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In 1975, one of us (Rhode) was a Yale law student working at a New Haven legal aid clinic. Like most legal aid offices, both then and now, the office was under-funded and over-burdened. Because of a flood of needy clients, the lawyers in these offices had no choice but to try to triage, choosing cases of greatest need or greatest impact. Divorce is, and has long been, a particularly acute area of need. The current demand for legal aid divorce services is so great that many offices will only handle divorces where physical abuse is alleged.[1]

Self-help is one obvious solution for clients that have gone unserved because of resource constraints. In 1975, the over-worked lawyers of New Haven's legal aid clinic responded by developing a do-it-yourself divorce kit to assist the vast numbers of poor people left without representation. The local bar responded by threatening to sue the clinic for unauthorized practice of law ("UPL"). Precedent at the time suggested that the suit might be successful, and the staff attorneys decided not to distribute the kit.[2] I was appalled. The bar's self-interest was obvious, as was the public's need for self-help assistance.

Why would the local bar care if a legal aid office helped poor people seek divorces on their own? Because divorce is a bread and butter service for "main street" lawyers (small firm and solo practitioners). Even if many of these folks could not afford a lawyer anyways, some of them might be able to scrape together the fees. Further, even if most legal aid clients could not pay for a lawyer, if do-it-yourself divorce kits help people efficiently

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1 *See* Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 971 n.148 (2004).

2 For a discussion of the law at the time, see Ralph C. Cavanagh & Deborah L. Rhode, *Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 111–13 (1976).

and effectively, they would eventually enter the market for middle-class customers.

The bar's concern continues. For example, when the Texas Access to Justice Commission tried to move forward with uniform forms for uncontested divorces, it encountered significant opposition from the Family Law Section of the Texas Bar.[3] Naturally, the Section did not acknowledge that its members were worried about losing business. Instead, it argued that the forms were misleading and dangerous, and even questioned whether there was an actual need for such assistance. It was not the bar's finest hour, as was apparent in national media coverage in *The Wall Street Journal* and *Bloomberg News*.[4] Eventually, the Texas Supreme Court stepped in and promulgated the forms over the bar's objections. But the Family Law Section's brazenness in the twenty-first century shows that professional interests still sometimes trump the public interest.

The bar has long claimed that prohibitions on the UPL through kits and services are necessary to protect the public. Evidence for that claim has been notable for its absence. My reaction to the 1975 experience was to spend the next two years of law school working on a law review empirical study that explored the rationale for allowing and increasing *pro se* legal services.[5] This study found almost no support for the consumer protection rationale, but ample evidence of protectionism.

Over the last several decades, I have returned to the subject with depressing regularity. Although the unauthorized practice doctrine has evolved in progressive directions since the 1970s and *pro se* assistance is now widely available, the bar has continued to attempt to halt this trend. In 2015, I conducted a study with Lucy Ricca on enforcement activities by unauthorized practice committees. Like its predecessor, the study found that

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3 *See* Anna Whitney, *Some Family Lawyers Oppose Creating Divorce Forms*, TEX. TRIBUNE (Jan. 24, 2012), https://www.texastribune.org/2012/01/24/texas-state-bar-asks-supreme-court-stop-forms-task/ [http://perma.cc/87WW-XBBL]. For a description of the controversy, see TEX. SUPREME COURT, ORDER APPROVING UNIFORM FORMS – DIVORCE SET ONE, http://www.dallascounty.org/distclerk/media/SupOrder.PDF [http://perma.cc/Q8Z6-42UZ].

4 Nathan Koppel, *Divorce-By-Form Riles Texas Bar*, WALL ST. J. (Feb. 24, 2012), http://online.wsj.com/news/articles/SB10001424052970204778604577239480550755826?mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052970204778604577239480550755826.html&cb=logged0.13556139869615436; *For an Easy, Affordable, Lawyer-Free Divorce, Check 'Yes,'* BLOOMBERG NEWS (Mar. 4, 2012, 7:00 AM), https://www.bloomberg.com/view/articles/2012-03-05/for-an-easy-affordable-lawyer-free-divorce-check-yes-view [http://perma.cc/S62C-EB5F].

5 Cavanagh & Rhode, *supra* note 2, at 105–07.

most of the current UPL activities seemed more responsive to professional than public interests.[6]

Despite forty years of UPL research and critique, the bar has continued to offer vague and expansive definitions of the practice of law[7] and to enforce them regardless of consumer harm.[8] However, the Supreme Court's recent ruling in *North Carolina Board of Dental Examiners v. Federal Trade Commission* suggests that these anticompetitive practices may face new hurdles. [9] If so, society as a whole will benefit.

The discussion that follows proceeds in four parts. Part I begins by surveying the background of federal antitrust doctrine. Part II turns to the scope and rationale of the *Dental Examiner's* ruling. Part III offers some thoughts on the implications of the decision for bar regulatory activities, including a recent example involving the North Carolina bar's UPL action against LegalZoom. Part IV offers some suggestions about how the bar should proceed going forward.

I.

In 1890, under its power to regulate interstate commerce, Congress enacted the Sherman Act. Its objective was to impose some constraints on anticompetitive activity.[10] The statute did not by its terms encompass practices that were the result of governmental activity. A half-century later, in *Parker v. Brown*, the Supreme Court recognized state action immunity from antitrust liability where states act in their sovereign capacities.[11] At issue in the case was California's agricultural price support and marketing program for raisins. In the Court's view, federalism would be compromised if the Sherman Act were to ban every instance in which state policies had anticompetitive effects: "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[12]

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6 *See* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking the Professional Monopoly*, 82 FORDHAM L. REV. 2587, 2595 (2014).

7 *Id.* at 2605.

8 *Id.* at 2598.

9 *See* N.C. Board of Dental Exam'rs v. Fed. Trade Comm'n, 135 S. Ct. 1101, 1117 (2015).

10 *See* 15 U.S.C.A § 1 (West 2016). *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW (4th ed. 2011).

11 *See* Parker v. Brown, 317 U.S. 341, 351–54 (1942).

12 *Id.* at 351; *see also* Ronald E. Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine under the Antitrust Laws*, 74 NW. U. L. REV. 31, 74

Parker stated a relatively broad exception to antitrust protections, and over the years the Court has gradually clarified and narrowed its test for state action immunity.[13] In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, the Court made clear that a private actor who invokes the state action exemption must show that that the anticompetitive restraint is "clearly articulated and affirmatively expressed as state policy" and is "actively supervised by the State."[14] This two-pronged test is meant to distinguish private price-fixing arrangements hiding under "a gauzy cloak of state involvement" from programs that are truly state-created and carefully state-managed.[15]

For almost a century, the legal profession remained free from federal antitrust liability. Then, in 1975, in a case involving state bar minimum fee schedules, the Supreme Court rejected the claim that the Sherman Act was "never intended to include the learned professions."[16] The case, *Goldfarb v. Virginia State Bar*, involved home purchasers who could not find an attorney to assist with their title search at a fee lower than the minimum established by the Fairfax County Bar Association.[17] Although the Association did not enforce the fee schedule, the Virginia State Bar, an administrative agent of the Virginia Supreme Court, condoned it. Indeed, one bar opinion indicated that an attorney who habitually charged less than the suggested minimum fee would be presumptively guilty of misconduct.[18] According to the Supreme Court, such activities by the state and local bar should be subject to the Sherman Act.[19] Writing for a unanimous Court, Chief Justice Burger reasoned that "[i]n the modern world it cannot be denied that . . . anticompetitive activities by lawyers may exert a restraint on commerce."[20] In rejecting the bar's claim of state action immunity, the Court reasoned that the fee schedule was not an implementation of a clearly articulated state policy requiring such anticompetitive

(1979) ("State sovereignty is not injured when the federal government validly acts in the sphere to which it is delimited.").

13 *See* C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1129 (2000).

14 Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

15 *See* Merrick Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 501 (1987).

16 Goldfarb v. Va. State Bar, 421 U.S. 773, 786 (1975).

17 *Id.* at 775–76.

18 *Id.* at 777–78.

19 *Id.* at 791–92.

20 *Id.* at 788.

action.[21] Nor was the state particularly involved in overseeing or implementing the schedules.[22] Accordingly, it failed both prongs of the modified *Parker* test.[23] On remand to the lower court, the Virginia State Bar and Fairfax County Bar Association settled the case for $200,000.[24]

However, a decade later in *Hoover v. Ronwin*, a divided Supreme Court gave greater latitude to the bar's anticompetitive practices. Edward Ronwin failed the Arizona bar examination and brought suit against the Arizona Supreme Court's Committee on Examinations and Admissions under the Sherman Act.[25] He claimed that the Committee had "artificially reduc[ed] the numbers of competing attorneys in the State of Arizona" by setting passing scores with reference to the number of new attorneys that the Committee thought appropriate rather than "with reference to . . . some 'suitable' level of competence."[26] The Committee on Examinations and Admissions was made up of seven members of the State Bar selected by the Arizona Supreme Court from a list supplied by the Arizona State Bar Association's Board of Governors.[27] Thus, the decision-making structure was somewhat similar to the structure found to be non-state action in *Goldfarb*—both relevant state supreme courts delegated substantial authority to an arm of the bar association.

In fact, the Ninth Circuit had held exactly this in denying state action protection in its decision in *Ronwin*.[28] However, a divided Supreme Court disagreed and found that the bar admission system did not violate the Sherman Act.[29] In the majority's view, Ronwin's failure to gain admission was an act of the state supreme court rather than a state agency or the bar.[30] *Parker v. Brown* controlled, and the challenged action was "exempt from antitrust liability regardless of the State's motives in taking the action."[31]

Three justices dissented. They recognized that "[w]hen [state] authority is delegated to those with a stake in the competitive conditions within the market, there is a real risk

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21 *Id.* at 791.
22 *Id.* at 709.
23 *Id.* at 790.
24 CHARLES WOLFRAM, MODERN LEGAL ETHICS, 40 n.29 (1986).
25 Hoover v. Ronwin, 466 U.S. 558, 564 (1984).
26 *Id.* at 565.
27 *Id.* at 586 (Stevens, J., dissenting).
28 Ronwin v. State Bar of Ariz., 686 F.2d 692, 696–97 (9th Cir. 1981), *as amended on reh'g*.
29 *Hoover v. Ronwin*, 466 U.S. at 573.
30 *Id.* at 588 (Stevens, J., dissenting).
31 *Id.* at 580.

that public power will be exercised for private benefit."[32] In fact, the dissent noted that these private parties have "used licensing to advance their own interests in restraining competition at the expense of the public interest."[33]

Ronwin led to a series of lower court opinions upholding ABA or state bar regulations via state action immunity. For example, in *Lawline v. American Bar Association*, Lawline sued the ABA, the Illinois Supreme Court, and various other bar regulatory authorities under antitrust law. The suit claimed that Model Rule 5.4 (which bars lawyers from joining in partnerships with non-lawyers) and Rule 5.5 (which prohibits lawyers from assisting in the UPL) violated the Sherman Act.[34]

Lawline described itself as a free legal advice service attempting to bridge the access to justice gap:

> Lawline [was founded] in 1978 to use law students, paralegals and lawyers to answer legal questions from the public without charge over the telephone and to assist them in representing themselves in routine legal matters. Lawline's other stated purposes are to refer members of the public without financial resources to agencies providing legal services and to refer them to young lawyers who charge reduced fees, thus creating a "prototype legal delivery system" subsidized by referral fees. In its ten years of existence, Lawline is said to have answered legal questions for more than 500,000 people, particularly in Illinois, Indiana and Wisconsin, and also nationally through a toll-free telephone number.[35]

The lawsuit arose after Thomas Holstein, the lawyer who founded Lawline, tangled with an Illinois bankruptcy court, as well as the Illinois Supreme Court's Attorney Registration and Disciplinary Commission, over UPL and other regulatory issues. Lawline and Holstein then brought suit against a host of bar regulators alleging that the Supreme Court of Illinois had adopted UPL rules and other restrictions based on ABA drafts, and that the provisions violated the Sherman Act. The plaintiff lost on a motion to dismiss at the trial court and the Seventh Circuit affirmed. The Seventh Circuit held that any harm to the plaintiff was a result of the actions of the Illinois Supreme Court, not the ABA, and that the state action doctrine applied.[36]

Another challenge to ABA actions failed in *Massachusetts School of Law v. American Bar Association*. There, the ABA had

32 *Id.* at 585.
33 *Id.* at 584.
34 Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1381 (7th Cir. 1992).
35 *Id.* at 1381–82.
36 *Id.* at 1384–85.

denied a new Massachusetts law school accreditation.[37] The school sued under the Sherman Act, alleging ten restraints of trade:

> (1) [F]ixing the price of faculty salaries; (2) requiring reduced teaching hours and non-teaching duties; (3) requiring paid sabbaticals; (4) forcing the hiring of more professors in order to lower student/faculty ratios; (5) limiting the use of adjunct professors; (6) prohibiting the use of required or for-credit bar review courses; (7) forcing schools to limit the number of hours students could work; (8) prohibiting ABA-accredited schools from accepting credit transfers from unaccredited schools and from enrolling graduates of unaccredited schools in graduate programs; (9) requiring more expensive and elaborate physical and library facilities; and (10) requiring schools to use the LSAT.[38]

The Third Circuit cited both *Hoover* and *Lawline* and found state action because it was the Massachusetts Supreme Court, not the ABA, which had decided to only allow graduates of accredited schools to sit for the bar.[39]

Following the *Massachusetts School of Law* case, the Department of Justice ("DOJ") filed suit against the ABA for its law school accreditation practices, alleging some of the same grounds as the Massachusetts School of Law.[40] The ABA and the DOJ eventually settled the case under a consent decree.[41] The decree limited the ABA's ability to set minimum salaries for law professors, but left most other accreditation practices alone. In Spring 2006, the DOJ asked the court to hold the ABA in civil contempt over multiple violations of the consent decree. The ABA acknowledged the violations and reimbursed the United States $185,000 in fees and costs.[42]

II.

Taken together, these cases reflect the federal courts' ability, but reluctance, to use antitrust law to set limits on lawyer regulation. In 2002, in an effort to push the doctrine in a more progressive direction, the Federal Trade Commission ("FTC")

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37 Mass. School of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1031 (3rd Cir. 1997).

38 *Id.* at 1031–32.

39 *Id.* at 1035–36; *see also* Staver v. Am. Bar Ass'n, 169 F. Supp. 2d 1372, 1380 n.7 (M.D. Fla. 2001) (denying an injunction against the ABA for failing to accredit Barry Law School).

40 United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996).

41 *Id.*

42 *See* Press Release, U.S. Dep't of Justice, Justice Department Asks Court to Hold American Bar Association in Civil Contempt (June 23, 2006), https://www.justice.gov/archive/atr/public/press_releases/2006/216804.htm [http://perma.cc/223T-HLFK]. The decree expired in 2007. Thomas O. Barnett, *Interoperability Between Antitrust and Intellectual Property*, 14 GEO. MASON L. REV. 859, 869 (2007).

convened a State Action Task Force. The Task Force's objective was to "identify opportunities to direct the development of case law in a manner that promotes competition and enhances consumer welfare."[43] Among the Task Force's recommendations was that any quasi-governmental entity should be subject to antitrust law if it was composed in whole or in part of market participants or if there was an "appreciable risk that the anticompetitive conduct at issue [was] the result of a deviation from state policy."[44] At the same time, the FTC also began a focused litigation effort to restrain anticompetitive conduct. Among its targets was the North Carolina Board of Dental Examiners.

Under the governing North Carolina statute, the North Carolina Board of Dental Examiners is an "agency of the State" engaged in the "regulation of the practice of dentistry."[45] The Board has eight members: six practicing dentists, one dental hygienist, and one consumer representative appointed by the governor.[46] The Board can promulgate rules and regulations, subject to approval by the North Carolina Rules Review Commission, and can bring lawsuits to enjoin the unauthorized practice of dentistry ("UPD").[47]

In response to complaints from dentists concerning teeth whitening services offered by non-dentists, the Board launched an investigation. Like UPL, most of the UPD complaints on teeth whitening "expressed a principal concern with the low prices charged by non-dentists" as opposed to "possible harm to consumers."[48] Although there were "[f]ew complaints" of public injury, the Board issued at least 47 cease and desist letters to non-dentists who were offering teeth whitening services.[49] In addition, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists not to offer such services and requested mall operators to consider expelling

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43 Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy* (Dec. 10, 2002), https://www.ftc.gov/public-statements/2002/12/looking-forward-federal-trade-commission-and-future-development-us [http://perma.cc/SK5R-G6MS].

44 FEDERAL TRADE COMMISSION, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 3 (Sept. 2003), https://www.ftc.gov/sites/default/files/documents/reports/report-state-action-task-force-recommendations-clarify-and-reaffirm-original-purposes-state-action/stateactionreport_0.pdf (last visited Aug. 19, 2016).

45 N.C. GEN. STATE. ANN. § 90-22 (2013).

46 *Id.*

47 *Id.* at §§ 90-48, 90-40.1.

48 N.C. Board of Dental Exam'rs v. Fed. Trade Comm'n, 135 S. Ct. 1101, 1108 (2015).

49 *Id.*

them.[50] When these enforcement efforts proved successful, the FTC filed a complaint. The Board invoked state action immunity, and a divided Supreme Court rejected that defense.

The *North Carolina Board* majority first found that state agencies or boards are "nonsovereign" actors and thus not automatically entitled to state action immunity.[51] When "a controlling number of decisionmakers" on a board are "active market participants in the occupation the board regulates," the board will not enjoy antitrust immunity unless both *Midcal* requirements are satisfied: clear articulation of state policy and active supervision.[52] According to the Court, the need for supervision turns not on the "formal designation given by States to regulators but on the risk that active participants will pursue private interests in restraining trade."[53] The majority listed four minimum criteria for state oversight to qualify as active supervision:

> [1] [T]he supervisor must review the substance of the challenged conduct, not merely the procedures followed to produce it; [2] the supervisor must have the power to modify or veto particular decisions to ensure they accord with state policy; [3] there must be more than the "mere potential" of state supervision; and [4] the state supervisor may not itself be an active market participant.[54]

Because the North Carolina Board had not received "active supervision" of its efforts to preempt non-dentist provision of teeth whitening services, state-action immunity was not available.[55]

Justice Alito, joined by Justices Scalia and Thomas, dissented. Rejecting the majority's view of the Board as a non-sovereign entity, the dissent accepted the "agency label" that North Carolina had conferred on the Board by statute.[56] In the dissent's view, the majority's approach created numerous "practical problems."[57] First, the decision could encourage states to select nonprofessionals to serve on regulatory boards. This would "compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise."[58]

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50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.* at 1114.
54 *Id.* at 1116–17 (internal citations omitted).
55 *Id.* at 1117.
56 *Id.* at 1122 (Alito, J., dissenting).
57 *Id.*
58 *Id.*

The dissent also worried about ambiguities in interpreting terms, such as "active market participant."[59]

North Carolina Board is one of those ever-rarer cases where the voting coalitions seem reversed from a political standpoint. The FTC investigation of the North Carolina Board started in the administration of George W. Bush.[60] The conservative-leaning Cato Institute filed an amicus brief supporting the FTC and opposing state immunity.[61] The Goldwater Institute, the American Enterprise Institute, and libertarian groups have all lined up against occupational licensing.[62] And yet we find the three most reliably conservative Justices dissenting, and the liberal wing, joined by Kennedy and Roberts, dealing a significant blow to many American occupational licensing regimes.

III.

What impact *North Carolina Board* will have on state bar regulation is not yet clear, and the answer will doubtless vary by state. At issue is governance occurring in three major contexts: admission, discipline, and the UPL. State supreme courts control lawyer regulation to a lesser or greater extent in all fifty states.[63] These courts typically have demanding caseloads, so they delegate their bar governance authority to other entities. Exactly which entities differs across jurisdictions. In some states, the supreme court has given all three responsibilities to one entity, often a state bar association.[64] In other states, these regulatory duties are handled by different entities.[65] Antitrust suits have been brought in all three contexts,

59 *Id.* at 1123 (Alito, J., dissenting).

60 *See* Muris, *supra* note 43.

61 Brief for Pacific Legal Foundation and Cato Institute as Amici Curiae Supporting Respondent, N.C. State Board of Exam'rs v. Fed. Trade Comm'n, No. 13-534, 2014 WL 3895927, 135 S. Ct. 1101 (2015).

62 *See* James Pethokoukis, *The Terrible Economic Burden of Occupational Licensing*, AEI IDEAS (Apr. 21, 2014, 1:45 PM), https://www.aei.org/publication/the-terrible-economic-burden-of-occupational-licensing/ [http://perma.cc/C53V-US5F]; *see also* Stephen Slivinski, *Bootstraps Tangled in Red Tape*, GOLDWATER INST. (Feb. 23, 2015), http://goldwaterinstitute.org/en/work/topics/free-enterprise/entrepreneurship/bootstraps-tangled-in-red-tape/#.Vbf7ULO51vw.facebook [http://perma.cc/BJB2-KF7V]; *see also* David S. D'Amato, *Occupational Licensing is a Scam*, LIBERTARIANISM.ORG (Sept. 9, 2015), http://www.libertarianism.org/columns/occupational-licensing-is-scam [http://perma.cc/8XPW-5FV3].

63 BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 105 (2011).

64 *Id.*

65 Robert A. Burgoyne & Mark Emery, *State Action Antitrust Immunity in the Wake of* North Carolina State Board of Dental Examiners v. Federal Trade Commissioner*: What Does it Mean for State Bars and Bar Examiners?*, THE BAR EXAM'R 19 (June 2015).

and their success will depend on the composition of those governance bodies and the extent of supervision by the state.[66]

To preempt litigation, some jurisdictions have already modified governance practices. For example, the Washington bar has temporarily suspended its ethics committee's authority to issue advisory opinions that could be viewed as having anticompetitive effects.[67] The Pennsylvania bar also has temporarily stopped issuing cease and desist letters and has been referring UPL complaints to the attorney general.[68]

Another example of bar regulators proceeding more cautiously in light of *North Carolina Board* comes from North Carolina itself: the settlement of LegalZoom's UPL battle with the state bar. The dispute began in 2003, when the North Carolina bar sent a letter to LegalZoom announcing a UPL investigation.[69] LegalZoom responded with a letter explaining why the company was in compliance with existing state standards. At this point, the North Carolina bar agreed and dismissed the complaint.[70]

The bar reopened its investigation in 2007, and LegalZoom again argued that it was not engaged in unauthorized practice of law.[71] This time the bar decided otherwise and sent a cease and desist order in 2008. LegalZoom again objected and, most notably, continued to operate in North Carolina without any significant changes to its practices.[72] For observers familiar with the Internet entrepreneur's playbook, this strategy should not be surprising. From Uber to Airbnb, multiple Internet startups have plowed into legal gray areas, assuming they will be able to grow fast enough that eventually regulatory resistance will become futile.[73]

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66 *Id.* at 24.

67 Samson Habte, *Washington Bar Suspends Ethics Opinions, Cites Antitrust Fears*, ABA/BNA LAW. MANUAL ON PROF. CONDUCT (Dec. 17, 2015), http://www.bna.com/washington-bar-suspends-n57982065288/ [http://perma.cc/8JZD-YV8C].

68 Kelso L. Anderson, *Beware of Boards: Professional Boards Barred From Anticompetitive Conduct*, LITIG. NEWS (Summer 2015), https://static1.squarespace.com/static/577fd873d2b857d5d6ae8164/t/57800a9959cc687a7d59cb71/1468009130123/Beware+of+Boards+from+Litigation+News+Summer+2015.pdf [http://perma.cc/ZUW7-JKRR].

69 All of the early, pertinent documents were attached to LegalZoom's initial 2011 complaint. Complaint, LegalZoom.com v. The N.C. State Bar, No. 11-CVS-15111 (Wake Cnty. Ct. Sept. 30, 2011) http://online.wsj.com/public/resources/documents/ LegalZoom.pdf [hereinafter LegalZoom Complaint] [http://perma.cc/FTN9-BZQQ].

70 *Id.*

71 *Id.*

72 *Id.*

73 Jordan M. Barry & Elizabeth Pollman, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. (forthcoming 2017), http://digital.sandiego.edu/cgi/viewcontent.cgi?article=1008&context=law_fac_works [http://perma.cc/K56B-TEZ8].

The North Carolina UPL stalemate continued until 2010 when LegalZoom added a "subscription model" of legal advice along with its interactive forms.[74] Because the subscription model involved pre-payment for legal services, LegalZoom applied to the North Carolina Bar for approval as a Prepaid Legal Plan, as required under North Carolina law. In light of LegalZoom's continuing presence in North Carolina after a cease and desist letter, the North Carolina Bar considered this new application rather cheeky and denied it based upon the ongoing UPL issues.[75]

After a few more letters and a clear rejection of LegalZoom's prepaid legal services plan, LegalZoom took the unusual step of transforming from prey into predator. In 2011 it sued the North Carolina Bar under state constitutional law, the Equal Protection Clause, and several common law counts.[76]

This was a gutsy move on LegalZoom's part, and obviously not a good idea. The company had never sued a state bar, although it had been a defendant and settled several of these cases out of court. In Washington State, LegalZoom paid $20,000 in costs to the bar regulators;[77] in Missouri, it paid attorney's fees and changed some parts of its site for the state's customers.[78] The Missouri case was a particularly close call. The District Court there rejected LegalZoom's summary judgment motion on unauthorized practice of law and concluded that LegalZoom's interactive forms were very similar to the provision of legal services by a lawyer, and thus were likely unlawful.[79] Although the company had passively resisted the North Carolina Bar in the past, there is a substantial difference between ignoring cease and desist letters and taking the fight to the courts. If LegalZoom had lost in North Carolina, it would have been a stinging defeat and might have provided a damaging precedent in other states.

Instead, the gamble paid off. As LegalZoom's 2011 case ground on, the Supreme Court decided *North Carolina Board of*

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74 LegalZoom Complaint, *supra* note 69.

75 *Id.*

76 *Id.*

77 Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 5, 2011, 6:00 AM), http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html [http://perma.cc/32ZM-BTCT].

78 Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, WALL ST. J. (Aug. 23, 2011, 11:47 AM) http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit/.

79 Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1054, 1065 (W.D. Mo. 2011). For an analysis and some key quotes from the case, see Venkat Balasubramani, *Missouri Federal Court Says LegalZoom Could Be Engaged in the Unauthorized Practice of Law – Janson v. LegalZoom*, TECH. & MKTG. L. BLOG (Aug. 15, 2011), http://blog.ericgoldman.org/archives/2011/08/missouri_federa_1.htm [http://perma.cc/FQ7U-82LQ].

Dental Examiners. LegalZoom quickly filed a *second* lawsuit against the state bar, this time seeking $10.5 million in damages and squarely alleging federal antitrust violations based on *North Carolina Board*.[80] This upped the ante and the state bar suddenly had to decide whether it was willing risk everything in its battle with LegalZoom. If LegalZoom prevailed on its antitrust suit, the bar might lose some or all of its regulatory power. An aggressive application of *North Carolina Board* to lawyers might require removing the bar's regulatory power altogether or demanding that the power be shared with non-lawyers.

Within months, the bar settled both of LegalZoom's suits. The terms were very favorable to the company.[81] LegalZoom agreed to have a licensed North Carolina attorney review its online forms and inform potential customers that its forms are not a substitute for advice from an attorney.[82] LegalZoom argued that it was already doing that anyway.[83] In return, the bar dropped its UPL fight, and even supported a change in North Carolina law to make LegalZoom and other form providers more clearly legal.[84] Although this settlement was not explicitly linked to *North Carolina Board*, its timing speaks volumes about the impact that the case could have on bar governance. At a minimum, it suggests that regulators will tread more carefully when prosecuting or defining UPL.

North Carolina Board also raises the possibility that the bar will rethink the role that competitive concerns play in the accreditation of law schools. As a consequence, the ABA may find itself between a rock and a hard place because it is also facing criticisms by the Department of Education for being too lax in accreditation.[85]

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80 Jacob Gershman, *LegalZoom Sues North Carolina Bar*, WALL ST. J. (June 7, 2015, 7:43 PM), http://www.wsj.com/articles/legalzoom-sues-carolina-state-bar-news-digest-1433720614.

81 *See* Daniel Fisher, *LegalZoom Settles Fight with North Carolina Bar over Online Law*, FORBES (Oct. 22, 2015, 2:16 PM), http://www.forbes.com/sites/danielfisher/2015/10/22/legalzoom-settles-fight-with-north-carolina-bar-over-onlinelaw/#3caa56a0693e [http://perma.cc/FPN8-8A7B]; Terry Carter, *LegalZoom resolves $10.5m antitrust suit against North Carolina State Bar*, A.B.A. J. (Oct. 23, 2015, 3:15 PM), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar [http://perma.cc/4QDE-8WKG].

82 Carter, *supra* note 81.

83 Fisher, *supra* note 81.

84 *Id.*

85 *See, e.g.*, Stephanie Francis Ward, *ABA threatened with 1-Year suspension of law school accreditation powers*, ABA J. (June 24, 2016, 2:00 PM), http://www.abajournal.com/news/article/aba_threatened_with_1-year_suspension_of_law_school_accreditation_powers [http://perma.cc/KT38-ZNCM].

IV.

After a relatively long period of antitrust immunity, the American bar suddenly finds itself facing a new regulatory regime. We have several suggestions for navigation.

First, bar entities should ensure that they are acting in accordance with a clearly articulated state policy that serves the public interest. These entities should follow formal rules adopted by a disinterested body after notice and comment. Bar practices should also be subject to active supervision, preferably by an individual or a body other than the state supreme court.[86] As both of us have noted, judges share the background and worldview of those they claim to regulate.[87] After serving their judicial term, many state supreme court justices return to active law practice.[88] Further, most state judges are elected and depend on lawyers for endorsements, rankings, and campaign contributions.[89] Even in states where judges are selected through merit processes, state and local bars exercise substantial influence.[90] The judiciary is also dependent on support from the organized bar concerning salaries and budgets, and is readily accessible to informal lawyer lobbying at conferences, annual meetings, and social gatherings.[91] By contrast, consumer interests rarely have such opportunities for influence. To minimize the risk that bar regulators will be captured by those they regulate, states should not rely on the judiciary for active supervision.[92]

For example, antirust experts have proposed that:

> States can appoint a single employee of the state government with relevant expertise in a board's subject area to supervise its activities, and/or house boards within the relevant state agency and require the director's approval to adopt rules and regulations, as is done in Rhode

86 *See* Ken Friedman, *Could Dental–Board Decision Unlock Lawyer Control of State Bar Regulations?*, FORBES (Mar. 4, 2015, 7:04 AM), http://www.forbes.com/sites/danielfisher/2-15/03/04/dental-board-decision-could-unlock-lawyer-control/print/ [http://perma.cc/7BH5-QYTS].

87 DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 89 (2015); Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 458 (2008); *see also* BARTON, *supra* note 63, at 132–40.

88 Burgoyne & Emery, *supra* note 65, at 22; Friedman, *supra* note 86.

89 Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167, 1185, 1198–1200 (2003); BARTON, *supra* note 87; BARTON, *supra* note 63.

90 Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 656 (2002); Barton, *supra* note 89, at 1199–1200.

91 BARTON, *supra* note 63, at 133; Barton, *supra* note 87, at 458; Barton, *supra* note 89, at 1200.

92 Friedman, *supra* note 86.

> Island . . . . Or states may place their board inside a state agency that oversees the actions of all professional boards in the state, as is done to different degrees by California and Utah.[93]

Some regulatory functions, such as policing unauthorized practice of law, can be handled by local prosecutors or by states' attorney generals, who have more public accountability than state bar committees.[94] As Rhode and Ricca's recent survey of unauthorized practice enforcement revealed, many bar committees routinely proceed against lay competitors without evidence of consumer injury.[95] This should cease, and will be more likely to do so when disinterested decision makers control enforcement priorities.

States should also rethink the composition of governance bodies to prevent active market participants from dictating decisions. No matter how well intentioned, such participants are likely to lack impartiality in appearance if not in fact.[96] Other nations, such as Great Britain, build in a controlling role for non-lawyers in their bar governance processes and all the available evidence suggests that this approach has worked well.[97] Although the American bar has historically been reluctant to relinquish regulatory autonomy, *North Carolina Board of Dental Examiners* creates a powerful incentive for it to do so. If active market participants are not controlling members of governance boards, supervision of their processes is not necessary to avoid antitrust liability.[98]

Thirty-five years ago, one of us wrote:

> [T]he bar itself has much to gain from abdicating its role as self-appointed guardian of the professional monopoly. Given mounting popular skepticism about unauthorized practice enforcement, prudential as well as well as policy considerations argue for greater consumer choice . . . . If, as bar spokesmen repeatedly insist, the "fight

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93 Austin D. Smith, Logan M. Breed & Robert F. Leibenluft, North Carolina Board of Dental Examiners v. FTC: *How States Will Respond to Improve Competition and Accountability in State Regulatory Boards*, CPI ANTITRUST CHRON. 3–4 (Apr. 2015) (bullet points omitted from original).

94 *See generally* Rhode & Ricca, *supra* note 6.

95 *Id.*

96 For arguments supporting removal of active market participants from control, see Smith, Breed, & Liebenluft, *supra* note 93.

97 For discussion of England's disciplinary process, see generally Deborah L. Rhode and Alice Wooley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761 (2012).

98 *See supra* notes 57–61 and accompanying text.

> to stop lay practice is the public's fight," it is time for the profession to relinquish the barricades.[99]

That time is long overdue. Our hope now is that the Court's decision in *North Carolina Board of Dental Examiners* will supply the necessary nudge.

99 Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Perspective on Unauthorized Practice Enforcement*, 34 STAN. L. REV. 1, 98–99 (1981).