are few all-in-one products like those available to larger firms”).

79. See Daniel N. Kluttz & Dierdre K. Mulligan, *Automated Decision Support Technologies and the Legal Profession*, 34 BERKELEY TECH. L.J. 853, 874 (2019) (noting that vendor platforms designed for large firms “reduce costs and uncertainties of litigation through longer-term arrangements, standardization across litigation matters, and use of broader information-governance services that integrate litigation support”).

effectively.<sup>80</sup> At the other end of the spectrum, smaller firms and solo practices that rely on technology are often comparatively less efficient and competitive,<sup>81</sup> in part because the less expensive technologies they can afford do not allow them to serve as many people.<sup>82</sup> Additionally, those people they do serve might not be served as effectively because one-size-fits-all technology might not account for the vastly different needs among these users.<sup>83</sup> The result of this dichotomy could make it more likely that those firms that are able to augment their work with legal technology will create work product that is superior to those that cannot.<sup>84</sup> This could result in a “vicious cycle in which the technology rich will get richer and the gap between the have and have-nots will widen even further.”<sup>85</sup>

A third system is feared by those who believe that a two-tiered system of those who can and cannot access legal services already exists, and that legal technology will not significantly alter this status quo.<sup>86</sup> This third system could develop if technology does not meet currently over-hyped expectations in key areas<sup>87</sup> or will do so too slowly due to lengthy timelines for necessary

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80. See Guttenberg, *supra* note 43, at 441 (explaining how large firms can harness communication and information technology across their organizations and exploit the resulting information for further growth).

81. See *id.* at 480–81.

82. See Finnemore, *supra* note 77, at 26.

83. See *id.* (“[A] product that works well for one small firm won’t necessarily be the best for another”).

84. See, e.g., Thomas R. Moore, *The Upgraded Lawyer: Modern Technology and Its Impact on the Legal Profession*, 21 UDC/DCSL L. REV. 27 (2019); Walters, *supra* note 57, at 1076 (predicting that “the quality of work product created by lawyers augmented with AI [will] surpass[] the work created without AI”); Lucille A. Jewel, *The Indie Lawyer of the Future: How New Technology, Cultural Trends, and Market Forces Can Transform the Solo Practice of Law*, 17 SMU SCI. & TECH. L. REV. 325, 340 (2017) (“If society is going to connect technology with lawyering . . . the best approach may be a hybrid approach that uses technology along with human, legal counseling.”).

85. See Peter K. Yu, *The Algorithmic Divide and Equality in the Age of Artificial Intelligence*, 72 FLA. L. REV. 331, 344 (2020).

86. See Simshaw, *supra* note 61, at 177; see also Kristin B. Sandvik, *Is Legal Technology a New ‘Moment’ in the Law and Development Trajectory?*, PEACE RSCH. INST. OSLO BLOGS (Feb. 14, 2020), <https://blogs.prio.org/2020/02/is-legal-technology-a-new-moment-in-the-law-and-development-trajectory> [<https://perma.cc/8B5A-2KWL>] (describing a strand of legal technology literature that is “highly critical of the so-called ‘legal futurists’—tech evangelists who promulgate the inevitability and advantages of a technologized approach to lawyering— . . . and that argue[s] . . . that the underlying perspective on technology is too optimistic”).

87. See, e.g., Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1122 (2009) (describing “[o]verheated expectations and early unbridled enthusiasm” for emerging technologies and the resulting “disappointment when projects in law and information technology produce[] only modest improvement or even result[] in failure”); Pasquale & Cashwell, *supra* note 56, at 40 (“The acceleration of automation beyond its present level . . . appears doubtful for many reasons.”); Clark D. Asay, *Artificial Stupidity*, 61 WM. & MARY L. REV. 1187, 1193 (2020) (arguing that “[o]ur computerized world” is “plagued with an artificial stupidity confined to carrying out particular, narrow tasks, and not often very well”); Kunkel, *supra* note 66, at 386 (questioning the “rather bold assumption that technology will necessarily deliver on [the] promise of efficiency”).

investment.<sup>88</sup> Even if technology does live up to performance expectations, some fear that the results will not meaningfully impact the access to justice gap.<sup>89</sup> These fears are exacerbated by the conservative legal profession's ingrained pessimism toward technology,<sup>90</sup> notwithstanding technology's potential to impact the justice gap.

*B. Barriers to Calibrating Legal Technology for Access to Justice*

But a two-tiered system can, and should, be avoided or overcome. This author has argued that achieving legal technology's promise and avoiding its peril requires effectively "calibrating" it for access to justice. This would involve "careful consideration of the appropriate level of reliance [or restraint] on the technology depending on the (1) consumers, (2) legal issues, and (3) underlying processes involved with each case."<sup>91</sup> But the calibration process is as complex as it is important. This is illustrated by the following three calibration considerations, all of which are not adequately accounted for under current regulations and all of which would benefit from the regulatory reform processes advocated for in this Article.

First, legal technology must be calibrated to account for a vast variation of consumer expectations, needs, and experiences, all of which might warrant more or less technology reliance or restraint.<sup>92</sup> Failure to account for these consumer considerations could undermine the effectiveness of the technology and any access-to-justice benefits.<sup>93</sup> This process must account

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88. See Asay, *supra* note 87, at 1253 ("[Investors] are often reluctant to invest in innovations that only promise returns, if at all, after a long period of risky trial and error.").

89. See, e.g., Kunkel, *supra* note 66, at 366 (describing the literature's "barrage of policy discussions proposing modest technical interventions" and how they have obscured larger political questions surrounding the justice gap); Richard Tromans, *Does Legal Tech Share a Common Cause?*, ARTIFICIAL LAW. (June 3, 2020), <https://www.artificiallawyer.com/2020/06/03/does-legal-tech-share-a-common-cause/> [https://perma.cc/WSJ4-33KT] (describing how well-intentioned startups focused on access to justice eventually cave to other demands and interests); Sandvik, *supra* note 86 (critically describing "a theory of change in the burgeoning legal tech literature . . . espousing optimistic and frequently utopian claims about the capacity of technology to improve legal practice, make it more affordable and accessible and lower the price of legal services").

90. See OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 6 ("The legal profession is nothing if not conservative. Lawyers are schooled in precedent, consistency, and risk avoidance.").

91. See Simshaw, *supra* note 61, at 180–81.

92. See *id.* at 183.

93. See Cruz, *supra* note 24, at 366–67 ("Without intentional consideration of end users and their needs, limits, and preferences, technology can lead to . . . barriers that will prevent access to legal services."); Katherine Alteneider & Linda Rexer, *Consumer Centric Design: The Key to 100% Access*, 16 J.L. SOC'Y 5, 13 (2014) ("Without a keen understanding of self-represented litigants' behavior and needs, we risk designing systems that will miss the mark and be unused by the consumer.").



for differing levels of consumer legal and technological sophistication,<sup>94</sup> as well as comfort with and ability to seek legal services in the first place.<sup>95</sup>

Second, calibration requires accounting for the nature of the legal issues involved.<sup>96</sup> For example, restraint might be warranted for issues involving life, liberty, or a high level of expert assistance.<sup>97</sup> But “[n]ot all legal work requires the personal engagement of a highly experienced specialist,”<sup>98</sup> and in some cases, increased reliance on technology might be warranted. Whereas technology-driven services might be appropriate for legal problems with simple facts and a limited number of possible outcomes,<sup>99</sup> licensed legal professionals might be needed to address issues for which pre-established outcomes are not appropriate, such as cases with especially vulnerable consumers, cases with strong emotional and social consequences, and cases in which errors are less likely to be detected.<sup>100</sup> Some issues might be suitable for commodified “one-size-fits-all” technology-driven assistance,<sup>101</sup> whereas other cases may need to be tailored to an individual’s specific needs.<sup>102</sup> In addition, some tools created for one industry or interest group might not work well for others.<sup>103</sup>

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94. See Schmitz, *supra* note 43, at 2382 (noting that some might refrain from seeking services “because they lack the knowledge, experience, or resources to artfully and actively pursue their interests”).

95. See, e.g., Guttenberg, *supra* note 43, at 438 (noting that people in need of services “may be intimidated by lawyers and the legal system”); Schmitz, *supra* note 43, at 2382 (discussing why, despite needing legal services, “the majority of consumers remain silent”); Brescia et al., *supra* note 21, at 588 (“[M]any individuals are unaware that they even have a legal problem.”).

96. See Simshaw, *supra* note 61, at 190.

97. See, e.g., Cabral et al., *supra* note 22, at 307 (“Fully resolving some legal problems requires the help of a lawyer.”).

98. Guttenberg, *supra* note 43, at 434–35; see also SUSSKIND, *supra* note 43, at 90.

99. See Brescia et al., *supra* note 21, at 609–10 (“With any type of case, there will be those cases that bear characteristics that make them good candidates for a one-size-fits-many approach, even if it does not fit them all.”); Guttenberg, *supra* note 43, at 437 (describing “fairly convincing argument[s] that not all legal practice requires unique solutions on each occasion”); Cabral et al., *supra* note 22, at 307 (noting that even though lawyers might be needed to achieve full resolution of some legal problems, “easier problems may be handled by [self-represented litigants] if there are tools to assist them”).

100. See Jewel, *supra* note 84, at 331 (describing the “deep-seated human need to have one’s story heard”); Green, *supra* note 43, at 1274 (noting that, while nonlawyers might be able to provide reliable help with no-fault divorces, lawyers might be needed for contested divorces because “contested divorces are more complicated, nonlawyers are too prone to making errors, and errors are unlikely to be caught and corrected by court clerks, judges, and others”).

101. See Brescia et al., *supra* note 21, at 607 (acknowledging the commodification of legal services and describing how “[s]ervice providers can identify complicating factual scenarios that take an individual out of the ‘commodified’ scenario . . . where the one-size-fits-all approach does not quite match that individual’s situation”).

102. See *id.* at 605 (identifying foreclosure applications as an example where there is “no substitute for an individual receiving full representation by an attorney that is tailored to his or her needs and through which that individual receives the benefit of the lawyer’s training and experience”).

103. See Johnson, *supra* note 60, at 183 (noting concerns that “certain types of document creation software available to transactional lawyers have been created by specific interest and

And third, legal technology must be calibrated to account for the tasks underlying each consumer's legal issue.<sup>104</sup> Some tasks might warrant more reliance on technology—including those in which properly designed machines have proven to be more efficient or even more accurate than humans,<sup>105</sup> like eDiscovery<sup>106</sup>—but tasks requiring more constant human judgment and decision-making likely warrant more restraint.<sup>107</sup> This might also apply to tasks that “require expertise and reliance on experiences, observations, or human emotions that are not easily reduced to the types of data that fuel AI,”<sup>108</sup> such as fact investigation and applying the law to those facts through legal writing.<sup>109</sup> Calibrating for different legal tasks also requires accounting for biases that can result from improper design or use of technology. Bias can manifest overtly, as demonstrated by chatbots like ChatGPT making racist statements due to being trained by language scraped from websites such as Reddit.<sup>110</sup> Bias can also manifest more subtly, but still harmfully, such as when predictive analytics embed the designers' judgments into the system.<sup>111</sup> Such biases can lead to racially biased results,<sup>112</sup> as well as broader harms that could undermine access-to-justice efforts.<sup>113</sup> On the other hand, effectively calibrated legal technology can actually help combat bias in the legal system, such as by “eliminating some extraneous factors from decision-making” and “unearth[ing] the extra-legal (and perhaps improper) factors that judges might be using in making decisions.”<sup>114</sup>

As these three calibration considerations demonstrate, effective calibration of legal technology for access to justice “requires significant *resources*, a

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industry groups,” which “has made lawyers wary about whether using such technology would benefit their clients”).

104. See Simshaw, *supra* note 61, at 195.

105. See McPeak, *supra* note 22, at 466 (describing legal technologies that “can produce more accurate results, for less cost, and in a much quicker timeframe”); *id.* at 461 (“[N]atural language processing enables more accurate research results, analysis of documents, and completion of legal forms.”); Sandvik, *supra* note 86 (“Legal technology is less time-consuming, tedious and expensive, and increasingly more precise than humans.”).

106. See Walters, *supra* note 57, at 1076 (noting that “eDiscovery . . . has been shown to surpass human review in both accuracy and recall”).

107. See *id.* at 1078.

108. Simshaw, *supra* note 61, at 196.

109. *Id.* at 196–97.

110. See Cyphert, *supra* note 27, at 404 (explaining how, by scraping websites such as Reddit, racist outputs can result from GPT).

111. See Kluttz & Mulligan, *supra* note 79, at 862 (“[P]redictive algorithmic systems embed many subjective judgments on the part of system designers—for example, judgments about training data, how to clean the data, how to weight different features, which algorithms to use, what information to emphasize or deemphasize, etc.”).

112. See Cruz, *supra* note 24, at 399 (“[W]ithout careful coding considerations, legal technologies that integrate artificial intelligence . . . into their decision-making programs run the risk of producing racially biased results.”).

113. See Poppe, *supra* note 40, at 186 (describing probate as an example for which there is “the potential of legal technology to reproduce, rather than ameliorate, existing social inequalities”); Cruz, *supra* note 24, at 399 (“Technology is not helpful if the end result harms the communities it is employed to assist.”); *id.* at 370–71 (“Unless the designers deliberately consider the issue of biased schemas within their design, AI may promote implicit biases that negatively impact the communities that are in most need of the help.”).

114. See McPeak, *supra* note 22, at 467.

high level of *resilience* in the face of inevitable challenges, and *relationships* between stakeholders across the legal problem-solving landscape, including between licensed legal professionals and technologists.”<sup>115</sup> But there are significant barriers to stakeholders leveraging these resources, resilience, and relationships that national regulatory reform could help overcome.

*Resource* barriers inhibit licensed legal professionals, consumers, and innovators from effectively designing, adopting, maintaining, and using legal technology.<sup>116</sup> Emerging legal technology is often expensive,<sup>117</sup> due at least in part to early design and development costs<sup>118</sup> that discourage some lawyers from designing their own technology systems.<sup>119</sup> Other costs include those that derive from necessary investment in underlying “core technologies”<sup>120</sup> and the need to convert information into machine-readable data.<sup>121</sup>

*Resilience* barriers inhibit stakeholders from adapting and responding to calibration’s inevitable challenges.<sup>122</sup> Some of these barriers are rooted in the culture of conservatism within the legal profession that resists change, especially with technology.<sup>123</sup> Others are rooted in “human frailties”<sup>124</sup> that

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115. Simshaw, *supra* note 61, at 202–03 (emphasis added).

116. *See id.* at 203.

117. *See* Guttenberg, *supra* note 43, at 480–81 (noting that only “those firms with access to greater capital may have the funds necessary to pursue these technologies”); Furlong, *supra* note 75, at 55–56 (“All the new legal systems and soft-ware coming our way sound wonderful—but not everyone will be able to afford them and access them.”).

118. *See* Kunkel, *supra* note 66, at 386–87 (describing the “significant expense involved with developing [technology-driven] solutions”).

119. *See* Brescia et al., *supra* note 21, at 572–73 (describing “reluctan[ce] to adopt [legal] technology, partly because of the cost of developing such systems”).

120. *See* Staudt, *supra* note 87, at 1145 (noting that the “emerging and fully transformative model for delivering legal information and legal services to low-income people requires a significant investment in core technologies”).

121. *See* Pasquale & Cashwell, *supra* note 56, at 41 (explaining that “additional costs are associated with converting [documents] into electronically stored information” in order to engage in e-Discovery).

122. *See* Simshaw, *supra* note 61, at 206; *see also* STATE BAR OF CAL., STATE BAR TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES REPORT: REQUEST TO CIRCULATE TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 22 (2019), <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf> [<https://perma.cc/AFF3-NB5R>] (“Innovation requires changes in perception, new knowledge, and often unexpected occurrences.”).

123. *See* COMM. ON THE FUTURE OF LEGAL SERVS., *supra* note 18, at 8–9 (“The legal profession’s efforts to address [its] challenges have been hindered by resistance to technological changes and other innovations.”); Finnemore, *supra* note 77, at 27 (describing technology users’ need for “a certain level of comfort with change and ambiguity—‘neither of which are hallmarks of the legal profession’”); McPeak, *supra* note 22, at 469 (describing a “fundamental disconnect between the slow-moving, conservative tradition of the legal industry and the newly emerging, fast-paced sector of tech disruption”); Jewel, *supra* note 84, at 370 (explaining that certain technological innovations “conflict with entrenched ways of practicing law”); *see also* OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 6.

124. *See* Poppe, *supra* note 40, at 212 (explaining within the context of legal technology that “[h]uman frailties hinder the willingness and ability of many individuals to engage successfully with new technologies”).

can manifest in being overwhelmed by technological change,<sup>125</sup> the amount of information involved,<sup>126</sup> and “cyber paralysis” from the number of tech options available.<sup>127</sup> Some stakeholders are stifled by fear of ethics violations and malpractice resulting from use of new technology, such as violating the emerging duty of technological competence.<sup>128</sup> Still other resilience barriers stem from insufficient time needed to learn through “trial and error.”<sup>129</sup> This need for time can also lead to long-term technology funding challenges.<sup>130</sup>

*Relationship* barriers are perhaps the most significant because cross-industry collaboration could help combat many of the resource and resilience barriers discussed above.<sup>131</sup> For example, licensed legal professionals with the means to do so are increasingly relying on technical experts by hiring them in-house or consulting third-party vendors.<sup>132</sup> But solo and small-firm lawyers often lack the necessary financial resources to do the same.<sup>133</sup>

Across the landscape, these relationships are hindered by certain regulations,<sup>134</sup> including the absolute prohibition of ownership of or investment in law firms by individuals who are not licensed attorneys.<sup>135</sup> This prohibition inhibits many legal service providers from accessing sources

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125. See McPeak, *supra* note 22, at 471 (noting that some lawyers “are not actively rejecting technology but may feel overwhelmed by the sheer speed and scope of technological change”).

126. See Finnemore, *supra* note 77, at 27 (noting that, despite benefits, services like e-Discovery “can . . . overwhelm attorneys with information”).

127. See *id.* at 25 (explaining that, with “so many options available . . . [f]ear of making the wrong choice . . . can often lead to ‘cyber paralysis’”).

128. See McPeak, *supra* note 22, at 473 (“For some lawyers . . . the prospect of even gaining basic technological competence is daunting.”); see also Cabral et al., *supra* note 22, at 317 (“The deployment of technology to help deliver legal services more efficiently may be hindered by providers’ uncertainty over ethical and professional responsibility obligations.”).

129. See Roberta L. Tepper, *The Flexible Lawyer: Promoting Agility and Innovation*, 57 ARIZ. ATT’Y 26, 28 (2020); Asay, *supra* note 87, at 1253 (describing “innovations that only promise returns, if at all, after a long period of risky trial and error”); Jewel, *supra* note 84, at 347 (explaining that, even though some projects fail, “technology facilitates the failure that allows other projects to succeed”).

130. See Asay, *supra* note 87, at 1253 (noting that it is “difficult for innovative start-up companies to obtain financing for the type of long-term innovation capable of yielding radical discoveries”); Cabral et al., *supra* note 22, at 312 (discussing how “managers may be reluctant to commit limited resources to new technology projects even though they might pay off in greater efficiency and furtherance of the organization’s mission over time”).

131. See Simshaw, *supra* note 61, at 211.

132. See Kluttz & Mulligan, *supra* note 79, at 854 (describing interviews with legal professionals who “report relying on the evaluation and judgment of a range of new technical experts within law firms and, increasingly, third-party vendors and their technical experts”).

133. See *supra* notes 115–20 and accompanying text (discussing resource barriers to calibrating legal technology).

134. See WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 42 (“New business models, innovative partnerships, and creative approaches to new licenses are all shut down by the lack of flexibility under the current rules.”); see also McPeak, *supra* note 22, at 475 (explaining how “regulations serve as a barrier to entry into the legal services market”).

135. See MODEL RULES OF PRO. CONDUCT r. 5.4(b) (AM. BAR. ASS’N 2020) (prohibiting ownership of or investment in law firms by nonlawyers).

of capital for investments in new technology or financial partnerships with nonlawyer technology experts and innovators.<sup>136</sup> In addition, such relationships can be hindered out of fear that either the lawyer or the technologist might be assisting with or engaging in UPL.<sup>137</sup> This is especially true of entities that offer online legal services aimed at helping people with their civil legal problems,<sup>138</sup> often across multiple jurisdictions.<sup>139</sup> These concerns are exacerbated by the widely varying “UPL” definitions and regulatory schemes across jurisdictions<sup>140</sup> and can stunt collaboration and investment in innovation aimed at increasing access to justice.<sup>141</sup>

### C. *The Need for Regulatory Reform*

There is no easy or singular solution to overcoming barriers to calibrating legal technology for access to justice. Indeed, historical efforts to promote

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136. See WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 42 (“Many smaller legal service startups can’t secure funding because there are questions as to whether their businesses may operate.”); STATE BAR OF CAL., *supra* note 122, at 22 (“Innovation . . . requires collaboration, multi-disciplinary participation and funding/investment. Expecting new innovation in access to justice to happen utilizing the same knowledge, perceptions and people (lawyers) with little to no reward or incentive for new partners to the industry is expecting innovation to foster in a place that has yet to achieve meaningful innovation in access to justice.”).

137. See Poppe, *supra* note 40, at 200; Green, *supra* note 43, at 1274 (“[E]xperimentation in employing nonlawyers to assist the public is restricted or curtailed by UPL laws.”).

138. See WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 39 (noting that entities “offering online legal services [and] helping people with their civil legal problems . . . may be unlawfully practicing law”).

139. See *id.* at 41 (explaining that online legal services might not be targeting consumers in Washington State specifically, since they are internet-based services).

140. See Jayne R. Reardon, *Advancing Technology Poses Challenges to Enforcing UPL*, L. PRAC. TODAY (Mar. 28, 2023), <https://www.lawpracticetoday.org/article/advancing-technology-poses-challenges-to-enforcing-upl/> [<https://perma.cc/G7WL-L3LH>] (noting that “the definitions of ‘the practice of law’ and UPL vary by jurisdiction, if they are defined at all,” and that “[t]he line between the practice of law and sharing information and services via technology is blurry”); Brescia et al., *supra* note 21, at 580 (“State ethical and criminal codes sometimes leave much to be desired in terms of defining the practice of law and UPL.”); Walters, *supra* note 57, at 1088 (“Although software might violate UPL rules, it is not at all clear which software and which services would do so, and in which states. There is no universal standard for what constitutes ‘the practice of law’ in the United States. Instead, UPL rules are set by a patchwork quilt of regulations, state statutes, case law, bar ethics committee opinions, and attorney general opinions.”).

141. See Cabral et al., *supra* note 22, at 322 (“[T]he uncertain application of unauthorized practice rules to software in nonprofit legal aid settings . . . poses a non-trivial risk of chilling the development and broader use of innovative technologies that could significantly improve access to justice for underserved populations.”); Brescia et al., *supra* note 21, at 580 (“Claims of UPL constantly hover over these websites and other services, and the threat of civil and criminal charges might chill what could be a viable solution for the ‘justice gap.’”); Walters, *supra* note 57, at 1090 (“The lack of clear guidelines and uniformity [of UPL] has the potential to create a chilling effect on innovation and access-to-justice efforts . . . . [T]he risk of criminal penalties, combined with uncertainty about what is permitted, may well deter many otherwise enthusiastic developers from even trying to enter the market.”).

technology-driven innovation in legal services have struggled.<sup>142</sup> But with an appreciation of the resource, resilience, and relationship barriers to calibration described above, several regulatory reforms emerge as demonstrating strong potential to address these barriers, facilitate competition and innovation, and ultimately help technology increase access to justice. However, as the remainder of this Article will demonstrate, these reforms have stalled at the state level and would be more effectively managed through nationally driven processes.

One type of responsive reform would be to reduce the broad regulatory uncertainty that inhibits some stakeholders from innovating in this space.<sup>143</sup> Professor Ed Walters has noted that, in particular, “[i]t will be important . . . to define more clearly what constitutes the ‘practice of law’ so that innovators and law firms alike will have safe harbors for innovation.”<sup>144</sup>

In addition, many calibration barriers could be alleviated through increased flexibility in who can invest or have an ownership interest in law practices. In almost all U.S. jurisdictions, only licensed lawyers can have such financial interests in a law firm.<sup>145</sup> In these jurisdictions, only one-way investment is allowed: lawyers can invest in technology personnel for their practice, but technology companies cannot invest in law practices. Under such rules, resource-rich law firms with the capital to invest in technology expertise are positioned to do so, but small firms generally have more limited financing options. The inability of law firms to offer even a small ownership interest in their practice to access-to-justice-minded technologists has led many scholars to call for reforms to ownership limits, or at least for experimentation with permitting alternative business structures.<sup>146</sup>

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142. See STATE BAR OF CAL., *supra* note 122, at 14 (“In the legal industry, there is no existing definitive structure that has demonstrated an ability to spark technology-based innovation in delivering legal services to consumers.”).

143. See OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 10 (describing how “[s]ome state bar associations have been very resistant to change, electing to double down on traditional regulation methods through restrictive ethics opinions and reactive lawsuits”); TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 10 (summarizing the ways in which “[e]thical rules have been called out as contributing to the justice gap”); WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 42 (“As various businesses try to create new service delivery models aimed at filling the urgent need for legal advice, they find their ideas and initiatives stifled by certain existing regulatory rules.”); Cabral et al., *supra* note 22, at 317 (“The deployment of technology to help deliver legal services more efficiently may be hindered by providers’ uncertainty over ethical and professional responsibility obligations.”).

144. See Walters, *supra* note 57, at 1091; see also Reardon, *supra* note 139 (arguing within the context of advancing technologies that “[w]e need to rethink the regulation of UPL”); Eli Wald, *The Access and Justice Imperatives of the Rules of Professional Conduct*, 35 GEO. J. LEGAL ETHICS 375, 421 (2022) (“[T]he ABA should now lead the way to thoughtfully and systematically unwinding these very UPL statutes to increase access to legal services”); Baxter, *supra* note 26, at 242 (recommending that states “[r]eplace the UPL Ban with a Tailored Statement of the Legal-Service Roles Requiring a Law License”).

145. See MODEL RULES OF PRO. CONDUCT r. 5.4(b) (AM. BAR ASS’N 2020) (prohibiting ownership of or investment in law firms by nonlawyers).

146. See, e.g., JASON SOLOMON, DEBORAH RHODE & ANNIE WANLESS, STANFORD CTR. ON THE LEGAL PRO., HOW REFORMING RULE 5.4 WOULD BENEFIT LAWYERS AND CONSUMERS, PROMOTE INNOVATION, AND INCREASE ACCESS TO JUSTICE 8 (2020), [https://law.stanford.edu/wp-content/uploads/2020/04/Rule\\_5.4\\_Whitepaper\\_-\\_Final.pdf](https://law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf) [https://

A small number of jurisdictions have explored such reforms but not with the rate of success or at the speed needed to overcome calibration barriers nationwide. For example, Arizona's Task Force on the Delivery of Legal Services recently recognized that the state's prior version of Rule 5.4 had "been identified as a barrier to innovation in the delivery of legal services"<sup>147</sup> and underscored a sentiment within its workgroup that "lawyers have the ethical obligation to assure legal services are available to the public, and that if the rules of professional conduct stand in the way of making those services available, then the rules should be changed, albeit in a way that continues to protect the public."<sup>148</sup> The task force further recognized that reform to this rule would allow, among other things, "[a] nonlawyer to serve as a firm's . . . chief technology officer."<sup>149</sup>

Similarly, the Washington Courts Practice of Law Board has argued that, "[w]ith so many people unable to access meaningful legal assistance, the time has come for us to consider opening the pool of legal service providers and eliminating the limitation that only attorneys and [Limited License Legal Technicians] may own law firms."<sup>150</sup>

In 2019, California's Task Force on Access Through Innovation of Legal Services recommended exploring revisions to its version of Rule 5.4, which were "intended to facilitate the ability of lawyers to enter into financial and professional relationships with nonlawyers who work in designing and implementing cutting-edge legal technology."<sup>151</sup> The group emphasized its "understanding, from discussions with legal technologists on the Task Force and otherwise, that a primary impediment to such relationships is the inability of lawyers to share in the profits that accrue from the delivery of legal services," and concluded that, "by expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities that deliver legal services, this deterrent to the adoption of technology will be removed and the concomitant practice efficiency enhancements will increase access to legal services."<sup>152</sup>

Despite these calls from scholars and state task forces, few jurisdictions around the country have acted. Part III will explore the limited examples of responsive local regulatory reform that, although alone insufficient, could and should inform broader national regulatory reform processes.

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perma.cc/SC7P-4934]; Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 82–83 (2015) (encouraging states to experiment with reforms related to alternative business structures, emphasizing that such reforms could produce helpful data that could ultimately result in change to Model Rule of Professional Conduct 5.4.); Wald, *supra* note 144, at 420 (arguing that "the Rules [of Professional Conduct] can relax independence requirements to allow non-lawyer investment and ownership of law firms, which can lead to greater capital investment and innovation in the means of providing access to legal services, for example, via artificial intelligence").

147. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 10.

148. *Id.* at 11–12.

149. *Id.* at 16.

150. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 42.

151. STATE BAR OF CAL., *supra* note 122, at 20.

152. *Id.*

### III. THE INADEQUATE LOCAL REGULATORY RESPONSES TO DATE

Although some jurisdictions have acted or are beginning to explore local regulatory reforms that account for new legal technologies, these efforts are insufficient to adequately steer legal technology nationwide in a way that both protects consumers and addresses the justice gap. This Part will analyze these efforts, as well as the barriers hindering local regulatory reform that could be overcome by shifting regulatory reform processes to the national level.

#### A. Limited but Helpful Examples of Local Reform Efforts

Although the nationwide response has been inadequate, some jurisdictions have recognized that achieving legal technology's access-to-justice potential and avoiding its peril would be aided by exploring reforms to certain rules of professional conduct and laws and rules concerning UPL. Alone, these efforts are insufficient to effectively regulate legal technology nationwide, but these examples still serve as helpful models for structuring national legal regulatory reform processes that could have a wider impact. Some examples of local reforms are not new. For example, Washington, D.C. has permitted alternative business structures for decades.<sup>153</sup> Most examples, though, are more recent.

In exploring these potential reforms, some jurisdictions are experimenting with “regulatory sandboxes” to temporarily permit technology-driven services or technology-minded business structures that might otherwise violate existing rules of professional conduct (such as prohibitions on nonlawyer ownership and investment in law firms) or amount to UPL.<sup>154</sup> In its order adopting a legal services regulatory sandbox, the Utah Supreme Court explained that “[a] regulatory sandbox is a policy tool through which a government or regulatory body permits limited relaxation of applicable rules to facilitate the development and testing of innovative business models, products, or services by sandbox participants.”<sup>155</sup> Within a regulatory sandbox, an innovative legal service would “be granted a temporary safe harbor from certain rules and be permitted to operate under the close watch of [an] oversight body, with strict reporting requirements that address any identified risks to consumers.”<sup>156</sup> If the innovative service performs well based on the production of relevant data, “regulators can decide whether to

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153. See D.C. R. PRO. CONDUCT r. 5.4 (permitting ownership and investment in law practices by nonlawyers).

154. See, e.g., *Utah Supreme Court to Extend Regulatory Sandbox to Seven Years*, UTAH CTS. (May 3, 2021), <https://www.utcourts.gov/utc/news/2021/05/03/utah-supreme-court-to-extend-regulatory-sandbox-to-seven-years/> [https://perma.cc/EW5U-KJDP]; WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 5 (proposing a legal services regulatory sandbox to the Washington Supreme Court).

155. Utah Supreme Court Standing Order No. 15 (effective Aug. 14, 2020), <https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf> [https://perma.cc/F7YL-U973].

156. Simshaw, *supra* note 61, at 221–22.



approve the service for longer-term operation or amend certain rules to allow it and similar services to enter the market.”<sup>157</sup>

Utah’s sandbox was the nation’s first for legal services, launching in 2020.<sup>158</sup> Former Utah Supreme Court Justice Deno Himonas and his then-clerk Tyler Hubbard described the sandbox as part of Utah’s broader effort to “democratize the rule of law by making an understanding of the law and access to [Utah’s] civil legal system more widely affordable and available.”<sup>159</sup> The sandbox’s duration was extended from two to seven years in May 2021.<sup>160</sup>

Other jurisdictions have also explored launching legal regulatory sandboxes. In 2021, a committee of the Supreme Court of Florida recommended “that Florida adopt a Law Practice Innovation Lab Program very similar to the approach taken in Utah,” recognizing that proposed concepts “can be tested in a controlled environment where data can be collected, and public harm can be assessed and prevented.”<sup>161</sup> Washington State also proposed a legal regulatory sandbox with the express purpose of “encourag[ing] legal professionals and entrepreneurs to experiment with innovative business models and nontraditional legal services that will reduce the Access to Justice (ATJ) gap.”<sup>162</sup>

Other jurisdictions are engaging in targeted legal regulatory reform through other means. For example, Arizona recently enacted legal regulatory reform without a sandbox. The Arizona Supreme Court has approved alternative business structures for law firms,<sup>163</sup> permitting “a business entity that includes nonlawyers who have an economic interest or decision-making authority in a firm and provides legal services in accord with [Arizona] Supreme Court Rules,”<sup>164</sup> thereby eliminating its version of Rule 5.4.<sup>165</sup> According to the state’s task force, the action permitting alternative business structures is “rooted in the idea that entrepreneurial lawyers and nonlawyers would pilot a range of different business forms,” and that this would

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157. *Id.*

158. *Id.* at 222.

159. Deno G. Himonas & Tyler J. Hubbard, *Democratizing the Rule of Law*, 16 STAN. J.C.R. & C.L. 261, 263 (2020).

160. *See* UTAH CTS., *supra* note 154.

161. JOHN STEWART, CESAR ALVAREZ, JOSEPH CORSMEIER, JOSIAS DEWEY, SANTO DIGANGI, ADRIANA GONZALEZ, JOHN F. HARKNESS, JR., SHAWNNA HOFFMAN-CHILDRESS, LANSING SCRIVEN & SARAH SULLIVAN, FINAL REPORT OF THE SPECIAL COMMITTEE TO IMPROVE THE DELIVERY OF LEGAL SERVICES 19 (2021), <https://www.media.floridabar.org/uploads/2021/06/final-report-of-the-special-committee-to-improve-the-delivery-of-legal-services.pdf> [<https://perma.cc/9E9S-PE9G>].

162. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 9.

163. *See Alternative Business Structures*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/cld/Alternative-Business-Structure> [<https://perma.cc/D2WZ-H2EX>] (last visited Sept. 3, 2023).

164. *Id.*

165. *See* Ord. Amend. the Ariz. Rules of the Sup. Ct. & the Ariz. Rules of Evidence, *In re Restyle & Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs from 1.0 to 5.7), 46–51, 54–58, 60 & 75–76, No. R-20-0034 (Ariz. 2020)*, <https://www.azcourts.gov/Portals/215/Documents/082720FOrderR-20-0034LPABS.pdf?ver=2020-08-27-153342-037> [<https://perma.cc/RGJ5-ENMJ>] (eliminating Rule 5.4).

ultimately improve access to justice and enhance the delivery of legal services.<sup>166</sup> To ensure consumer protection, “[c]omplaints against Alternative Business Structures are received, investigated, and prosecuted by the State Bar of Arizona in the same manner as complaints against lawyers.”<sup>167</sup>

Other technology-related reforms have been more widespread but slowly implemented and with limited impact. In 2012, the ABA amended the commentary to its Model Rule of Professional Conduct 1.1, Competence, to read, in part, “[t]o maintain the requisite knowledge and skill [for competence], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology.*”<sup>168</sup> As of 2023, forty states have adopted some version of this “technology competence” rule.<sup>169</sup> Some of those states moved relatively quickly in adopting the change within the first few years after the ABA’s amendment,<sup>170</sup> while others waited almost a decade.<sup>171</sup> Other jurisdictions still do not explicitly recognize such a duty.<sup>172</sup>

Although the technology competence rule has largely been seen as a positive development in recognition of the importance of the benefits and risks of legal technology, some commentators have noted remaining ambiguity concerning technology-related obligations.<sup>173</sup> The manner in and degree to which the duty of competence will be enforced in light of the technology comment remains to be fully seen, and technology competence remains a daunting concept for many lawyers.<sup>174</sup>

Although many of these reforms and efforts have the potential to positively steer the responsible and effective design, adoption, and use of legal

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166. See TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 9–10.

167. See ARIZ. JUD. BRANCH, *supra* note 163.

168. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 6 (AM. BAR ASS’N 2020) (emphasis added).

169. See Robert Ambrogi, *Tech Competence*, LAW SITES, <https://www.lawnext.com/tech-competence> [<https://perma.cc/3R2Y-YHV3>] (last visited Sept. 3, 2023) (tracking states’ adoption of the rule).

170. See, e.g., Ord., *In Re* Amend. of Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2 & 7.3 of the Pa. Rules of Pro. Conduct, No. 120 (Pa. 2013), <https://www.pacourts.us/assets/opinions/Supreme/out/120drd.pdf> [<https://perma.cc/Q2CW-E2ZW>].

171. See, e.g., Ord. Amend. the Haw. Rules of Pro. Conduct, *In re* Haw. Rules of Pro. Conduct, No. SCR-11-0001047 (Haw. 2021), [https://www.lawnext.com/wp-content/uploads/2022/03/2021\\_hrpcond1.1\\_1.4\\_1.15\\_5.3am\\_ada.pdf](https://www.lawnext.com/wp-content/uploads/2022/03/2021_hrpcond1.1_1.4_1.15_5.3am_ada.pdf) [<https://perma.cc/EVF4-7W6S>].

172. See Ambrogi, *supra* note 169 (reflecting that, as of 2023, Alabama, Georgia, Maine, Maryland, Mississippi, Nevada, New Jersey, Oregon, Rhode Island, and South Dakota still did not have a technological competence rule).

173. See, e.g., Katherine Medianik, Note, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1515 (2018) (“[S]tate competency rules shadowing the Model Rules . . . remain too ambiguous to lend an adequate sense of direction for lawyers using AI technology.”).

174. See *supra* note 128 and accompanying text.

technology, they are insufficient on a national level in light of the national access-to-justice crisis. Indeed, calls for broader regulatory reform persist.

### B. Persisting Calls for More and Wider Legal Regulatory Reform

Calls continue to mount for legal regulatory reforms from academics,<sup>175</sup> numerous centers and standing committees of the ABA,<sup>176</sup> and influential courts and judges.<sup>177</sup> The U.S. Department of Justice and Federal Trade Commission have also voiced general support for innovation in the delivery of legal services,<sup>178</sup> and the historical failure of regulation in the legal field

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175. See, e.g., Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1195 (2016); WILLIAM D. HENDERSON, STATE BAR CAL., LEGAL MARKET LANDSCAPE REPORT (2018), <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000022382.pdf> [<https://perma.cc/GNF6-53HT>]; Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public?: Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2588 (2014); James McCauley, *The Future of the Practice of Law: Can Alternative Business Structures for the Legal Profession Improve Access to Legal Services?*, 51 U. RICH. L. REV. 53, 55, 59 (2016); SOLOMON ET AL., *supra* note 146 (arguing that reforming Model Rule of Professional Conduct 5.4 would benefit lawyers and consumers, promote innovation, and increase access to justice).

176. See Am. Bar Ass'n Ctr. for Innovation, Standing Comm. on the Delivery of Legal Serv., Standing Comm. on Ethics and Pro. Resp., Standing Comm. on Pro. Regul., Standing Comm. on Pub. Prot. in the Provision of Legal Serv., *Resolution 115: Encouraging Regulatory Innovation* (2020), [https://www.americanbar.org/groups/centers\\_commissions\\_center-for-innovation/Resolution115/](https://www.americanbar.org/groups/centers_commissions_center-for-innovation/Resolution115/) [<https://perma.cc/3W3B-HED3>].

177. See, e.g., Rebecca Love Kourlis & Neil M. Gorsuch, *Legal Advice Is Often Unaffordable. Here's How More People Can Get Help: Kourlis and Gorsuch*, USA TODAY (Sep. 17, 2020), <https://www.usatoday.com/story/opinion/2020/09/17/lawyers-expensive-competition-innovation-increase-access-gorsuch-column/5817467002/> [<https://perma.cc/2HFT-8D94>] (advocating for lifting law firm ownership and investment restrictions); CONF. OF CHIEF JUSTS., RESOLUTION 2: URGING CONSIDERATION OF REGULATORY INNOVATIONS REGARDING THE DELIVERY OF LEGAL SERVICES (2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0010/23500/02052020-urging-consideration-regulatory-innovations.pdf](https://www.ncsc.org/_data/assets/pdf_file/0010/23500/02052020-urging-consideration-regulatory-innovations.pdf) [<https://perma.cc/T8JK-TLXS>] (urging its members “to consider regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services, while ensuring necessary and appropriate protections for the public”); *Redesigning Legal Speaker Series: Leading from the Bench—Expanding Access through Regulatory Innovation*, INST. FOR ADVANCEMENT AM. LEGAL STUDS. (June 9, 2021), <https://iaals.du.edu/events/redesigning-legal-leading-bench-expanding-access-through-regulatory-innovation> [<https://perma.cc/P74K-443J>].

178. See Susan Saab Fortney, *Online Legal Document Providers and the Public Interest: Using a Certification Approach to Balance Access to Justice and Public Protection*, 72 OKLA. L. REV. 91, 94–95 (2019) (describing agency support for innovation in the delivery of legal services); see also Letter from Fed. Trade Comm'n and Dep't of Just., to the Hon. Bill Cook (June 10, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-436/160610commentnbcbill.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-436/160610commentnbcbill.pdf) [<https://perma.cc/RQ5E-M3BP>] (welcoming “the opportunity to share [the agencies'] views on the definition of the practice of law and North Carolina House Bill 436” and stating that “[o]verbroad scope-of-practice and unauthorized-practice-of-law policies can increase prices, impede innovation, and otherwise harm competition and consumers”); Submission of the United States, *Disruptive Innovations in Legal Services*, OECD Doc. DAF/COMP/WP2/WD(2016)4 (May 30, 2016), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2/WD\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2/WD(2016)4&docLanguage=En) [<https://perma.cc/5XUB-Y5DQ>] (summarizing U.S.

to keep up with technology is increasingly being recognized by state bar task forces.<sup>179</sup>

In 2019, California’s task force recommended that “[l]awyers in traditional practice and law firms . . . should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers,”<sup>180</sup> which it said is intended to promote collaboration “either under [a rule] or another regulatory model that fosters investment and development in technology-driven delivery systems, including but not limited to on-line legal services, Alternative Legal Service Providers (ALSPs) and an expanded role for paraprofessionals and nonlawyer specialists.”<sup>181</sup> That task force’s work was halted in 2022.<sup>182</sup>

The Oregon State Bar Futures Task Force reached similar conclusions. It emphasized that “[t]o fully serve the Bar’s mission of promoting respect for the rule of law, improving the quality of legal services, and increasing access to justice, we must allow and encourage the development of alternate models of legal service delivery to better meet the needs of Oregonians.”<sup>183</sup> The task force further noted that it “believe[s] that there are opportunities to embrace new models of practice, leverage technological advances, and begin to close the access-to-justice gap without compromising that historical commitment.”<sup>184</sup>

Despite these and other calls for reform, examples of success at the state level are limited in number, scope, and impact. The following section explores why this is the case from both substantive and process perspectives before arguing that these barriers and forms of resistance could be overcome by shifting certain regulatory reform mechanisms to the national level.

### C. Barriers and Resistance to Local Legal Regulatory Reform

Although some regulatory reform efforts have demonstrated early promise, the successes have taken years and are not easily replicated in other jurisdictions, much less scalable on a state-by-state basis across the nation.<sup>185</sup> As this section will explain, there are both substantive and procedural reasons for this stagnation.

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Department of Justice and Federal Trade Commission activities relating to innovation in the area of legal services).

179. See, e.g., STATE BAR OF CAL., *supra* note 122, at 10 (“The slow evolution of the rules governing lawyers . . . are examples of regulatory reforms failing to keep pace with changes in the legal services market, including changes in the market driven by evolving innovation and technology and related consumer behavior and preferences.”); OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 6 (describing how “market disruption and rapid change . . . demand an evolution in the manner and methods by which lawyers provide legal services, and the way in which those services are regulated”).

180. STATE BAR OF CAL., *supra* note 122, at 9.

181. *Id.* at 10.

182. See Karen Sloan, *California Lawmakers Pull Plug on Legal Industry Reforms*, REUTERS (Aug. 29, 2022), <https://www.reuters.com/legal/legalindustry/california-lawmakers-pull-plug-legal-industry-reforms-2022-08-26/> [<https://perma.cc/T6Z5-NCYP>].

183. OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 7.

184. *Id.* at 10.

185. See, e.g., Sloan, *supra* note 182.

Some concerns with reform are substantive; that is, some people fear even considering proposals that they are certain are bad ideas, with or without data and with or without adequately considering the impact of new technologies on access to justice. For example, California decision-makers shut down the state's proposal for a sandbox after questioning whether even considering the sandbox conflicted with their core mission to protect the public.<sup>186</sup> Some of these concerns stem more specifically from resistance to opening the door to nonlawyer ownership and investment. As the Washington Courts Practice of Law Board has noted, "regulators hesitate to amend the existing rules, citing potential harm to the public [resulting from] new business models and service providers."<sup>187</sup> This resistance stems from the belief that such structures categorically compromise the independence of lawyers and pose conflicts of interest due to increased profit motive.<sup>188</sup> These concerns persist even though such prohibitions have been chronicled as rooted in economic protectionism, not protecting the public.<sup>189</sup> Moreover, these concerns persist despite widespread observations from legal ethics scholars that lawyers constantly must account for competing financial interests and pressures related to billable hours, practice expenses, loans, and competitive pressures from other firms.<sup>190</sup> In addition, the legal ethics rules already provide for obligations related to professional independence that include an ethical framework for navigating such pressures.<sup>191</sup> Moreover, as the Arizona task force noted, Rule 5.4's "twin goals of protecting a lawyer's independent professional judgment and protecting the public are reflected in other ethical rules which can be strengthened"<sup>192</sup> through other reforms, and a failure to

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186. See Cheryl Miller, *State Bar Pauses 'Regulatory Sandbox' Work After Criticism by Lawmakers*, LAW.COM (Dec. 13, 2021, 11:39 PM), <https://www.law.com/therecorder/2021/12/13/state-bar-pauses-regulatory-sandbox-work-after-criticism-by-lawmakers> [<https://perma.cc/2V9A-2FLZ>] ("California's state bar has paused committee work on creating a legal regulatory sandbox after lawmakers . . . questioned whether the agency has strayed from its core public protection mission.").

187. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 42; see also OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 10 (describing how "[s]ome state bar associations have been very resistant to change, electing to double down on traditional regulation methods through restrictive ethics opinions and reactive lawsuits").

188. See Knake, *supra* note 40, at 14 (explaining opposition to nonlawyer ownership).

189. See TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 15.

190. See, e.g., SOLOMON ET AL., *supra* note 146, at 12–13; Knake, *supra* note 40, at 42 ("The professionalism/independence paradigm ignores the economic realities of law practice. The fact is that law practice is a business—one increasingly pressured in the twenty-first century by competition and technological innovation.").

191. See, e.g., MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR. ASS'N 2012) (requiring lawyers to "exercise independent professional judgment and render candid advice"); *id.* r. 1.7 (prohibiting representations where there would be a significant risk that the lawyer would be materially limited by a third party); *id.* r. 1.8 (prohibiting interference from third-party payors on a lawyer's independent professional judgment).

192. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 13; see also *id.* at 16 (describing the existing Arizona rule that "already directs that third-party payers such as insurance companies cannot interfere with a lawyer's independent professional judgment or the client-lawyer relationship").

reform “may impede the legal profession’s ability to innovate to fill the access-to-civil-justice gap.”<sup>193</sup>

There is also substantive resistance to even entertaining reforms to rules and laws concerning UPL. Although some jurisdictions are reexamining their definitions of the practice of law and prohibitions of UPL, most have resisted any changes in response to new technologies. For example, many stakeholders and decision-makers hold firm in the belief that online document services should constitute UPL.<sup>194</sup> The California Task Force on Access Through Innovation of Legal Services Report in 2019 declined to recommend “a change to existing rules or statutes as to the definition of UPL,” favoring instead “continu[ing] the current common law approach evidenced through a large body of case law going back almost a century,” despite recognizing that “[t]he lack of a precise definition of either the practice of law or the unauthorized practice of law creates uncertainty for the public and potential providers.”<sup>195</sup>

In addition to substantive resistance, other barriers to legal regulatory reform are rooted in process-oriented logistical concerns related to reform. For example, despite its appetite for reform, Arizona’s Task Force on the Delivery of Legal Services considered but rejected a proposal to implement a regulatory sandbox for legal services.<sup>196</sup> It cited as one hurdle “identifying who would decide applications for waivers,” despite the task force’s recognition that a sandbox would have helped “permit the [state] Supreme Court to determine how Rule 5.4 should be amended and eliminate the guesswork involved . . . .”<sup>197</sup> Instead, Arizona eliminated the rule without first testing the reform in a sandbox,<sup>198</sup> an approach many other jurisdictions have understandably avoided.

Other jurisdictions have experienced resistance to experiment-based reform processes. Professor Bruce A. Green has argued that resistance to experiment-based reform is ingrained within our legal systems, noting that, “[u]nlike those in the medical profession who attempt to resolve medical uncertainty by testing, research, and experimentation, courts are comfortable making law by relying on unproven empirical assumptions without testing them.”<sup>199</sup> He has also observed that “courts often eschew the collection of data and experimentation, relying instead on anecdotes, impressions, received wisdom, and analogies—indeed, this is a hallmark of common-law development.”<sup>200</sup> Aside from the courts, legislatures can also be a hurdle. California’s proposal for a Utah-like legal regulatory sandbox stalled when lawmakers requested additional information, expressed skepticism, and

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193. *Id.* at 13.

194. *See* Fortney, *supra* note 178, at 93–94.

195. STATE BAR OF CAL., *supra* note 122, at 7–8. Instead, the task force recommended a number of new exceptions to the prohibition on UPL for certain individuals and entities.

196. *See* TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 19, at 13.

197. *Id.*

198. *See* Ord. Amend. the Ariz. Rules of the Sup. Ct. & the Ariz. Rules of Evidence, *supra* note 166 (eliminating Rule 5.4).

199. Green, *supra* note 43, at 1272–73.

200. *Id.* at 1273.

seemed to indicate that such a proposal would require legislative approval.<sup>201</sup> Many other jurisdictions have simply not engaged in any discussion of regulatory reform, much less taken any action.

One emerging theme from both forms of resistance is that current debates about regulating legal technology lack data about how such technology is actually being used across the legal services landscape.<sup>202</sup> This lack of data exacerbates both substantive and process-oriented challenges because, without data, stakeholders are concerned about the substance of contemplated reforms, and without new regulatory reform processes, the necessary data cannot be generated. Even so, jurisdictions continue to resist reform processes based on fears not founded in data. As Green observes, resistance to regulatory experimentation and data collection often exists “because untested assumptions are embedded so deeply that courts assume that they cannot be disproven.”<sup>203</sup> The result is a vicious cycle that harms the discourse necessary for regulating in light of emerging legal technology and with an eye toward access to justice. Even though such informational deficiencies concerning technology are not unique to the legal services industry,<sup>204</sup> debates concerning nonlawyer ownership have been especially contentious.<sup>205</sup> Although states could generate much-needed data through legal regulatory sandboxes, such regulatory innovation at the state level continues to stall.<sup>206</sup>

The remainder of this Article argues that shifting certain regulatory reform processes to the national level can overcome these substantive and procedural barriers, as well as other forms of resistance to engaging in needed regulatory reforms. It further argues that this would ultimately benefit legal technology calibration for access to justice.

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201. See Cheryl Miller, *Lawmakers Criticize State Bar Proposal Giving Nonlawyers Role in Legal Services*, LAW.COM (Dec. 9, 2021), <https://www.law.com/therecorder/2021/12/09/lawmakers-criticize-state-bar-proposal-giving-non-lawyers-role-in-legal-services> [<https://perma.cc/8ES7-G9E6>].

202. See, e.g., Kluttz & Mulligan, *supra* note 79, at 861 (“[L]ittle is known about how legal professionals, their organizations, and their professional environments are shaping the adoption, implementation, and governance of machine-learning systems that support professional decision-making. This gap reflects the more general dearth of empirical data on professionals, their organizational environments, and their interactions with today’s automated, machine-learning-based decision-making systems more generally.”).

203. Green, *supra* note 43, at 1273.

204. See Henry T. Greely, *The Law of the Tetrapods*, 22 VAND. J. ENT. & TECH. L. 251, 266 (2020) (“Few people understand how the new technology works, and no one can be confident they know how, or even whether, it will end up being used. This is a problem for setting up a regulatory regime, and it continues to be a problem for running one. Even finding out how widely a technology has been adopted can be a problem—much less understanding its risks and benefits.”).

205. See Guttenberg, *supra* note 43, at 479; see also Knake, *supra* note 40, at 14 (“[T]he debate on nonlawyer investment is not for the faint of heart.”).

206. See Sloan, *supra* note 182 (noting that “California hitting the brakes on regulatory innovation could slow adoption in other jurisdictions”).

#### IV. THE CASE FOR SHIFTING REGULATORY REFORM PROCESSES TO THE NATIONAL LEVEL

Many of these regulatory reform challenges and barriers could be overcome, enabling technology- and access-to-justice-conscious reforms on a larger scale, by shifting certain regulatory reform processes to the national level. By overcoming the process challenges that hinder local reform efforts, troves of helpful data can be created through a legal regulatory sandbox at the national level, which, through data-generation, would in turn help overcome the substantive resistance to reform currently experienced in most jurisdictions.

On the one hand, this proposal is a modest one, as it would not require regulators in any individual jurisdiction to do anything that they are not already doing.<sup>207</sup> Rather, a national sandbox would provide a streamlined path for engaging in the type of data-driven reform that has demonstrated early promise in Utah, with the additional expertise, empirical benefits, and economic advantages available at the national level.

On the other hand, the proposal is a bold one, as it would depart from a tradition of establishing, enforcing, and reforming legal services regulation at the local level. But technology-driven tools and services are here and here to stay,<sup>208</sup> and a national legal regulatory sandbox has the potential to accelerate and broaden reforms in a legal services landscape that cannot afford to stay stuck in the status quo any longer. After describing and advocating for this proposal, this Article will respond to potential challenges and critiques to show why this is a promising and needed mechanism.

As explained more fully below, organizing a sandbox at the national level would provide for additional expertise, empirical benefits, and economic advantages and efficiencies not available at the local level. This Part will (1) propose a structure for a national legal regulatory sandbox, (2) frame its appropriate scope, and (3) break down the process of testing emerging technology-conscious reforms within the sandbox to generate data that will enable data-driven legal regulatory reform across the nation.

##### A. *The Sandbox Structure*

Any regulatory sandbox requires an oversight body. One inefficiency with jurisdiction-specific legal regulatory sandboxes is that each jurisdiction must create some oversight entity or assign oversight responsibilities to an existing entity, which would have technological expertise<sup>209</sup> and some relationship

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207. See *infra* Part V.D (explaining the state autonomy that would still exist under a national regulatory sandbox).

208. See OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 10 (“Alternative legal service delivery models, which harness technology to offer limited-scope services to consumers in lieu of the traditional model of full-service legal practice, are here to stay.”); WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 41 (“The danger of doing nothing is that the online legal services are not going away . . . . [T]his is evidenced by the investment of venture capital into the companies offering such services.”).

209. See RYAN CALO, BROOKINGS, *THE CASE FOR A FEDERAL ROBOTICS COMMISSION* 15 (2014), <https://www.brookings.edu/articles/the-case-for-a-federal-robotics-commission/>



with the state supreme court and, potentially, the state bar. For example, Washington State's sandbox proposal called for an independent state supreme court board that would report to the court and be administered by the state bar association.<sup>210</sup> Conversely, Utah's legal regulatory sandbox was originally overseen by its new Office of Legal Services Innovation and reported to the Utah Supreme Court, without being affiliated with the bar.<sup>211</sup> By 2023, due to funding issues, the sandbox transitioned to being run by the state bar itself.<sup>212</sup> Oregon's recommendation to explore regulatory reform noted the need to "[p]rovide a dedicated resource responsible for data collection, design, and dissemination," similar to how "[m]any successful businesses now have a chief data officer or chief information officer in addition to, or sometimes as an expansion of, the role of chief technical officer."<sup>213</sup> A national entity of this sort would have expertise, empirical benefits, and economic advantages over a network of individual-jurisdiction sandboxes and would decrease the need for duplicative funding, bodies, and actions.

Although the national oversight body would handle the administration of the sandbox, the body's decisions would not be directly enforceable in any particular jurisdiction without some action by states' supreme courts in their capacities as the regulators of legal services within their respective jurisdictions. For example, those courts would have to formally approve and implement the recommendations of the national sandbox by issuing orders temporarily permitting new services or through some other means. Similarly, the courts would review the data and monitoring reports from the national sandbox while services are being tested. Finally, the courts would have to evaluate, approve, and formally implement any recommended suspensions or removals of participants from the sandbox, as well as review the long-term licensure recommendations or appropriate reform recommendations from the national sandbox. If a court, instead, did not want to act in accordance with a national sandbox recommendation, it would be free not to.

In light of these roles, and depending on a jurisdiction's regulatory structure, resources, and variations from the ABA's Model Rules of Professional Conduct, a jurisdiction might choose to still create a local body to aid its supreme court in these residual responsibilities. But in those cases,

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[<https://perma.cc/M8VX-76GM>] (recounting the nation's history of "[forming] formal institutions around specific technologies, for the obvious reason that understanding a technology or set of technologies requires a dedicated staff, and because it can be more efficient to coordinate oversight of a technology centrally").

210. See WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 11.

211. See generally UTAH OFF. OF LEGAL SERVS. INNOVATION, INNOVATION OFFICE MANUAL (2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/08/IO-Manual-Published-Aug.-25-2021.pdf> [<https://perma.cc/5J9C-HPVB>].

212. See OFF. OF LEGAL SERVS. INNOVATION, ACTIVITY REPORT: MARCH 2023, at 2 (2023), <https://utahinnovationoffice.org/2023/04/27/march-2023-activity-report/> [<https://perma.cc/ELE7-Q4XQ>] (noting that "[t]ransition of the Office operations to the Utah State Bar has begun"); see also *supra* note 34 and accompanying text (describing observations of the logistical limits of the Office of Legal Services Innovation).

213. OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 13.

the jurisdiction's work would be significantly less than if the jurisdiction was fully responsible for all aspects of designing, launching, and running a legal regulatory sandbox. With much of the work being done on the national level, local bodies could focus their efforts on the nuances necessary to optimize the effectiveness of the sandbox's implementation at the local level, rather than developing and administering a more substantial program from scratch.

Within this structure, local expertise might at times benefit the local functions of implementing the national sandbox's recommendations. For example, local experts would be effective in accounting for the impact of ethical obligations unique to that jurisdiction's rules of professional conduct, which, in turn, might affect the parameters of any safe harbors granted. But leveraging national expertise as part of a national sandbox would help ensure that such local expertise could be focused on local issues, rather than on repeating work that could be done more efficiently on the national level. Relying on duplicative expert-driven efforts to develop and oversee local sandboxes is potentially also economically inefficient if such expertise is of the paid variety, as is contemplated in some jurisdictions.<sup>214</sup>

Because state supreme courts would retain the final say over what services are permitted within each jurisdiction both during and after a service's term in the national sandbox, the national sandbox's oversight body would not be an entity or agency of the federal government, nor would it have any direct or enforceable authority over individual jurisdictions. Rather, the oversight body would likely take the form of an independent nonprofit organization, similar to the status of the ABA or National Conference of Bar Examiners (NCBE). The role of a national oversight body would, in many ways, be similar to the ABA's existing function of drafting and updating its Model Rules of Professional Conduct, which are then largely implemented by jurisdictions nationwide,<sup>215</sup> despite the ABA's lack of enforceable authority. Further, the sandbox oversight body could leverage national expertise in the same way that the ABA convenes many centers, sections, committees, and workgroups dedicated to technology, legal ethics, and access to justice that could help provide the expertise needed for a sandbox.<sup>216</sup> As recent ABA

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214. See, e.g., WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 13 (noting costs associated with "some of the legal-related services provided by [Washington State Bar Association (WSBA)] to the [sandbox] Board, such as providing a legal opinion about regulating a nontraditional legal service," and that the "Board would pay back to WSBA the cost of such an opinion"); STATE BAR OF CAL., *supra* note 122, at 11 (cautioning that "costs should be anticipated for the ongoing periodic analysis of the data," including "the cost of retaining expert consultants and vendors who possess the resources and skills to design reasonable and realistic benchmarks").

215. See *Policy & Initiatives*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/policy/](https://www.americanbar.org/groups/professional_responsibility/policy/) [<https://perma.cc/7LKT-QHP9>] (last visited Sept. 3, 2023) (describing how "[t]he Center Policy Implementation Committee provides assistance to jurisdictions on the review and implementation of adopted policy, promotion of policy to the bar and the public, and maintains a national clearinghouse of information on implementation efforts," and listing ongoing implementation projects and charts on jurisdictional adoption of various rules and amendments).

216. See, e.g., *Legal Technology Resource Center*, AM. BAR ASS'N, [https://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/](https://www.americanbar.org/groups/departments_offices/legal_technology_resources/) [<https://perma.cc/>

action reflects, there are many national voices eager to engage on these issues. In February 2023, the ABA House of Delegates adopted Resolution 604 at its midyear meeting, which addresses how stakeholders, including attorneys and regulators, should assess accountability, transparency, and traceability issues associated with artificial intelligence.<sup>217</sup> Potential funding sources for the oversight body will be discussed in conjunction with several of its key functions, described in detail below.

The next two sections will propose the appropriate scope of the oversight body's role and the processes it would follow to run the national sandbox.

### B. The Sandbox Scope

At a foundational level, it is important to understand what a national legal regulatory sandbox, through its oversight body, would be designed to do.

To be clear, a legal regulatory sandbox is not a means of automatic deregulation,<sup>218</sup> nor is it an environment that encourages UPL.<sup>219</sup> It is also not a means by which a disbarred attorney could offer legal services or by which an out-of-state licensed professional could skirt local temporary admission processes.<sup>220</sup> Rather, as the Washington Courts Practice of Law Board noted in its sandbox proposal, “the intent [of a legal regulatory sandbox] is to determine the appropriate regulations to protect consumers of legal services from harm,” and “to provide a pathway for legal professionals and entrepreneurs to provide nontraditional legal service under the authorization and active supervision of the [state] Supreme Court or its delegate.”<sup>221</sup> Through its careful oversight, a legal regulatory sandbox could

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48L-9M2S] (last visited Sept. 3, 2023); *Science & Technology Law Section*, AM. BAR ASS'N, [https://www.americanbar.org/groups/science\\_technology/](https://www.americanbar.org/groups/science_technology/) [https://perma.cc/TK8T-VXKA] (last visited Sept. 3, 2023); *Standing Committee on Ethics and Professional Responsibility*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/ethicsandprofessionalresponsibility/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/) [https://perma.cc/3X9S-M2X2] (last visited Sept. 3, 2023); *Access to Justice Committee*, AM. BAR ASS'N, <https://www.americanbar.org/groups/litigation/committees/access-justice/> [https://perma.cc/XW8P-MM58] (last visited Sept. 3, 2023).

217. *See Midyear Meeting 2023—House of Delegates Resolution 604*, AM. BAR ASS'N, [https://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2023/house-of-delegates-resolutions/604/](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2023/house-of-delegates-resolutions/604/) [https://perma.cc/4NRV-5RJ3] (last visited Sept. 3, 2023); *see also* Amanda Robert, *ABA House Adopts 3 Guidelines to Improve Use of Artificial Intelligence*, ABA J. (Feb. 6, 2023, 11:22 AM), <https://www.abajournal.com/web/article/aba-house-adopts-3-guidelines-to-improve-use-of-artificial-intelligence> [https://perma.cc/GGT3-5HWF].

218. *See, e.g.*, WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 11 (noting that its proposal “is not recommending the creation of a non-regulated environment”).

219. *See, e.g., id.* (emphasizing that the Washington State sandbox proposal “is not recommending the creation of an environment that encourages the Unauthorized Practice of Law”).

220. *See, e.g., id.* at 43; UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 6 (stating Utah’s sandbox would deny an application if an “[e]ntity is merely a vehicle for an out of state lawyer to practice within Utah”).

221. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 11.

lead to regulatory changes for both licensed legal professionals and nontraditional legal service providers.<sup>222</sup>

Further, participation in the sandbox would still subject services to existing statutes, regulations (including business, licensing, and financial regulations), court rules, and any relevant court orders in the jurisdictions in which they would be temporarily permitted to provide services.<sup>223</sup> Similarly, services would not automatically be exempt from enforcement of a violation of consumer protection statutes and would not automatically be protected from discipline for violations of the rules of professional conduct for which they had not received a safe harbor in their jurisdiction.<sup>224</sup> Rather, a national legal regulatory sandbox would vet and recommend a service to be temporarily authorized within willing jurisdictions.<sup>225</sup> The participating service would only be granted temporary safe harbors that stem from clearly identified rules prohibiting UPL and specific rules of professional conduct chosen by each jurisdiction, likely based on the recommendations from the sandbox.<sup>226</sup>

One subject of the safe harbors would be relevant rules of professional conduct. Even though most jurisdictions' rules of professional conduct closely track the ABA's Model Rules of Professional Conduct, there are some variations from jurisdiction to jurisdiction. Therefore, although it would likely be appropriate for a national sandbox to largely base its recommendations on the Model Rules, it could also account for or otherwise acknowledge how variations in different jurisdictions' rules might affect the jurisdiction-specific parameters of a local safe harbor. Some rules that are especially likely to be invoked by technology-conscious proposals for innovative services in a sandbox are Rules 1.5 (governing fees), 5.4 (concerning professional independence and nonlawyer ownership and investment in law firms), and 5.5 (prohibiting UPL).<sup>227</sup> But the sandbox would not be limited to proposals concerning these examples. One benefit

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222. *See id.* at 10 (describing the possibility of these changes resulting from a Washington State legal regulatory sandbox).

223. *See* UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 4 (noting that the state's "Innovation Office must confirm that each applicant . . . affirm[s] that its service conforms to any applicable requirements of Utah law"); WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 19 (recognizing that participants in its proposed sandbox would still be subject to other Washington State laws).

224. *See* UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 3 ("As a general rule, Utah lawyers working with or for Sandbox entities must maintain their compliance with the Utah Rules of Professional Conduct and remain subject to disciplinary action should they fail to comply."); WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 19 (noting that participants would still be subject to these rules when participating in a Washington-specific sandbox).

225. *See* WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 19 (discussing the limited, temporary safe harbors that would be offered under Washington's proposal).

226. *See id.*

227. *See, e.g., id.* at 9 (listing these rules as likely to be invoked, and noting with regard to Rule 5.4, specifically, that "an applicant might want to propose a business model that could allow legal professionals to work with nonlegal professionals in the provision of a nontraditional legal service in the [sandbox], which could require changes to RPC 5.4 Professional Independence").

of its structure is that it would be open, subject to review and approval, to innovative services and rule reforms that have not yet been contemplated.

The sandbox would not, however, be an invitation to eviscerate truly foundational principles governing the legal profession and legal services. Indeed, there might be some rules for which even temporary exemption is inappropriate or that might at least be approached with a presumption that these rules are not appropriate for testing through experimentation. As Washington State's proposal explicitly recognized, "not every [rule of professional conduct] or other regulation is appropriate for alternative regulation testing," elaborating, for example, that Rules "1.1 Competence, 1.3 Diligence, and 1.4 Communications are so important to the practice of law and protecting consumers they are required for both traditional and nontraditional legal services."<sup>228</sup> The national sandbox could explicitly exclude proposed exceptions to these and other foundational principles from consideration, or it could approach such proposals with presumptions against admission to the sandbox.

The national sandbox could also prioritize access to justice explicitly within its scope, as has been contemplated to varying degrees at the state level. The California task force, for example, recommended prioritizing access to justice by scaling the fees for participating in a sandbox-like program depending on how much the services addressed the justice gap.<sup>229</sup> Washington State's proposal for a sandbox went even further by actually requiring an applicant to identify the service's access-to-justice impact.<sup>230</sup> Specifically, Washington State's proposal would have required applicants to provide information concerning targeted consumers, the service's cost-effectiveness, how its accessibility compares to existing services, and other ways the service would help close the justice gap.<sup>231</sup> Utah's sandbox, by contrast, has not implemented a similarly explicit focus on access to justice. Although the access to justice benefits of its sandbox were contemplated before its launch<sup>232</sup> and have been documented since,<sup>233</sup> there have been calls to "confine the Sandbox for the time being to projects that are clearly addressed at improving access to legal services in areas where they are lacking."<sup>234</sup> It would be appropriate for a national sandbox to collect access-to-justice information from applicants and participants, to account for

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228. *Id.*

229. *See* STATE BAR OF CAL., *supra* note 122, at 17 ("Allowing scaled fees based upon how much the product addresses the access to justice gap incentivizes innovation that specifically addresses the need . . ."). The task force's work has since been halted. *See* Sloan, *supra* note 182.

230. *See* WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 17 (including in its list of application criteria information about "[h]ow the nontraditional legal service will reduce the [access-to-justice] gap").

231. *See id.* at 28–29.

232. *See* Standing Order No. 15, *supra* note 155, at 7 ("The overarching goal of this reform is to improve access to justice."). *See generally* Himonas & Hubbard, *supra* note 159.

233. *See* Cornett & DeMeola, *supra* note 33.

234. *E.g.*, Eisenberg, *supra* note 34, at 26.

access-to-justice impact when making its recommendations, and to encourage jurisdictions to consider those data in their decision-making.

With an appreciation of the structure and scope of a national sandbox, the next section will outline the processes of a national legal regulatory sandbox, with a focus on the benefits of implementing the processes on a national—rather than only local—level.

### *C. The Sandbox Process*

A national legal regulatory sandbox would have four primary functions: (1) soliciting, evaluating, and admitting applicants for participation in the sandbox; (2) recommending that jurisdictions authorize temporary safe harbors for admitted participants accordingly; (3) monitoring the performance of the participants operating in the sandbox, including by collecting relevant data and issuing update reports to partnering jurisdictions; and (4) recommending long-term licensures or reforms after a participant's term in the sandbox has ended. All four of these functions could be primarily completed at the national level. The rest of this section will analyze each of these primary functions, demonstrating the benefits of national—as opposed to purely local—organization and execution.

#### 1. Solicit, Evaluate, and Admit Applicants for Participation

An expert-driven national legal regulatory sandbox would solicit, evaluate, and admit innovative, technology-driven, and access-to-justice oriented legal services for participation in the national sandbox. It would then recommend that jurisdictions allow certain services to temporarily operate within the jurisdiction under carefully crafted safe harbors and subject to identified oversight measures with mandatory data reporting based on any identified risks of harm to consumers. The need for expertise, as well as the empirical and economic demands at the application stage, underscore why a national sandbox would have many advantages over local sandboxes.

Foundationally, a national sandbox would serve as a centralized means through which prospective participants could seek safe harbors for their innovative services. Currently, and for the foreseeable future under the status quo, a service experiencing regulatory uncertainty would have to limit its services to those few jurisdictions that have implemented or are considering implementing a local legal regulatory sandbox. Such a limitation could inhibit those services' potential reach and, even if successful, their growth. In the longer term, if more sandboxes are launched, a new problem for participants would emerge in the form of having to separately apply and report to multiple jurisdictions, which could require exponentially more resources, funds, and time. As explained below, a national sandbox would centralize the application process, benefitting both applicants and participating local jurisdictions.

To begin with, the application process of a legal regulatory sandbox requires identifying and evaluating what existing laws and rules would be

implicated by a proposed service,<sup>235</sup> as well as the potential likelihood and degree of any consumer harm that could result from the proposed service, including, for example, accounting for potential bias manifestation.

The technological nature of the proposals and evaluative processes will make technical expertise—which is not currently a central focus of most local legal services regulators<sup>236</sup>—essential. One major advantage of a national sandbox would be the efficient harnessing of national expertise on necessary topics, including technology, data science, legal ethics, bias, and access to justice. Existing and proposed legal regulatory sandboxes have leveraged or are anticipating having to leverage this expertise.<sup>237</sup> However, siloing expertise by jurisdiction or repeatedly calling on the same national experts for guidance misses opportunities to efficiently broaden the scope, diversity, and quality of experts on these issues.

Expertise at the application phase can also be expensive. Consolidating expertise at the national level would alleviate the high cost of leveraging it repeatedly at the local level.<sup>238</sup> For example, Washington State’s proposal estimates that review of a single application in its proposed sandbox would cost \$600 in legal expertise and administrative time.<sup>239</sup> This cost, at the application stage alone, multiplied by many applicants and combined with other costs, may be prohibitive for some jurisdictions that might already have other concerns about organizing a local sandbox. A national sandbox would alleviate the need to duplicate these efforts and costs across jurisdictions.

Of course, an alternative way of paying for expertise would be to pass application and other administrative costs on to sandbox applicants.<sup>240</sup> However, this would risk undermining efforts to encourage participation in the sandbox from access-to-justice focused services already navigating challenging resource barriers.<sup>241</sup> Even so, if a national sandbox were to charge an application fee as part of its funding structure, a single application fee would still be preferable to applicants having to pay multiple application (and later participation) fees to participate in multiple sandboxes across the country.

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235. One approach, as Washington has proposed, would require applicants to provide “a description of [Rules of Professional Conduct] or other regulations that may need to be modified in the [sandbox].” WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 30.

236. *See* STATE BAR OF CAL., *supra* note 122, at 15 (“As with all technology, a new regulatory scheme will require development of new skill sets by the regulating entity that it may not currently possess . . .”).

237. *See, e.g.*, WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 12–13 (proposing that the sandbox’s “core membership would pull in expertise as needed based on the applicant and the nontraditional legal service, from a variety of sources, including the Washington Supreme Court, WSBA, the WSBA sections (for specific legal subject matter expertise), the law schools in Washington State, and members of the bar and the tech community”).

238. *See, e.g.*, STATE BAR OF CAL., *supra* note 122, at 15 (describing how regulating new technologies requires “development of new skill sets by the regulating entity that it may not currently possess, which will take time and money”).

239. *See* WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 14.

240. *See, e.g., id.* at 13–15; STATE BAR OF CAL., *supra* note 122, at 17.

241. *See supra* notes 115–20 and accompanying text (discussing resource barriers to calibrating legal technology).

Access to expertise is also important at this stage because it is needed to effectively solicit, evaluate, and respond to information concerning potential consumer harms that could result from proposed services. As California's task force noted during its contemplation of a sandbox (which was eventually abandoned), "[d]evelopment of strategic data collection and metrics likely will involve the cost of retaining expert consultants and vendors who possess the resources and skills to design reasonable and realistic benchmarks."<sup>242</sup> As explained further below, such organization and costs could be more effectively and efficiently executed on a national level.

The evaluation of applications is a critical stage of the sandbox because it helps set the parameters of any temporary safe harbors that would be granted based on the service's potential benefits and risks. Potential harms to consumers can ultimately be reduced in a number of ways. For example, those reviewing the application could assign a risk level categorically based on the type of service offered.<sup>243</sup> Alternatively, the sandbox could require applicants to identify in their applications potential harms and the risks that they pose, along with how any resulting harms could be measured,<sup>244</sup> mitigated, and reported during participation in the sandbox.<sup>245</sup>

As an example of the categorical approach, Utah's sandbox was designed to categorically assign risk levels of low, low-or-moderate, moderate, or high to applicants depending on the level of reliance on technology and the level of involvement of licensed lawyers. The services identified as *low-risk* are those where a "lawyer [is] employed or managed by a nonlawyer," those that are proposing "[l]ess than 50% nonlawyer ownership," and those involving a "[s]oftware provider with lawyer involvement," such as those involving "legal document completion."<sup>246</sup> Services considered to have a *low-or-moderate risk* of consumer harm are those where "[l]awyers [would] shar[e] fees with nonlawyers," those proposing "50% or more nonlawyer ownership,"<sup>247</sup> and those with "an entity offering a software- or online-based platform to connect . . . lawyers with interested consumers," which "may also offer other legal practice support services such as timekeeping, billing, video-conferencing, etc."<sup>248</sup> Those considered to have a *moderate risk* are those involving a "[n]onlawyer provider with lawyer involvement" and

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242. STATE BAR OF CAL., *supra* note 122, at 11.

243. *See, e.g.*, UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 4–6; *see also* WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 25–26 (summarizing Utah's different categorical risk levels).

244. *See* WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 29 (proposing that applicants submit information concerning "[h]ow any risk of harm can be measured (that is, what data will be collected to show risk and steps to mitigate the risk)").

245. *See, e.g., id.*, at 17 (including in its list of application criteria information about "[a]ll potential harms to consumers the nontraditional legal service may create, and the risk that the harm might occur," "how the applicant will mitigate such harm," and "[h]ow these [access-to-justice] gap and harm mitigation factors will be measured and reported while operating in the" sandbox).

246. UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 5.

247. *Id.*

248. *Id.* at 5 n.3.



“software provider[s] with lawyer involvement.”<sup>249</sup> The services considered *high-risk* are those involving a “[n]onlawyer provider without lawyer involvement” and “[s]oftware provider[s] without lawyer involvement.”<sup>250</sup> In the sandbox’s first year, of the thirty entities that were approved for participation by the Utah Supreme Court, four were categorized as low-risk, twelve as low-or-moderate risk, thirteen as moderate-risk, and one as high-risk.<sup>251</sup>

Under a different, noncategorical evaluation process, as contemplated in Washington State’s sandbox proposal, applicants would complete a self-assessment of risk, which would be closely scrutinized by an oversight board. The proposal “recommends that applicants must disclose each anticipated potential harm to consumers, and for each potential harm indicate a score based on the likelihood of the harm occurring (very likely, possible, or almost certain), versus the impact of the harm (negligible, manageable, or catastrophic).”<sup>252</sup> Although Washington applicants would offer a self-score in their applications, the oversight board would still review the data and be in charge of creating final scores for the risk categories.<sup>253</sup> Applicants proposing services with higher risk of harm to consumers based on the self-assessment would either be denied admission to the sandbox or be subject to additional data collection requirements during their participation in the sandbox.<sup>254</sup> Washington’s proposal also recommended prohibiting, without consideration, the participation of legal professionals who have been disbarred, who have had their licenses revoked, or who have been suspended from practice.<sup>255</sup> Utah does not appear to have such a strict prohibition.<sup>256</sup>

A national sandbox’s application process could be informed by these existing and proposed local sandbox processes. Because local jurisdictions might differ somewhat in their risk tolerance of various legal service proposals, the granularity of Washington State’s proposed self-assessment process—and the data that would result—would have advantages on the national level. The presumed risk reflected in the Utah risk categories could be incorporated into a Washington-like assessment through presumptions or guidelines. For example, if a service involves a software with legal professional involvement, certain minimum scores might be presumed when evaluating the nature, probability, and timing of certain risks, and applicants could rebut those presumptions in their applications.

The Utah sandbox has shown that effective identification of risks during the application stage can help minimize harms to consumers from sandbox participants. More than 2,500 consumers used services offered through

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249. *Id.* at 5.

250. *Id.*

251. *See* Cornett & DeMeola, *supra* note 33.

252. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 22.

253. *See id.*

254. *See id.* at 21–22 (describing Washington’s proposed method for measuring and accounting for potential risks of services proposed by applicants).

255. *See id.* at 22.

256. *See id.* (distinguishing Utah’s policy).

Utah's sandbox in its first year, with more than 550 of the legal services delivered by software with lawyer involvement.<sup>257</sup> During the first year, there were only two consumer complaints of harm, which were both found to have been sufficiently mitigated.<sup>258</sup>

Although these processes demonstrated promise in Utah and have sparked proposals in other jurisdictions, it is doubtful that a network of nationwide sandboxes could be achieved in a time frame that would adequately respond to technological development and the current justice gap crisis. Even if it could, it would not be as effective or efficient as a national sandbox. The following sections demonstrate why this is also true of other sandbox processes occurring after an applicant has been admitted to the sandbox.

## 2. Recommend Temporary Safe Harbors

After the initial application data has been solicited, gathered, and evaluated by an expert-driven oversight body, the national sandbox would then issue a recommendation as to whether jurisdictions should permit the service to temporarily operate within a safe harbor concerning specific regulations.

The technical permission-granting mechanism under which an entity would then be permitted to operate might vary slightly by jurisdiction. Under current and proposed local legal regulatory sandboxes, an oversight body recommends safe harbor parameters with regard to a sandbox applicant for approval by the state's supreme court. For example, in Utah, the Office of Legal Services Innovation "develop[ed] the outline for its authorization recommendation, including risk category, service area(s), waivers, authorization term, and any additional requirements," and then "determine[ed] which service models it [would] recommend for [c]ourt review and approval."<sup>259</sup> Similarly, Washington State proposed that "[e]very participant in the [sandbox] would be subject to a specific [state] Supreme Court Order that both authorizes participation in the [sandbox] and details the regulations in effect in the [sandbox]."<sup>260</sup> After approval, the entity would be allowed to "provide the defined and approved services and only the defined and approved services under the Court Order and under the ongoing supervision of the [state's oversight] Board."<sup>261</sup> The state supreme court order would also include a "description of regulations, including any [rules of professional conduct], that will apply to the provision of the nontraditional legal service, and any new or proposed modified [rules of professional conduct] that might be needed."<sup>262</sup> A national sandbox would issue similar recommendations to jurisdictions nationwide; willing jurisdictions would

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257. See Cornett & DeMeola, *supra* note 33.

258. See *id.* (reporting that Utah recognized that the "entity response to harm-related complaints has been adequate and acceptable as related to mitigation").

259. UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 7.

260. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 11; see also *id.* at 17.

261. *Id.* at 17.

262. *Id.* at 30.

then take the necessary steps to temporarily permit sandbox participants within their respective jurisdictions.

The duration of a participant's term in the sandbox could be fixed, as was proposed by Washington State, or have an option of extension, as is the practice in Utah.<sup>263</sup> Considering that a national sandbox would have the benefit of more data than that which would be available under a single jurisdiction's sandbox, a higher level of durational flexibility under a national sandbox would be warranted. To account for varying jurisdictional needs, the national sandbox could also issue preliminary recommendations at the end of a set duration, while also continuing to monitor a service for jurisdictions that might want to wait longer and generate more data before deciding whether to grant a longer-term license or to make any responsive regulatory changes.

As a result of this process at the national level, a wide variety of proposed services meeting a wide range of legal needs could begin to be tested around the country. Indeed, this was the case in the first year of Utah's sandbox on a smaller scale, which, as reported by the Institute for the Advancement of the American Legal System (IAALS), included innovative services addressing "end-of-life planning (19.6%); business-related matters such as intellectual property, contracts and warranties, and entity incorporation (22.3%); and marriage and family (15.0%)."<sup>264</sup> Other types of legal services that were available via the sandbox at the time "include[d] education, real estate, domestic violence, and immigration."<sup>265</sup> The volume and variety of services would likely be significantly magnified at the national level.

### 3. Monitor Participant Performance and Collect Data

A national legal regulatory sandbox would also serve a monitoring function during participating services' time in the sandbox, requiring the services to report certain data on risks of harm, any consumer complaints received, consumer outcomes, and its access-to-justice impact. In many ways, this is the most important function of a sandbox and the one that would benefit most from the expertise, empirical benefits, and economic advantages available at the national level. As Professor Rebecca Sandefur and Dr. Emily Denne have recognized, "change creates new data points that permit new discoveries," and because "[l]egal services regulatory reform is in its early days . . . [m]any questions are as yet unanswered, and the field is wide open for inquiry."<sup>266</sup> A national sandbox could generate data that moves these inquiries forward.

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263. See UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 42; WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 36 (comparing the Washington Blueprint and practice in Utah).

264. Cornett & DeMeola, *supra* note 33.

265. *Id.*

266. Rebecca L. Sandefur & Emily Denne, *Access to Justice and Legal Services Regulatory Reform*, 18 ANN. REV. L. & SOC. SCI. 27, 38 (2022).

Since sandboxes are experimental by nature, it is important that a sandbox lends both credibility and transparency to the experimental process while services are being tested in the market. For example, Utah requires certain disclosures by sandbox participants to consumers,<sup>267</sup> which could also be required by the national sandbox so that partnering jurisdictions would have the option of requiring the disclosures as a prerequisite to offering services within the jurisdiction. Similarly, Utah's Office of Legal Services Innovation created a "badge" that it required to be displayed on the website and offices of all sandbox participants,<sup>268</sup> and the national sandbox would benefit from similar transparency, messaging, and branding. Such action by a sandbox at the national level would offer high-profile, credible, and helpful transparency to regulators, legal service providers, and consumers concerning the probationary and experimental nature of the service at all stages.<sup>269</sup>

A central goal of the national oversight body would be the generation of data that can inform regulatory decisions that balance innovation, access to justice, and consumer protection. For example, Washington State's proposal for its sandbox specifically recommended the collection of "in-depth data about any reduction of the [access-to-justice] gap and the benefits and harms to consumers through the provision of a nontraditional legal service."<sup>270</sup> After similar collection at the national level, the data would then be shared with jurisdictions that have temporarily permitted the service or are otherwise considering regulatory reform. A national sandbox would be better positioned than individual jurisdictions to effectively and efficiently manage this monitoring, including by generating the data, accounting for and responding to any consumer harms, and tweaking the sandbox practices as needed based on the generated data. By leveraging national expertise and broader data sources, a national sandbox would also generate more and better data than an individual jurisdiction could, which would in turn inform better regulatory reform at the state level.

More broadly, existing and proposed sandboxes at the state level involve or contemplate collection of different data depending on the nature of the participating service.<sup>271</sup> Washington State, for example, proposed collecting data from participating services quarterly and, at the end of the sandbox term, analyzing "whether the [access-to-justice] gap was reduced, and whether the

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267. See UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 9 (listing information that must be disclosed, as applicable, including "[t]his is not a law firm" and "[t]his service is not a lawyer," along with contact information).

268. See *id.* (providing a visual image of the badge and noting that it "will facilitate consumer knowledge and confidence and will provide question / complaint information").

269. See, e.g., WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 18 (noting that its proposed sandbox would "provide a mechanism that ensures consumers know that the nontraditional legal service being offered to them is being offered through a [sandbox], and how they can report any issues with the nontraditional legal service to the [oversight] Board").

270. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 9.

271. See, e.g., UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 10–13 (providing charts that outline the reporting requirements for participants in different risk categories, with specific data and frequency varying based on the risk of harm category); WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 10 (noting in its proposal that "[s]ome data collected in Washington will differ from the data collected in Utah").

entity managed risk to consumers.”<sup>272</sup> The data collected as part of a national sandbox would necessarily vary based on each participant, but common forms of data collected could mirror the data contemplated by Washington State, including the “[n]umber of consumers served since last report,” the “[n]umber of completed transactions or services,” the “[n]umber of incomplete transactions or services (and explanation),” the “[a]verage cost per transaction or service,” the “[e]lapsed time to provide each transaction or service,” the “[n]umber and type of complaint(s),” the “[n]umber of complaints resolved and manner of resolution,” the “[t]ime to resolve each complaint,” and “[o]ther data based on the transaction or service.”<sup>273</sup>

Collecting this data at the national level stands to benefit not only regulators, but also those individuals actually developing the emerging technology-driven services. The transparency into the public policy and values of the sandbox would provide helpful guidance for services when they engage in the important process of calibrating the appropriate technology reliance and restraint in light of the consumers, issues, and tasks involved with the service.<sup>274</sup> California’s task force acknowledged the need for transparency in its proposal for a regulatory sandbox, noting that, “[p]articularly where the providers to be regulated are developing technology-driven delivery systems, the regulator’s plan and methodology for capturing data and applying quantitative and qualitative metrics should be considered by the providers at the time that the technology itself is being developed.”<sup>275</sup> Centralization of comprehensive quantitative and qualitative methods at the national level would help developers in these endeavors, rather than making them track different metrics and policies across multiple jurisdictions.

Administering these processes on the national level also makes economic sense. Although some costs of administering a sandbox are inevitable, those costs should not be unnecessarily duplicated across jurisdictions engaging in similar processes. For example, under a network of state-specific sandboxes, there may be repeat costs for participants if each jurisdiction charges fees for participation in the sandboxes (in addition to potential application fees and any eventual licensing fees), as is the norm in current and proposed state sandboxes and other regulatory reform mechanisms.<sup>276</sup>

It is also inefficient and expensive for multiple oversight bodies to review a service’s data submitted to sandboxes across multiple jurisdictions.

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272. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 31.

273. *Id.*

274. *See supra* Part II.B (describing calibrating legal technology for access to justice); *see also* Simshaw, *supra* note 61.

275. STATE BAR OF CAL., *supra* note 122, at 11.

276. *See, e.g.,* WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 13–15 (recommending that the state supreme court fund its proposed sandbox “by authorizing the collection of fees from applicants and participants, and from licensing fees from those participants who after successful completion of a term operating in the [sandbox], may provide the legal service in Washington”); STATE BAR OF CAL., *supra* note 122, at 17 (recommending that its proposed UPL “safe harbor” regime for new technology-driven services would “require those entities to pay a registration or certification fee to fund the regulatory agency tasked with oversight”).

Washington State’s sandbox proposal, for example, estimated that reviewing quarterly reports of a single sandbox participant would cost the sandbox \$2,400 in legal expertise and administrative costs over a two-year term.<sup>277</sup> Again, the prospect of these expenses and fees, when combined with other costs, is likely to give pause to both jurisdictions and participants alike.

Because resulting participation fees could be especially prohibitive for nonprofit legal service providers, who are especially likely to aim their innovations toward access-to-justice ends, each jurisdiction would need to consider whether and how to address such cost burdens. Failure to account for the impact of costs on these providers could undermine the potential impact of the sandbox on innovations that could benefit access to justice. Other means of accounting for these administrative costs, such as subsidizing nonprofit applicants and participants through higher fees for for-profit applicants and participants,<sup>278</sup> risk driving up costs to certain potential sandbox participants, which would be further compounded if such costs are imposed by each jurisdiction in which the entity hopes to provide services.

Moreover, start-up costs associated with administering a sandbox might be prohibitive for some jurisdictions that might otherwise be inclined to explore sandbox processes.<sup>279</sup> To the extent that grants might be a helpful source of funds for local sandboxes,<sup>280</sup> a nationwide network of sandboxes would be more likely to deplete grant sources than would a centralized nationwide sandbox that reduces duplicative administrative and other costs. These limited funds would be better consolidated to facilitate a sandbox on the national level.

#### 4. Share Data and Make Long-Term Reform Recommendations

At the end of a service’s participation in the national sandbox, recommendations would be made to jurisdictions as to whether and how the service should continue to be available to the public, then freeing state supreme courts to follow or ignore the recommendations.<sup>281</sup> If the service

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277. See WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 14.

278. This has been considered in at least one proposal. See WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 15 (recommending, among other potential funding options, “that the fees for nonprofit applicants and participants in the [sandbox] be subsidized by the for-profit applicants and participants”).

279. See STATE BAR OF CAL., *supra* note 122, at 15 (identifying as a “con” to its proposal for a UPL “safe harbor” scheme—which was ultimately abandoned—the fact that it would “require an initial set of seed funding in order to get the program up and running, so that the regulating entity is ready to go when the first wave of applicants submit their products”).

280. See, e.g., WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 15 (seeking permission from the Washington Supreme Court to solicit grants “from charitable and for-profit organizations that fund legal reform”).

281. This discretion would be consistent with the operating sandbox in Utah and the vision of some proposed state sandboxes. See UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 14 (noting that the Utah Supreme Court “retains complete discretion to review and assess any recommended entity”); WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 36 (proposing that “[t]he [state] Supreme Court will have the discretion to approve or not approve” a recommended order concerning a service, “particularly if the Supreme Court feels

performed well in the sandbox, jurisdictions could allow it to continue and perhaps also allow similar entities to begin providing similar services without having to first participate in the sandbox.<sup>282</sup> In such cases, the national sandbox could continue to admit, monitor, and make recommendations concerning similar services until a national consensus emerges, if ever, concerning whether such services should be permitted. The sandbox could also recommend, and jurisdictions could implement, broader reforms to legal services regulations to account for lessons learned from the sandbox.

Additionally, at a foundational level, there is psychological value in separating a sandbox from the jurisdiction that would ultimately implement any resulting reforms based on the sandbox data. When there is too close of a relationship between the entity engaging in the data collection and the entity that would ultimately implement any resulting regulatory reform in light of that data, there runs a risk of operating in an environment that assumes regulatory reform will result.<sup>283</sup> A national sandbox would ensure that the necessary evaluation of recommendations is not biased by such an assumption and is done from an appropriately critical posture and in full consideration of the data generated.

Another risk of making decisions with only local data is that regulatory solutions can be harmfully oversimplified. More reference points at the national level will help jurisdictions avoid developing one-size-fits-all responses based on limited examples from a local sandbox. For example, as the California task force noted, “[w]hile a technology entity comprised of a majority of lawyer owners might be conducive to modest reforms that are similar to the regulation of a registered professional law corporation, that specific regulatory approach should not be considered as a ‘one-size fits all’ paradigm for all possible structures and combinations.”<sup>284</sup> More data and more reference points from a national sandbox would lessen the risk of oversimplification.

Indeed, the biggest benefit of a national sandbox would be the value of the data collected from the nationwide participants and the impact that data can have on regulatory debates and decision-making. Sandboxes allow regulatory decisions to be data-driven,<sup>285</sup> which is essential for responsible

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the data does not support the conclusion the nontraditional legal service should be allowed to continue to operate”).

282. See, e.g., WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 36 (“The [state] Supreme Court can determine whether the nontraditional legal service addresses [access to justice] to such a positive degree that it will allow other nontraditional legal service providers to follow the same order (without going through the [sandbox]).”).

283. See STATE BAR OF CAL., *supra* note 122, at 11 (cautioning that “a culture of evaluation and improvement assumes that changes will be made based on what is learned and this can be very challenging in a regulatory environment”).

284. *Id.* at 14.

285. See WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 9 (explaining that requiring data reporting “will allow the [state] Supreme Court to make data-driven decisions about which nontraditional legal services providers should be allowed to offer in Washington after completion of a successful term” in its sandbox).

regulatory reform<sup>286</sup> and currently a barrier to regulatory innovation efforts at the state level.<sup>287</sup> Data collection is especially critical in achieving credible and effective legal regulatory reform aimed at addressing the justice gap.<sup>288</sup>

Under a national sandbox, long-term local decisions could be made using data about a service's performance at the national level, generated through the regular reports from the participant to the national oversight board. This data would, in turn, be incorporated into the sandbox's recommendation to jurisdictions at the end of the service's term in the sandbox. Such summative data can include measurements of performance against goals;<sup>289</sup> the impact the service is having on the access-to-justice gap;<sup>290</sup> and any information concerning consumer harm, such as "loss of money, poor or incomplete legal service, untimely legal service, failure to exercise a legal right, or failure to meet a legal obligation."<sup>291</sup> After a national sandbox participant has completed a successful term in the sandbox, each jurisdiction would then have substantial helpful data and recommendations to determine whether it would like to allow that entity to continue or begin to provide services in the jurisdiction in the longer term, and under what, if any, conditions. The jurisdiction could also decide whether changes to specific rules and regulations would be warranted.

The logistics of any long-term licensure in response to the recommendation would depend on the regulatory structure of each jurisdiction<sup>292</sup> and would present opportunities for further state-specific regulatory innovation. For example, the Washington State proposal posited that a state supreme court order could establish that "nontraditional legal service providers may continue to operate within the boundaries of that

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286. *See id.* at 42 (advocating for consideration of loosening restrictions on law firm ownership and noting that, "[w]ithout data, we cannot do so responsibly," identifying a sandbox as a solution to both problems).

287. *See, e.g.,* STATE BAR OF CAL., *supra* note 122, at 23 (identifying the fact that there is "[l]ittle or no concrete evidence that this proposal would increase access to justice" as a "con" to a proposal to reform Rule 5.4).

288. *See, e.g.,* OR. STATE BAR FUTURES TASK FORCE, *supra* note 19, at 12 ("The profession in general, and the Bar in particular, would benefit from a substantially stronger focus on the gathering, dissemination, and use of data-based evidence to support and monitor progress toward its mission, values, and initiatives."); *id.* at 12–13 ("As the Bar looks to invest time and resources in various initiatives, including the recommendations of this Task Force, it is important that Bar leadership and the Board of Governors emphasize the importance of using data to give context to—and measure the effectiveness of—those initiatives."); STATE BAR OF CAL., *supra* note 122, at 11 ("Absent a plan and methodology for capturing data and applying measures to evaluate the impact of regulatory changes, there would be no reliable way of knowing whether regulatory changes are having any positive effect on the access to justice crisis.").

289. *See, e.g.,* WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 17.

290. *See, e.g., id.*

291. *See, e.g., id.* at 18.

292. For example, Washington's proposal recommended that its supreme court "create a license class that will authorize successful participants of the [sandbox] to offer legal services to people in Washington, under a specific court order that defines the level of regulation that the legal service must comply with, an annual report to the [sandbox oversight] Board and [state bar association], and that any annual licensure fees . . . be paid to the [state bar association]." WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 16.



[order] . . . and could also include specifics on any disciplinary action that would apply if the service deviated from the order, and any fee or other responsibilities that apply to the nontraditional legal service provider as it continues to operate.”<sup>293</sup> This is similar to Utah, where the state’s sandbox was structured such that the Office of Legal Services Innovation would propose an order to the state supreme court, which would then vote on whether to approve the service going forward.<sup>294</sup>

As with any sandbox, once a new service is licensed or regulatory reform has resulted, resources will be needed to educate legal service providers and consumers on the back end of any new regulatory structures.<sup>295</sup> As compared to changes resulting from local sandboxes, changes resulting from a national sandbox would be more likely to eventually result in widespread best practices that could help each jurisdiction avoid having to reinvent the wheel. Moreover, to the extent that local jurisdictions would still bear some implementation and educational costs, the costs would be less burdensome in light of savings at earlier stages in the regulatory reform process.

The data, recommendations, and eventual regulatory reforms could also be analyzed by third parties for the benefit of regulators and the public. This would be similar to how IAALS is “analyzing data gathered from the [Utah] sandbox in order to understand how the regulatory structure works in practice and whether it is achieving its intended goals” by examining “the risk and harm these entities do or don’t pose to consumers, their effects on the market, and how well they can address the state’s access-to-justice crisis.”<sup>296</sup> IAALS’s ultimate goal is that “the evaluation findings will be used both for continuous improvement to the new regulatory structure in Utah and to inform regulatory reform efforts across the country.”<sup>297</sup> The benefits of such data analysis on the national level would have exponentially greater impact. Although data could theoretically be shared through a network of local sandboxes in the absence of a national sandbox, cross-jurisdiction data sharing would require data to be collected in a consistent format. Some jurisdictions have considered this possibility without the prospect of a national sandbox.<sup>298</sup> However, this would be more practical on the national level with a central oversight entity that could coordinate such consistent formatting.

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293. *Id.* at 18.

294. *See* UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 14 (describing the process and substance of Utah’s sandbox orders).

295. *See* STATE BAR OF CAL., *supra* note 122, at 14 (“Significant resources will be necessary to provide robust education and outreach to help consumers, as well as lawyers, understand the new regulatory structures and the public protection consequences of a consumer using, or a lawyer participating in, one or more of the new legal services providers.”).

296. Cornett & DeMeola, *supra* note 33.

297. *Id.*

298. *See* WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 10 (noting that “most of the data [collected in Washington] will be collected in the same format to potentially facilitate cross-jurisdiction data analysis, and possible future reciprocity with other states such as Utah”).

If national trends in regulatory approaches can emerge from a national sandbox, the consistency could encourage further innovation aimed at improving access to justice. A lack of consistency, or a slower development of discernable trends, could have the opposite effect. This was noted by the California task force when it cautioned that “[a] multiplicity of structures for different new providers that each have their own rules and regulations may result in consumer confusion and stifle consumer adoption of any one of those new market participants.”<sup>299</sup>

With an appreciation for the benefits of a national legal regulatory sandbox, the next part will analyze and respond to several challenges and possible critiques, arguing that those challenges and critiques should not undermine this proposal.

#### V. RESPONSES TO ARGUMENTS AGAINST REFORM AND NATIONAL REGULATION OF LEGAL TECHNOLOGY

Arguments against legal regulatory reform and against national regulation—in the legal services industry or more broadly—do not undermine this particular proposal for increased legal regulatory reform processes at the national level.

##### A. *The Legal Services Industry Has Already Shifted Other Regulatory Mechanisms to National Entities*

One potential argument against shifting these regulatory reform processes to the national level is that legal services are and should continue to be regulated only at the state level. But shifting certain legal regulatory processes to the national level, while still allowing states to retain ultimate regulatory control, is far from unprecedented in the legal services industry.

Indeed, many jurisdictions require that, in order to be licensed to practice law in the jurisdiction, an individual must have earned a Juris Doctor degree from a law school that has been accredited by the ABA.<sup>300</sup> The ABA has promulgated standards and rules against which law schools are evaluated.<sup>301</sup> The ABA organizes experts on legal education and conducts site visits and evaluations for law schools nationwide. Although jurisdictions retain ultimate control over granting licenses within the jurisdiction, they significantly rely on the ABA’s evaluations concerning this important aspect of an applicant’s qualifications. Although it is beyond the scope of this Article to evaluate the effectiveness of the ABA in fulfilling this specific role, the widespread reliance on the ABA’s evaluations demonstrates that jurisdictions do not universally cling to control of every regulatory process.

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299. STATE BAR OF CAL., *supra* note 122, at 14.

300. See *Law School Accreditation*, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_education/accreditation](https://www.americanbar.org/groups/legal_education/accreditation) [https://perma.cc/B53H-4PLF] (last visited Sept. 3, 2023).

301. See AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2022–2023 (Erin Winters, ed., 2022), [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) [https://perma.cc/XT9T-DS9Y].

Another aspect of licensing legal service providers is the character and fitness evaluation of applicants for bar admission. Many jurisdictions have outsourced this function to the NCBE, which conducts investigations and draws conclusions about an applicant that jurisdictions routinely rely on.<sup>302</sup> Even though the bar examination has undergone intense scrutiny in recent years,<sup>303</sup> it is also worth noting that many jurisdictions also rely on the NCBE to design, administer, and score these licensing exams, using them as prerequisites to licensure in their jurisdictions,<sup>304</sup> while retaining the ability to set their own jurisdiction-specific minimum passing scores.

Moreover, very few jurisdictions write original rules of professional conduct that regulate licensed legal professionals in the jurisdiction. Instead, most jurisdictions' rules are based in very large part on the Model Rules of Professional Conduct drafted and recommended by the ABA.<sup>305</sup> The ABA convenes committees of national experts to draft and revise its version of the rules,<sup>306</sup> which jurisdictions routinely rely on while still reserving the ability to stray from the Model Rules when a jurisdiction sees fit.

Considering that many jurisdictions outsource some or all of the regulatory processes described above—even though some of those processes are controversial or contentious—there is good reason to believe that jurisdictions would not flatly reject a national legal services regulatory sandbox simply on the grounds that it would represent an outsourcing of some regulatory processes. Indeed, the national sandbox's flexibility, transparency, and inherent attention to the public interest should not subject it to the same criticisms as, for example, the bar exam. Rather, existing or new national entities would be well suited to take a new or more active role in guiding technology-related rules of professional conduct reform, issuing guidance concerning new legal technologies, and—as this Article proposes

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302. See *Character and Fitness*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/character-and-fitness/> [<https://perma.cc/FL4W-6Z84>] (last visited Sept. 3, 2023) (“On behalf of participating jurisdictions, NCBE conducts character and fitness investigations on applicants seeking a license to practice law.”).

303. See, e.g., Stephanie Francis Ward, *Bar Exam Does Little to Ensure Attorney Competence, Say Lawyers in Diploma Privilege State*, ABA J. (Apr. 21, 2020, 9:08 AM), <https://www.abajournal.com/web/article/bar-exam-does-little-to-ensure-attorney-competence-say-lawyers-in-diploma-privilege-state> [<https://perma.cc/S5KW-8U9W>]; Logan Cornett & Zachariah DeMeola, *The Bar Exam Does More Harm than Good*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Aug. 2, 2021), <https://iaals.du.edu/blog/bar-exam-does-more-harm-good> [<https://perma.cc/2FJE-89BQ>]; Deborah Jones Merritt, Carol Chomsky, Claudia Angelos & Joan Howarth, *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. (July 20, 2021, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies> [<https://perma.cc/29VP-MPQ3>].

304. See *Jurisdiction Information*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/jurisdiction-information/> [<https://perma.cc/29C6-MY9Y>] (last visited Sept. 3, 2023) (providing a list of U.S. jurisdictions and indicating whether each utilizes the Multistate Professional Responsibility Examination, the Multistate Bar Examination, the Multistate Essay Examination, and Multistate Performance Test).

305. See *supra* note 215 and accompanying text.

306. See *About the Model Rules*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/) [<https://perma.cc/T9DX-MCXX>] (last visited Sept. 3, 2023) (explaining the history of the Model Rules and the processes by which the various versions have been drafted and adopted).

as a starting point—overseeing a nationwide legal regulatory sandbox, all with an eye toward closing the access-to-justice gap nationwide. Although official approval of nontraditional services and implementation of reforms would likely continue to be the role of state bars and state supreme courts, in the same way that states currently set their own minimum bar exam scores and tweak rules based largely on the ABA Model Rules, these local entities should not bear the entire burden of the underlying regulatory reform processes that require significant expertise, as well as empirical and economic burdens.

Although a national legal regulatory sandbox, by design, would take time to eventually lead to reforms, it would still be a faster regulatory reform mechanism than leaving the process entirely to individual jurisdictions, through sandboxes or other means. For example, the Washington Courts Practice of Law Board recently noted that the state’s changes to its lawyer advertising rules took over sixty months from proposal to state supreme court approval, but that “[t]esting rule changes in a [sandbox] might be completed in 24–30 months because regulation testing is focused on specific regulations with supporting data collected and analyzed to support or reject any change.”<sup>307</sup> This efficiency underscores why such a reform mechanism is appropriate on the national level.

*B. Other Industries Routinely Leverage the Advantages of Regulating Technology at the National Level*

An additional response to concerns about regulating legal technology nationally is that such a shift would more closely align the legal industry with other industries that are benefitting from the efficiencies and expertise available through national regulation of relevant technologies.

For example, although local jurisdictions license medical doctors,<sup>308</sup> most medical technologies those doctors use are regulated at the national level by experts at the FDA,<sup>309</sup> an agency which routinely regulates through controlled experimentation,<sup>310</sup> including through regulatory sandboxes.<sup>311</sup>

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307. WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 10.

308. *See, e.g., Our Mission*, WASH. MED. COMM’N, <https://wmc.wa.gov/> [<https://perma.cc/8H23-UWP6>] (last visited Sept. 3, 2023) (explaining the state commission’s mission of “promot[ing] patient safety and enhanc[ing] the integrity of the profession through licensing, discipline, rule making, and education”).

309. *See Overview of Device Regulation*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/overview-device-regulation> [<https://perma.cc/8JY2-SABD>] (Sept. 24, 2020).

310. *See Green, supra* note 43, at 1273 (explaining how the FDA’s “licensing of pharmaceutical products for medical purposes requires testing that establishes the product’s safety and efficacy,” and noting that “[m]edical techniques are developed and refined[,] [m]edical knowledge is always developing, and conventional understandings are often discarded based on new studies that follow scientific standards”).

311. *See Catherine M. Sharkey & Kevin M. K. Fodouop, AI and the Regulatory Paradigm Shift at the FDA*, 72 DUKE L.J. ONLINE 86, 107–08 (2022) (describing how the “FDA has developed a flexible and iterative approach to regulating AI-based medical products by experimenting with regulatory ‘sandboxes’ and building partnerships to complement its own internal AI capacity”).

Similarly, although local jurisdictions license automobile drivers, the automobiles that those drivers drive are significantly regulated nationally by experts at the U.S. Department of Transportation (DOT) and the National Highway Traffic Safety Administration (NHTSA).<sup>312</sup>

To be sure, the legal services industry is unique, and it might not always make sense to model its regulation off of the laws, rules, and regulatory practices of other industries. Indeed, mechanisms like a national legal regulatory sandbox would appropriately operate in more of an advisory capacity than do the FDA, DOT, or NHTSA. Even so, this Article has identified many advantages of capitalizing on the knowledge, data, and efficiencies available at the national level concerning emerging legal technologies.

*C. To the Extent That Shifting Regulatory Processes to the National Level Is Disruptive, Such Disruption Should Be Welcomed Here*

To the extent that shifting certain regulatory processes concerning new technology to the national level would disrupt traditional local regulation of legal service providers, it is important to appreciate that technology has long been a driver of disruptive regulatory innovation.<sup>313</sup> As Professor Ryan Calo acknowledged when proposing a new national agency to help regulate robotics and artificial intelligence in 2014, “[w]e have in the past formed formal institutions around specific technologies, for the obvious reason that understanding a technology or set of technologies requires a dedicated staff, and because it can be more efficient to coordinate oversight of a technology centrally.”<sup>314</sup> This centralization of expertise and coordination would be a hallmark of a national legal regulatory sandbox and would free local jurisdictions from burdensome administration while still empowering them with the benefits of the resulting data.

National oversight of legal technology would also benefit from broader regulatory innovation concerning technological developments on the national and international stages,<sup>315</sup> as many challenges concerning new technologies are similar across industries.<sup>316</sup> As Professor Laurel S. Terry,

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312. See *Regulations*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/laws-regulations/fmvss> [<https://perma.cc/Y7TP-XWY3>] (last visited Sept. 3, 2023).

313. See Greely, *supra* note 204, at 270 (“This issue [of regulating technology] in particular can benefit from paying attention to history—and not just recent history. New technologies have been prompting new regulatory schemes for most of the history of the United States.”).

314. CALO, *supra* note 209, at 15.

315. See Alex Engler, *The EU and U.S. Are Starting to Align on AI Regulation*, BROOKINGS (Feb. 1, 2022), <https://www.brookings.edu/blog/techtank/2022/02/01/the-eu-and-u-s-are-starting-to-align-on-ai-regulation/> [<https://perma.cc/5CF4-4MG6>] (noting that the “range of regulatory changes and new hires from the Biden administration signals a more proactive stance by the federal government towards artificial intelligence (AI) regulation, which brings the U.S. closer to that of the European Union (EU),” and stating that “a more unified international approach to AI governance could strengthen common oversight, guide research to shared challenges, and promote the sharing of best practices, code, and data”).

316. See CALO, *supra* note 209, at 11 (advocating for “an agency with the purpose of fostering, learning about, and advising [multiple industries] upon robotics and its impact on society”).

Steve Mark, and Dr. Tahlia Gordon noted even back in 2012, “[b]ecause lawyers around the world are subject to many of the same globalization and technology forces, similar issues now arise in multiple locations around the world,” and, “[a]ccordingly, one can now speak of common ‘trends’ and challenges in lawyer regulation as regulators around the world scramble to respond to similar developments.”<sup>317</sup>

It is beyond the scope of this Article to extensively explore legal regulatory reform from international and comparative perspectives. However, it is worth noting that a U.S. sandbox and other nationally-driven reforms would benefit from the data and experiences related to the substance of reforms in other countries. Researchers from U.S. centers, including the Deborah L. Rhode Center on the Legal Profession at Stanford Law School, have issued several reports in recent years offering helpful comparative perspectives on, for example, the issue of nonlawyer ownership of law practices, which would be especially ripe for experimentation in a national sandbox. A report published by the center in 2020 recounted, for example, how Australia, Canada, England and Wales, Germany, the Netherlands, Scotland, as well as Brussels all “eliminated regulations similar to [Model Rule of Professional Conduct] 5.4 . . . [and] demonstrate[d] that involvement of non-lawyers fuels innovation without compromising legal services.”<sup>318</sup>

Since the access-to-justice gap is an international crisis<sup>319</sup> and technological transformation is a worldwide phenomenon, collaboration should increasingly be focused across industries and across nations, rather than merely across states. A national legal regulatory sandbox would be best positioned to ensure that the U.S. legal services industry is appropriately involved in these important dialogues and developments.

#### *D. States Would Still Retain Complete Autonomy and Final Decision-making Authority*

In the same way that a jurisdiction does not have to utilize the NCBE’s bar exams or adopt the ABA’s Model Rules of Professional Conduct, it is important to note that nothing in this Article’s proposal would prevent states from continuing, or exploring new, local regulatory reforms—or from insisting on none at all. For example, jurisdictions that already have or are contemplating legal regulatory sandboxes would continue to be free to operate or explore implementing them. If, at any point, they determine that some aspects of their sandboxes are unnecessarily duplicative of processes in the national sandbox, or otherwise determine that cooperation with the national sandbox would better serve their needs, the local sandboxes could

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317. Laurel S. Terry, Steve Mark & Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 *FORDHAM L. REV.* 2661, 2663 (2012).

318. SOLOMON ET AL., *supra* note 146, at 8.

319. See Schmitz, *supra* note 43, at 2396 (discussing how “[w]e have a justice crisis in the United States and the world”); Standing Order No. 15, *supra* note 155, at 1 (referring to “[t]he access-to-justice crisis across the globe”).

be slimmed down or discontinued in favor of partnering with the national sandbox.

On the other end of the spectrum, jurisdictions that are skeptical of regulatory reform or regulatory sandboxes would be free to wait and see how the national sandbox progresses. Although it would obviously be problematic for data generation if too many jurisdictions sit on the sidelines at first, this Article has identified reasons to believe that licensed legal professionals, consumers, and access-to-justice advocates would be able to persuade enough jurisdictions to opt in to the sandbox by following at least some of the recommendations coming out of it, without any long-term commitment.<sup>320</sup> As hesitant jurisdictions continue to see national sandbox successes similar to those seen in the early years of the Utah sandbox, they may become more likely to consider allowing temporary services under the national sandbox during the testing phase.<sup>321</sup> It is also important to underscore that reliance on the national sandbox would not be an all-or-nothing prospect; jurisdictions could follow some recommendations from the national sandbox and decline to follow others.<sup>322</sup>

Shifting regulatory reform processes to the national level would simply give all jurisdictions the option to leverage the expertise, empirical benefits, and economic advantages available at the national level. Indeed, national regulation will—and would continue to—benefit from the experiences of early innovators like Utah, while helping it and other jurisdictions maximize opportunities and minimize risks accordingly.

#### CONCLUSION

Legal technology has the potential to positively transform the legal services landscape and improve access to justice. However, under the status quo of states' resistance to regulatory reform, legal technology risks consolidating power, automating bias, and magnifying inequality under a two-tiered system of legal services. Despite persistent calls for regulatory reform to account for these opportunities and challenges, very little reform has occurred to date, and efforts to explore regulatory reform mechanisms

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320. See Cornett & DeMeola, *supra* note 33 (arguing that “it’s undeniable that the [Utah] sandbox is providing thousands of consumers with a variety of legal services, creating new jobs for lawyers and other types of professionals, and equipping courts, policymakers, and other justice system stakeholders with incredibly valuable data,” which is useful not only for Utah, “but also . . . other states who are looking to reimagine the way legal services are delivered”).

321. *Id.* (“As more states look to re-regulation as a means to increase access to legal services, the data from Utah’s sandbox—and the real people’s lives it is impacting—should be a strong push in that direction.”).

322. Indeed, even in existing and proposed sandboxes, state supreme courts need not follow all recommendations from their local sandbox oversight body. See UTAH OFF. OF LEGAL SERVS. INNOVATION, *supra* note 211, at 14 (noting that the Utah Supreme Court “retains complete discretion to review and assess any recommended entity”); WASH. CTS. PRAC. OF L. BD., *supra* note 31, at 36 (proposing that “[t]he [state] Supreme Court will have the discretion to approve or not approve” a recommended order concerning a service, “particularly if the Supreme Court feels the data does not support the conclusion the nontraditional legal service should be allowed to continue to operate”).

have stalled or been shut down. It is time for the legal services industry to join the ranks of other industries that have made important strides in responding to technological advancement with regulatory reforms aimed at maximizing opportunities and minimizing risks. The early short-term success of Utah's legal regulatory sandbox and the reform mechanisms envisioned in similar proposals made by several other jurisdictions provide a helpful framework for regulatory reform processes that could be shifted to the national level. Such change in process would leverage the expertise, empirical benefits, and economic advantages available at the national level, which have been realized in other aspects of legal services regulation, as well as by other industries that regulate some aspects of technology. This Article aims to initiate a national discussion of the benefits of shifting regulatory processes concerning legal technology and access-to-justice innovations to the national level. With national buy-in, regulatory reform will be better informed, more scalable, and better positioned to help shape a legal services landscape in which legal technology can fulfill its potential to help benefit stakeholders across the legal services landscape and finally make inroads in helping to close the access-to-justice gap.