CRACKS IN THE PROFESSION’S MONOPOLY ARMOR

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INTRODUCTION

The legal profession in the United States continues to enjoy its long-held monopoly in the nation’s legal services market. Historically, American courts are largely responsible for this monopoly and have relied on their “affirmative inherent power . . . to regulate . . . every aspect of the practice of law.” For example, courts establish standards for admitting and

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1. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 824-27 (1986) (highlighting how the lawyer monopoly over much of the legal process today results from the combination of courts and lawyers controlling bar admission and state courts enforcing “common-law and statutory prohibitions against the unauthorized practice [of law]” (UPL), and noting that a “vigorous and expansive doctrine” of UPL did not occur in America until “sometime after the First World War”); Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 STAN. L. REV. 1, 4 (1981) (“[T]he profession has engaged in disturbingly little introspection concerning the proper scope of its monopoly.”).

2. WOLFRAM, supra note 1, at 24; see, e.g., NISHA, LLC v. TriBuilt Constr. Grp., LLC, 388 S.W.3d 444, 447 (Ark. 2012) (reversing a court ruling that a hearing’s arbitrator could decide who would represent the parties and holding that the state supreme court has “exclusive authority” to regulate the practice of law); id. at 451 (“[A] nonlawyer’s representation of a corporation in arbitration proceedings constitutes [UPL].”); Cleveland Metro. Bar Ass’n v. Davie, 977 N.E.2d 606, 616 (Ohio 2012) (holding that the state supreme court “has exclusive power to regulate, control, and define the practice of law in Ohio” and “if a statute or administrative rule purports to permit laypersons to permit laypersons to practice law before a board or an administrative agency, this court retains the ultimate authority to determine what activities a layperson” may undertake before committing UPL); see also MODEL RULES OF PROF’L CONDUCT pmbl. para. 10 (2013) (“The legal profession is largely self-governing . . . [U]ltimate authority over the legal profession is vested largely in the courts.”); WOLFRAM, supra note 1, at 79 (“The history of the regulation of the legal profession in the United States and England is primarily that of supervision by courts.”); cf. Brown v. Gerstein, 460 N.E.2d 1043, 1052 (Mass. App. Ct. 1984) (holding that the practice of law is a practice or trade and thus subject to consumer protection statutes); In re Burson, 909 S.W.2d 768, 777 (Tenn. 1995) (deciding that the state legislature may authorize nonlawyer tax agents).
disciplining lawyers, and defining the unauthorized practice of law (UPL). This, in effect, excludes competition from nonlawyers and charges lawyers for court activities, including the operation of lawyer and judicial regulatory and disciplinary systems.

Courts often rely on bar associations for valuable input regarding these regulatory activities. Most notably, bar associations propose and assist courts in adopting ethics codes establishing behavioral norms for the

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3. Wolfram, supra note 1, at 79 (noting that traditionally, "in many American jurisdictions, courts alone are authorized to discipline lawyers. And normally that power is reserved to the state's supreme court which typically delegates its exercise to a lawyer disciplinary agency" (citation omitted)); see also Model Rules of Prof'l Conduct R. 10.2. para. 10.

4. UPL is broadly defined and construed in many states. See, e.g., Ohio Gov. Bar R. VII(2)(A) (providing that UPL is "[t]he rendering of [or holding out to the public that one could render] legal services for another by any person not admitted to practice in Ohio under Rule 1 of the Supreme Court Rules for the Government of the Bar unless the person" qualifies for one of several exceptions, including being a licensed legal intern or a registered foreign legal consultant). For examples of nonlawyer UPL, see Hansen v. Hansen, 7 Cal. Rptr. 3d 688, 689 (Ct. App. 2003) (holding that a personal representative of a decedent's estate who is not a licensed lawyer cannot appear "in propria persona" on behalf of the estate in matters outside the probate proceedings); Fla. Bar v. Am. Senior Citizens Alliance, 689 So. 2d 255, 259 (Fla. 1997) (finding UPL where salespersons and other employees "answered specific legal questions; determined the appropriateness of a living trust based on a customer's particular needs and circumstances; [and] assembled, drafted and executed the documents"); Toledo Bar Ass'n v. Joelson, 872 N.E.2d 1207, 1208 (Ohio 2007) (holding that a nonlawyer committed UPL when he prepared, signed, and filed documents in four lawsuits, including complaints, on behalf of Team Sports, Inc. because UPL is not limited to court appearances but includes "the preparation of papers . . . on another's behalf" concerning a lawsuit (citing Cleveland Bar Ass'n v. Misch, 695 N.E.2d 244 (Ohio 1998))). UPL also restricts the ability of lawyers to practice law in other states unless they become licensed to practice in that state. Lawyers can apply to the court in a state that they are not admitted for pro hac vice status, permitting the lawyer to represent someone in particular litigation in that state court. The lawyer must apply for a license in the foreign jurisdiction if the lawyer intends to practice in a foreign state court on more than an occasional basis. ABA Model Rule 5.5, commonly referred to as the multijurisdictional practice (MJP) rule, permits lawyers to represent persons in a jurisdiction where they are not licensed if the representation is only on a temporary basis and does not involve the lawyer appearing before a tribunal. Model Rules of Prof'l Conduct 5.5. For a recent and excellent discussion about the many issues and problems concerning UPL statutes and enforcement, see Arthur F. Greenbaum, Multi-jurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment, 43 Akron L. Rev. 729 (2010); see also Rhode, supra note 1.

5. See Wolfram, supra note 1, at 24–25.

6. See id. at 33–34 (observing that while appellate courts exercise power and initiative in regulating the legal profession, "courts serve as the largely passive sounding boards and official approvers or disapprovers of initiatives that are taken by lawyers operating through bar associations"); see also John Leubsdorf, Legal Ethics Falls Apart, 57 Buff. L. Rev. 959, 965 (2009) ("[S]trate supreme courts were . . . the prime regulators [and] typically acting in interplay with the bar."); Fred C. Zacharias, The Myth of Self-Regulation, 93 Minn. L. Rev. 1147 (2009). See generally Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 707 (1977) (contending that lawyers drafted rules to promote their own interests in a self-regulatory context).
profession and standards and processes for lawyer admission and discipline.7

But "the times they are a-changin'," as Bob Dylan notes in the title of his song.8 Today, the law governing lawyers cannot be found in a single body of ethics rules, such as the American Bar Association (ABA) Model Rules of Professional Conduct, produced internally by the "traditional duo of courts and bar associations."9 Legislators, administrators, and federal judges are no longer willing to defer to state courts or bar associations.10 As a result, the law governing lawyers is increasingly fragmented because authorities—many of them federal and external to the profession—now regulate lawyer behavior.11 This fragmentation has created a myriad of challenges and problems for regulators and the bar. It has prompted one expert to comment: "We are witnessing the decline of the ideal of professional self-regulation at the same time that the ideal has been almost entirely demolished in England."12

Although there are new regulators and related concerns, the "traditional duo of courts and bar associations" still plays a leading role in shaping the profession's behavioral norms and preserving its monopoly over the delivery of legal services.13 This Article addresses two recent developments by the courts and bar associations that significantly affect—or create cracks in—the profession's monopoly on the delivery of legal services.

Part I considers the Conference of Chief Justices' (CCJ) recent adoption of Resolution 15, "Encouraging Adoption of Rules Regarding Admission of Attorneys Who Are Dependents of Service Members."14 Resolution 15

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8. BOB DYLAN, The Times They Are a-Changin', on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964). The scope and magnitude of change buffeting all aspects of the legal profession is dramatic. See, e.g., Tamar Lewin, Task Force Backs Changes in Legal Education System, N.Y. TIMES, Sept. 20, 2013, at A16 (reporting that the recent American Bar Association Task Force on the Future of Legal Education's draft report calls for urgent and sweeping changes in legal education, and describing "the predicament of the many recent graduates who may never get the kind of jobs they anticipated" as "‘particularly compelling’").
9. See Leubsdorf, supra note 6, at 959.
10. Id. at 961.
11. Id. at 961–62. For example, a host of federal agencies, like the SEC, have enacted rules governing the practice of law. Id. at 961 & n.6; see also Ted Schneyer, An Interpretation of Recent Developments in the Regulation of Law Practice, 30 OKLA. U. L. REV. 559 (2005); cf. MODEL RULES OF PROF'L CONDUCT pmbl. para. 11 (2013) ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination.").
12. See Leubsdorf, supra note 6, at 959, 961.
13. See id. at 961 (asserting that most new regulators tend to be federal).
urges state bar admission authorities to "develop[] and implement[] rules permitting admission without examination for attorneys who are dependents" of United States service members. Resolution 15 represents a significant doctrinal break with the longstanding tradition that lawyers must take an examination before being licensed to practice law in a jurisdiction unless their prior experience allows them to waive into that jurisdiction. The CCJ's new approach to regulating admission promotes competition from within the bar by facilitating the movement of lawyers from one geographic market to another.

Part II of this Article discusses the Washington Supreme Court's new Admission to Practice Rule (APR) 28, titled "Limited Practice Rule for Limited License Legal Technicians" (LLLT), and its impact on the profession's legal services monopoly. The LLLT rule "allow[s] licensed legal technicians to help civil litigants navigate the court system." Washington's LLLT rule promotes competition from professionals—nonlawyer technicians—who are outside the bar.

The Article concludes that both developments—Resolution 15 and Washington's LLLT rule—promise to enhance competition for the delivery of legal services, but in different ways. This Article contends that both Resolution 15 and Washington's LLLT rule will indeed enhance consumer welfare.

I. RESOLUTION 15: A DOCTRINAL BREAK FROM GEOGRAPHIC BARRIERS

In recent years, there has been significant interest in, and support for, U.S. military personnel and their families from the public and the legal profession. For example, on January 24, 2011, President Barack Obama,
First Lady Michelle Obama, and Dr. Jill Biden presented a document titled *Strengthening Our Military Families: Meeting America’s Commitment* in response to a presidential study directive calling for a comprehensive federal approach by government agencies to improve support for military personnel and their families. The document outlined forty-seven initiatives by sixteen federal agencies to improve support for military families. The First Lady and Dr. Biden promised to pursue such improvement through their Joining Forces initiative dedicated to connecting military personnel and their spouses with the necessary resources to obtain jobs.

Many Americans have some sense of military families’ hardships and sacrifices in serving the nation, especially given recent U.S. involvement in several international conflicts. One of the many challenges confronting military families concerns military spouse lawyers. Because of frequent relocations, they often encounter serious licensure hurdles in their efforts to pursue legal careers.

Military families are forced to move every two to three years in addition to temporary or extended unaccompanied deployments. The impact of

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20. Support for Our Heroes, WHITEHOUSE.GOV, http://www.whitehouse.gov/joiningforces (last visited Apr. 26, 2014) (reporting that “Joining Forces is all about coming together to support our nation’s military families” and ensuring that “no veteran has to fight for a job at home after they fight for our nation overseas”).

21. One hardship for military families is the difficulty faced by spouses seeking employment. This is a serious problem but is often overshadowed by other pressing problems, such as posttraumatic stress disorder or helping wounded veterans. Many occupations require a state license, often with state-specific conditions and processes, which can cause lengthy re-employment delays for military spouses moving between states. Because of these delays and the expense involved in re-licensure, many spouses decide not to practice in their professions. This is a difficult financial and career choice issue for military members and their spouses, potentially impacting their desire to stay in the military: more than two thirds of married service members report their spouse’s inability to maintain a career impacts their decision to remain in the military by a large or moderate extent.


23. Id. at 6 n.21 (citing DEF. MANPOWER DATA CTR., MILITARY FAMILY LIFE PROJECT (2010), available at conferences.cna.org/pdfs/longitudinalstudy.pdf) (reporting that active
these frequent moves is reflected in national statistics that show: (1) military spouses are more likely to be unemployed than their civilian counterparts; (2) military wives suffer a higher rate of underemployment than civilian counterparts; and (3) employed military wives earn less than civilian wives.\textsuperscript{24} The Department of Defense Military Community and Family Office has addressed some of the licensing barriers that confront military spouses through state legislation.\textsuperscript{25} The practice of law, however, is not regulated by the legislature, and redress must be sought from the state courts.\textsuperscript{26}

The Military Spouse JD Network (MSJDN) reports that less than one-third of its members are employed in full-time legal positions and that approximately half are underemployed in paralegal positions or part-time work.\textsuperscript{27} MSJDN members claim that state licensing barriers hinder their employment opportunities, because rules for admission by motion or through reciprocity are too limited.\textsuperscript{28} For example, military spouses have difficulty in meeting the "'previous practice' requirements when: they are recently admitted; their military spouse has been assigned overseas; they have breaks in employment between duty stations; they have held non-attorney or part-time positions; or have been unable to find legal work at a duty station."\textsuperscript{29} The consequence of not satisfying state rules regarding admission by motion is significant: the applicant will have to pass an arduous two-and-a-half- to three-and-a-half-day, written bar examination and undergo a thorough character and fitness investigation.

One report argues that these barriers create a significant cost for the public and the military families who are deprived of a spouse's income.\textsuperscript{30} The resulting economic and related stress from this loss of spousal income exacts a significant psychological toll on the spouse and family.\textsuperscript{31} The loss may also cause the nonlawyer spouse to leave the military.\textsuperscript{32} The report contends that these costs warrant different licensure treatment for military spouse lawyers.\textsuperscript{33}

The report further articulates several benefits to eliminating or minimizing licensure barriers. First, even after being transferred, military

\textsuperscript{24} \textit{Id.} at 5.
\textsuperscript{25} \textit{Id.} at 7.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.} at 8.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} See \textsc{ABA Model Rule on Admission by Motion} (2012) (requiring applicants to have practiced for three of the five years prior to applying for admission); \textsc{Am. Bar Ass'n Comm'n on Ethics 20/20, Report to the House of Delegates} (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d_filed_may_2012.authcheckdam.pdf (accompanying the model rule on practice pending admission).
\textsuperscript{31} See \textsc{Cranston}, supra note 22, at 7.
\textsuperscript{32} \textit{Id.} at 4.
\textsuperscript{33} See \textit{id.} at 1.
spouse lawyers can continue to provide legal services to their clients. From a client perspective, clients are able to retain counsel of choice, which promotes consumer preference. "As technology improves, more clients and employers want to retain military spouse attorneys who are transferred." UPL rules in many states, however, prohibit military spouse attorneys from "maintain[ing] their employment and continuing to serve their clients when transferred to and residing in a new jurisdiction."

Another benefit of eliminating licensure barriers for military spouse lawyers is that it furthers access to justice for military personnel and their families. Military spouse attorneys have developed unique skills that benefit their clients and possess special insights concerning the "complexities of military life and are well suited to serve clients in the military, either through paid or volunteer work." Many of these military-related clients may lack adequate resources to obtain legal services. A 2010 military survey found that 27 percent of service members have more than $10,000 in debt compared to 16 percent of civilians, and that more than one-third of military families have trouble paying monthly bills. Lawyers who are military spouses are uniquely positioned to possess a special sensitivity for assisting military families and veterans because their families may be similarly situated financially and may understand military culture. For example, they may understand family problems resulting from frequent redeployments. This similarity in family experiences creates a good opportunity for military spouse lawyers to provide a more holistic approach to delivering legal services that addresses all of the client's needs.

Against this backdrop, the CCJ adopted Resolution 15. Not surprisingly, given the nation's support for military personnel and their

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34. Id. at 9.
36. Id. at 9.
37. FINRA INVESTOR EDUC. FOUND., FINANCIAL CAPABILITY IN THE UNITED STATES 5, 13 (2010), available at http://www.finra.org/web/groups/foundation/@foundation/documents/foundation/p122257.pdf; see also Donna Gordon Blankinship, Mil Fams Face Money Problems, MILITARY.COM, http://www.military.com/spouse/military-life/military-resources/mil-fams-often-face-financial-struggles.html (last visited Apr. 26, 2014) (citing a 2010 military survey reporting that the unemployment rate among military spouses is 26 percent, and noting that a staff sergeant's annual salary is about $39,000, not much money to support a family, especially when one member is sent overseas for long periods).
38. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 46 (2d ed. 2009).
39. Resolution 15 provides:
   WHEREAS, the states' highest courts regard an effective system of admission and regulation of the legal profession as an important responsibility for the protection of the public; and
   WHEREAS, the Department of Defense has recognized that military spouses face unique licensing and employment challenges as they move frequently in support of the nation's defense; and
   WHEREAS, the American Bar Association adopted a policy in February 2012 recognizing that these short-term, compulsory moves for attorneys married to military service members result in unique problems that should be addressed by amending traditional bar admission rules; and
families, the CCJ encountered little resistance in adopting Resolution 15 on July 25, 2012.40

A. Resolution 15—The Assault on Territorial Restraints

Resolution 15’s first provision underscores the courts’ fundamental gatekeeper function concerning admission and regulation of the legal profession. It provides that the “states’ highest courts regard an effective system of admission and regulation of the legal profession as an important responsibility for the protection of the public.”41 This opening proposition is not particularly noteworthy given state courts’ long tradition of regulating the profession to protect the public’s interest.

What is noteworthy however, is Resolution 15’s last provision. It breaks with the longstanding notion that lawyers generally have to take a burdensome written examination before being licensed to practice law in another state. The CCJ in Resolution 15 now “urges the bar admission authorities in each state and territory to consider the development and implementation of rules permitting admission without examination for attorneys who are dependents of service members . . . and who have graduated from ABA accredited law schools and who are already admitted to practice in another state or territory.”42 Resolution 15’s four other

WHEREAS, state bar admission authorities and state supreme courts remain responsible for making admission decisions and enforcing their own rules for admission; and

WHEREAS, issues relating to knowledge of local law can be addressed through a mandatory educational component;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices urges the bar admission authorities in each state and territory to consider the development and implementation of rules permitting admission without examination for attorneys who are dependents of service members of the United States Uniformed Services and who have graduated from ABA accredited law schools and who are already admitted to practice in another state or territory.

Resolution 15, supra note 14 (emphasis added).

40. See Telephone Interview with Robert N. Baldwin, Exec. Vice President & Gen. Counsel, Nat’l Ctr. for State Courts (Oct. 16, 2013) (stating that Resolution 15 was adopted without any reported opposition). The CCJ adopted Resolution 15 as proposed by the CCJ Professionalism and Competence of the Bar (PCB) Committee at the 2012 Annual Meeting on July 25, 2012. Id. The PCB Committee had access to a “Report to the Conference of Chief Justices” submitted by Mary Reding, President and Co-Founder of the Military Spouse JD Network, and the Honorable Erin Masson Wirth, Co-Founder of the Military Spouse JD Network. Id. The CCJ discussed the special challenges facing military spouse lawyers and the need for a proposed resolution to eliminate licensing barriers. Id. The PCB materials for the meeting included a draft rule. Id. The lack of modification to the PCB Committee proposal may reflect broad support within the CCJ for Resolution 15. See, e.g., Brad Cooper, Military Spouse Attorneys Answer the Joining Forces Challenge, WHITEHOUSE.GOV (June 14, 2012, 4:55 PM), http://www.whitehouse.gov/blog/2012/06/14/military-spouse-attorneys-answer-joinig-forces-challenge (reporting that ABA Resolution 108, a rough counterpart to CCJ Resolution 15, was passed by the “500+ members of the ABA House of Delegates . . . without any opposition”).


42. Id. (emphasis added). The ABA recently adopted a Model Rule on Practice Pending Admission Application (MRPPA) aimed at lessening the disruption to a lawyer’s career and life by permitting a lawyer to practice for up to a year upon applying for application to the
provisions support one of these two principles—the authority of state courts to regulate the bar, including admission, or the case for admission without examination.

Admission without examination for lawyers is not a new concept. The organized bar and state courts have long recognized the highly mobile nature of the bar and the concern that an examination complicates, if not deters, lawyer mobility. Most states have addressed this concern and the corresponding need to protect the public from unqualified lawyers by adopting admission-by-motion rules.

The ABA's Model Rule on Admission by Motion is the prototype for state rules. It requires, in part, an applicant to be "primarily engaged in the active practice of law . . . for three of the five years immediately

bar and notifying the state's regulatory authority. AM. BAR ASS'N COMM'N ON ETHICS 20/20, supra note 30. Washington, D.C., instituted a policy of admission pending application prior to the ABA Rule. Id.

43. See Resolution 15, supra note 14 ("[S]tate supreme courts remain responsible for making admission decisions . . . ").

44. See id. ("[R]ecogniz[ing] that military spouses face unique licensing and employment challenges as they move frequently in support of the nation's defense . . ."); see also REDING & WIRTH, supra note 19 (providing the CCJ with important information about why lawyer-spouses of military personnel should be admitted on motion).

45. Wisconsin provides perhaps the most unique and longest exception to the general rule of lawyers having to pass an examination for bar admission. Graduates of Wisconsin law schools are admitted automatically to practice law without examination. Wis. SUP. Ct. R. 40.03. Wisconsin's admission without examination policy has not jeopardized the public's interest in competent and ethical legal services. See, e.g., Beverly Moran, The Wisconsin Diploma Privilege: Try It, You'll Like It, 2000 Wis. L. Rev. 645; see also Wiesmueller v. Kosobucki, No. 07-CV-211-BBC, 2009 WL 4722197 (W.D. Wis. Dec. 4, 2009) (dismissing a recent court challenge to that rule).

46. The ABA's new MRPPA reflects the organized bar's appreciation for the increased mobility and accompanying licensure challenges of its members. AM. BAR ASS'N COMM'N ON ETHICS 20/20, supra note 30. The MRPPA allows a lawyer who holds a license to practice law in another U.S. jurisdiction and who has engaged in active practice for three of the last five years, to provide legal services in a new jurisdiction without a license for no more than 365 days. The lawyer must meet other criteria too, including notifying the Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice and not being the subject of a disciplinary matter.

47. Thirty-nine states permit admission without examination if the lawyer satisfies a number of conditions. Many of these states add a reciprocity condition, namely that the state the lawyer is departing from must accord admission without examination to members of the lawyer's new state. See AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY POLICY IMPLEMENTATION COMM., ADMISSION BY MOTION RULES (2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/admission_motion_rules.authcheckdam.pdf; see, e.g., ARIZ. SUP. CT. R. 34 (providing for admission by motion if certain conditions are met, including reciprocal admission rules for Arizona lawyers in the state that the lawyer is departing); Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Berch, No. CV-12-1724-PHX-BSB, 2013 WL 5297140 (D. Ariz. Sept. 19, 2013) (challenging the rule); see also Joan C. Rogers, Limiting Admission on Motion to Lawyers from States with Reciprocity Is Not Illegal, 29 Law. Man. Prof. Conduct (ABA/BNA) 610 (Sept. 23, 2013) (reporting that Arizona's reciprocity requirement in its admission by motion rule is constitutional and effectuates "the state's legitimate interest in regulating the practice of law for public protection purposes" and "encourage[s] other states to admit Arizona attorneys on similar terms" (citing Berch, 2013 WL 5297140)).

48. MODEL RULE ON ADMISSION BY MOTION (as amended Aug. 6, 2012).
preceding" the date of application, to be in good standing in all jurisdictions where the lawyer is currently licensed and not currently subject to lawyer discipline or the subject of a pending discipline matter, and to demonstrate the requisite fitness and good character to practice law. These requirements advance the ABA’s goal of protecting the public from unqualified lawyers while facilitating lawyer mobility. Essentially the courts, bar, and the public have a three-year track record of legal work to assess the lawyer’s competency, ethics, and professionalism. In addition, the admission-without-examination rule assumes that the newly admitted lawyer will not harm clients or the courts by failing to learn local law and practice—a frequently cited justification for requiring an examination before bar admission.

Not all lawyers can meet state requirements for admission by motion. For example, many lawyers, including military spouses, have difficulty in meeting the “previous practice” requirements.

The CCJ followed the customary track of considering bar input before adopting Resolution 15 and its policy changes regarding bar admission and discipline. This is poignantly illustrated by the CCJ’s explicit reference to the ABA House of Delegates’ recent adoption of ABA Resolution 108, or the Admission by Endorsement (ABE) Resolution. Although the CCJ did not adopt all of the ABE recommendations in Resolution 15, the similarity in language between ABE and Resolution 15 further evidences the bar’s influence on the CCJ’s adoption of Resolution 15. A review of the ABE Resolution is helpful to better understand the CCJ’s Resolution 15.

The ABE Resolution most notably “urges state and territorial bar admission authorities to adopt rules . . . and procedures,” including admission by endorsement to “accommodate the unique needs of military spouse attorneys.” The ABE’s “admission by endorsement” phrase means the same thing as Resolution 15’s phrase, “admission without examination.”

The ABE Resolution requires attorney-spouses to satisfy several other criteria before gaining bar admission. The additional criteria include a

49. _Id._

50. Another condition for admission by motion in many states is reciprocity—that two states accord each other’s bar members similar admission by motion benefits. The ABA discourages reciprocity as a requirement for admission by motion. _Am. Bar Ass’n Comm’n on Ethics 20/20, supra_ note 30 (accompanying the model rule for admission by motion).

51. _See, e.g., 22 N.Y. Ct. App. R. 520.10_ (requiring an attorney to obtain a certificate of legal education from the New York State Board of Law Examiners as part of admission by motion).

52. _Cranston, supra_ note 22, at 8.

53. _See Leubsdorf, supra_ note 6, at 965.

54. _Am. Bar Ass’n, supra_ note 14.

55. ABE recommendations not in Resolution 15 include: reviewing current bar application and admission procedures to minimize any burdens on military spouses and to promptly handle their applications; encouraging mentoring programs to better integrate military spouse attorneys with the bar; and offering reduced bar application and admission fees in the lawyer’s new and old jurisdictions. _Id._

56. _Id._
requirement that the attorney-spouse demonstrate a presence in the jurisdiction because of his or her military spouse’s service. The attorney-spouse must also establish that the attorney is not currently subject to lawyer discipline or the subject of a pending disciplinary matter, pay client protection fund assessments, and comply “with all other ethical, legal and continuing legal education obligations.” The ABE Resolution further recommends that state admission authorities review bar application standards and procedures in the hope of facilitating the licensure of military spouse attorneys.

The additional ABE criteria, such as the applicant showing that he or she is not currently subject to lawyer discipline, seem reasonable in light of the profession’s substantial, if not overriding, interest in protecting the public from problem lawyers. Interestingly, Resolution 15 does not expressly incorporate these additional criteria.

One possible explanation for the absence of the additional ABE criteria is that the CCJ thought it a better strategy to let the states choose which, if any, additional criteria are appropriate to protect the public’s interest given the CCJ’s landmark recommendation eliminating examinations for admission for military spouses. This approach allows state courts to tinker with the details of Resolution 15’s major doctrinal change, making Resolution 15 politically more palatable to the states, in part, by appearing less intrusive in state court regulation. Two broad provisions in Resolution 15 support this explanation and permit states to incorporate additional ABE criteria. The first one underscores that it is the responsibility of the states’ highest courts to establish a system of admission and regulation for protecting the public. The second provision notes that this responsibility belongs solely to the states’ highest courts. Whatever the reasons for not including the additional criteria, states are well advised to adopt some or all of the ABE criteria as additional safeguards for protecting the public from problem lawyers.

The ABA considered a variety of information in adopting the ABE Resolution. One key source was the twelve-page report submitted by Mary Cranston, the chair of the ABA Commission on Women in the Profession. The Cranston report incorporates other important sources of information, for example, Department of Defense (DOD) studies and reports. Some of the information in the Cranston report was reflected in a different report submitted to the CCJ for its consideration in adopting Resolution 15.

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57. *Id.* at 1.
58. *Id.*
59. *Id.*
61. *Id.*
63. See *id.*
64. See *supra* note 40 (discussing the report before the PCB Committee when it was considering possible action concerning military dependents who are lawyers).
There was ample support for the CCJ’s conclusion that military spouse lawyers face unique licensing problems because of “short-term, compulsory moves” and that “issues relating to knowledge of local law can be addressed through a mandatory educational component.” Stated differently, the CCJ decided that the traditional justification for requiring a written examination for lawyers, specifically to protect the public from unqualified lawyers—in effect, creating a territorial barrier to entry—was unnecessary for military spouse lawyers. A number of states have adopted Resolution 15’s recommendations and admit military spouse lawyers on motion where examination is generally required for other lawyers.

Resolution 15 promotes client and public welfare in several ways. First, Resolution 15 increases the supply of lawyers available to provide legal services. This increase in lawyer supply, albeit in small number, nevertheless is a plus for consumer choice and competition in any given market.

Military spouse lawyers also offer a special type of legal service because of their unique experiences and insights about military life. This special quality may be attractive to military personnel, their families, and veterans. A significant percentage of these clients may be from low- or middle-income brackets and unable to obtain legal services. Thus, military spouse lawyers may promote access to justice for these economically challenged clients.

Resolution 15 also promotes the public’s interest by protecting the public from unqualified lawyers by requiring those who waive in to attend a mandatory educational program that can address any deficiency in knowledge of local law.

Resolution 15 also makes it easier for individual military spouse lawyers to realize a return on their significant investment of time and money in obtaining a law degree. In general, Resolution 15’s benefits are important to consumers, the profession, and the courts.

B. Extending Resolution 15’s Reach

Resolution 15’s doctrinal change to eliminate admission by examination for military spouse lawyers is expressly tied to the “unique licensing ... challenges” resulting from compulsory and frequent moves “in support of the nation’s defense.” More important, the doctrinal change is premised

65. Resolution 15, supra note 14; see also supra note 40.
66. See, e.g., ARIZ. SUP. CT. R. 38(i); IDAHO BAR COMM’N R. 229; ILL. SUP. CT. R. 719; RULES GOVERNING ADMISSION TO PRACTICE LAW N.C. R. 0503; S.D. SUP. CT. R. 13-10; TEX. OCC. CODE ANN. § 55.004 (West 2012).
67. CRANSTON, supra note 22, at 9.
68. Resolution 15, supra note 14.
69. Id. The ABE Resolution language is similar: “[T]o accommodate the unique needs of military spouse attorneys who move frequently in support of the nation’s defense ...” AM. BAR ASS’N, supra note 14, at 1. State courts will occasionally exempt a certain class of lawyers from general bar requirements, for example, permitting unlicensed lawyers to practice law if it is on a pro bono and temporary basis. See MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 14 (2013); infra note 121 (discussing this trend).
on the belief that eliminating the examination requirement will not increase the risk of harm to the public from incompetent or unethical lawyers.\(^7\)

Resolution 15's mandate should be extended to all lawyers to eliminate the need for a written examination for lawyers who cannot meet the "practice requirements" for admission by motion. This is especially true in an era of increased lawyer mobility and new technologies that make it possible for lawyers to relocate across state borders and still serve clients.

There are many lawyers, besides military spouse lawyers, who cannot meet the practice requirements for admission by motion. These lawyers are faced with the daunting prospect of taking an onerous written examination to relocate and hopefully to pursue their profession. A total of 90,973 lawyers graduated from ABA-accredited law schools over a two-year period from 2011 to 2013.\(^7\) None of these graduates would meet the three-year practice requirement for admission by motion.

Like military spouse lawyers, some of these lawyers may feel compelled to move at the behest of their employer or to follow a spouse who moved at the request of an employer. More important, whether the lawyer is seeking to move to another state voluntarily or not should not be the deciding factor and overshadow the fact that the lawyer is still facing the same barriers and related costs to relocation as military spouses, principally, taking a bar examination.

The benefits of eliminating examinations for military spouse lawyers who move to another state also apply to nonmilitary spouse lawyers who move. Nonmilitary-related lawyers who move offer the prospect of increased competition in another state market, which theoretically should drive down the cost of legal services. Also, the lawyer who moves to another state increases consumer choice for legal services. This is especially true for lawyers who relocate because of their client-employer's request. The employer is able to retain its counsel of choice and still realize

\(^{70}\) The CCJ never expressly said military lawyer spouses deserve special treatment and were entitled to admission by motion even if it meant placing the public at increased risk of harm.

\(^{71}\) See AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ENROLLMENT AND DEGREES AWARDED 1963–2012 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admission_s_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf. For illustration purposes only, assume that for this two-year period, 70 percent of 90,973 or 63,681 graduates passed the bar exam and found full-time legal employment. The 63,681 lawyers would automatically fall short of the three-year practice requirement under the ABA model rule and many state rules for admission by motion. If 10 percent of these 63,681 lawyers— or 6,368—sought to move to another state, they would be facing the cost and time of taking and hopefully passing another two- to three-day examination. Of course, the illustration's numbers could be higher if you consider that many lawyers may not be able to find full-time employment, especially with today's difficult job market for law graduates. The illustration's numbers do not include additional lawyers who have practiced for more than three years but were then subsequently laid off from work and found only part-time legal work. Some of these lawyers may wish to move to a new state and resume full-time legal employment. They might have difficulty meeting the three years in practice requirement for admission by motion that would further add to the number of lawyers harmed by the examination requirement barrier.
the advantages of having him or her relocate. Some of these lawyers may possess experience and expertise—for example, an immigration lawyer who speaks Spanish—that may fill a consumer need for such services. Finally, like military spouse lawyers, nonmilitary spouse lawyers are able to realize a return on their investment in their legal education and contribute to society's well-being.

Resolution 15 may affect only a very small fraction of the total number of lawyers in the United States. The significance of Resolution 15 lies not in the number of lawyers it affects but rather in its recognition that mandatory educational courses about local law sufficiently protect the public’s interest against incompetent lawyers. It is a de facto recognition that written examinations that serve as territorial barriers to entry in the legal services market are unnecessary to protect the public’s interest from unqualified or unethical lawyers. Resolution 15 expressly acknowledges that any perceived knowledge deficiency regarding local law and procedure can be remedied by a less restrictive alternative of requiring a mandatory education course.

States should follow Resolution 15's lead and open up the licensure process to admission by motion for all lawyers, assuming they meet other additional criteria like some of those identified in ABE—for example, not being the subject of a pending disciplinary matter. Opening the state markets to increased lawyer competition by admission by motion provides significant benefits to consumers and to the individual lawyers with little, if any, downside. Time will tell whether the CCJ's break with the examination tradition will lead to extending the same benefits to nonmilitary related lawyers but, at the end of the day, territorially based barriers are unnecessary.

II. SHEDDING THE “BARBARIANS AT THE GATE” SYNDROME: ALLOWING NONLAWYERS INTO THE CLUB

Even stronger than the territorial barriers that the legal profession has maintained are the monopolistic barriers it has constructed to defend itself against incursion by nonlawyers into the delivery of legal services. Now, however, a growing recognition of the lack of access to justice has led some in the profession to conceptualize and to implement plans to address the problem not just by permitting—but also by inviting—nonlawyers to the table.

72. Less than 1 percent of Americans serve in uniform. WHITE HOUSE, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA’S COMMITMENT 1 (2011), available at http://www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf. It is estimated that 10 percent of civilian military spouses have advanced degrees, of which a law degree is one of many. Id. at 16.
A. The Great Need: Access to Justice

Some observers believe that the U.S. legal system is one of the best in the world. Many Americans do not share that belief. They are financially locked out of the legal system—too poor to afford legal assistance for navigating the system. This lockout, often referred to as the nation’s “access to justice crisis,” is a generally accepted proposition. Many scholars and others have commented about the longstanding need to increase access to justice in the United States. Statistics underscore the enormity and ever-increasing gap between the need for, and the availability of, legal services. More than 100 million people in the United States “are living with civil justice problems, many involving basic human needs” such as retaining housing, employment, and custody of children. Many of these persons never seek assistance for their basic human needs.

73. See TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 51 (2012), available at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS2012-APPENDICES.pdf [hereinafter REPORT TO CHIEF JUDGE].

74. The phrase “access to justice” may be defined in different ways. Brooks Holland, The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice, 82 MISS. L.J. SUPRA 75, 78 n.13 (2013). This paper defines “access to justice” as “the ability of individuals, regardless of financial [circumstances], to access the resources necessary to participate meaningfully and equally in our system of civil justice. In our legal system, these resources necessarily include some legal knowledge and training.” Id.

75. For a recent and helpful article discussing the nation’s access to justice crisis, see Benjamin P. Cooper, Access to Justice Without Lawyers, 47 AYRON L. REV. 205 (2014). Cooper’s article highlights both the enormity and seriousness of the access to justice crisis quoting several sources. E.g., Alan W. Houseman, The Future of Civil Legal Aid: Initial Thoughts, 13 U. PA. J.L. & SOC. CHANGE 265, 265 (2010) (“[E]qual justice is not a reality for millions of Americans[. . .] particularly . . . low-income Americans who do not have meaningful access to legal information, advice, assistance, or actual representation in court.”). In Access to Justice Without Lawyers, Cooper examines three ways to increase access to justice, including the licensing of nonlawyers to provide legal services. See generally Cooper, supra. This Article builds upon Access to Justice Without Lawyers and other works to argue that the Washington Supreme Court’s recent decision authorizing nonlawyers to deliver limited legal services represents a significant crack in the profession’s monopoly over the delivery of legal services. E.g., Holland, supra note 74; see DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004); see also Deborah L. Rhode, Lawyers As Citizens, 50 WM. & MARY L. REV. 1323 (2009). Chief Judge Jonathan Lippman of the New York Court of Appeals is a leading voice concerning access to justice who is not from the academy. See REPORT TO CHIEF JUDGE, supra note 73, at 51 (“[E]qual justice is fundamental to our society, and something . . . that differentiates our country from others . . . in the world[,] . . . access to justice is not a luxury in good times [but is] something that now more than ever, given what is going on in . . . our country is so necessary.”).

76. See Catherine R. Albiston & Rebecca L. Sandefur, Expanding the Empirical Study of Access to Justice, 2013 Wis. L. REV. 101, 101–03 (reporting a recent “renaissance” of empirical and other “research investigating the delivery of legal services and public experience with civil justice,” including a 2012 commitment by the Legal Services Corporation to use “robust assessment tools,” as well as the American Bar Foundation’s establishment in 2010 of an Access to Justice research initiative, and a 2010 Access to Justice Initiative by the Department of Justice; providing an excellent research agenda that includes “how current definitions and understandings of access to justice may blind policy makers to more radical, but potentially more effective, solutions”).

77. REBECCA L. SANDEFUR, AM. BAR FOUND. & UNIV. OF ILLINOIS AT URBANA-CHAMPAIGN, CIVIL LEGAL NEEDS AND PUBLIC UNDERSTANDING 1 (n.d.), available at
problems from a lawyer or a court; one recent study reports only "14% of civil justice problems were taken to a court or hearing body." Although only a modest 14 percent seek court access for assistance with their civil justice problems, it still creates a significant burden for the courts and system. This is because an ever-increasing number of these cases that make it to court involve pro se litigants who present special challenges for lawyers and judges as they attempt to efficiently and justly resolve disputes.

The legal assistance system in the United States is diverse and fragmented, the product of outputs of many public-private partnerships, most of them small scale. States and communities differ in terms of resources available to fund legal services. They also differ in terms of offering different services to different populations. There is little coordination among the various service providers, making it difficult for the needy to contact the provider who can help. The diversity and fragmentation creates large inequalities between states, and within them, over what legal services are available to which populations.

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78. SANDEFUR, supra note 77, at 1–2 (noting that most Americans do not consider taking their problems to lawyers or the courts as the most common reason for not seeking assistance, and that a study found that in Great Britain a significant percentage of persons sought legal assistance when they perceived their problem as legal, and not a social, moral, or private matter).


80. See Paula J. Frederick, Learning To Live with Pro Se Opponents, GPSOLO, Oct.–Nov. 2005, at 48, 50 (reporting that lawyers often complain about the “headaches” of dealing with pro se litigants); see also Morris, supra note 79. For example, pro se litigants, sometimes referred to as unrepresented litigants, are generally unfamiliar with the law and court rules. This may delay or prevent dispute resolution. See Benita Pearson, Judge, U.S. Dist. Court for the N. Dist. of Ohio, Panel Remarks at University of Akron School of Law Symposium: Navigating the Practice of Law in the Wake of Ethics 20/20: Globalization, New Technologies, and What It Means to be a Lawyer in These Uncertain Times (Apr. 5, 2013) (transcript on file with the author) (reporting a noticeable increase in the number of pro se cases and that this development presents challenges for the judge).

81. SANDEFUR, supra note 77, at 2; SANDEFUR & SMITH, supra note 77, at 9.

82. SANDEFUR, supra note 77, at 2; SANDEFUR & SMITH, supra note 77, at 2 (noting that the most recent survey, now twenty years old, “of low- and middle-income households in the U.S. found that about half of the households were experiencing at least one problem that had civil legal aspects . . . and [that] was potentially actionable under civil law”).

83. SANDEFUR & SMITH, supra note 77, at 12.

84. Id. at 21.

85. Id. at 9.
complicates access to justice for many and places a premium on the location rather than the nature of the request for legal services. More than 80 percent of the legal needs of the poor and 67 percent of the legal needs of middle-income Americans go unmet. Traditional methods of providing access to justice for these people are inadequate given the magnitude of the need. The vast need dwarfs the positive contributions of publicly funded legal aid and charitable-based organizations, pro bono efforts, and law school clinics—all of which are facing their own financial challenges in these difficult economic times. New York Court of Appeals Chief Judge Jonathan Lippman recently described the cuts to funding for civil legal services at the national level as "devastating." He further noted that support for legal services at the state level is also under stress. Funds from New York's Interest on Lawyer Trust Accounts (IOLTA) program that helps finance some legal services for the poor plummeted from $36 million to $6 million. New York's experience is not unique; many states are experiencing decreases in IOLTA funds.

86. Id. (observing that "[i]n this context, geography is destiny:" physical location and not the problems or services needed by the population determines the available legal assistance).

87. Cooper, supra note 75, at 205; see also Legal Servs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Needs of Low-Income Americans 14-15 (2005), available at http://www.mlac.org/pdf/Documenting-the-Justice-Gap.pdf; Am. Bar Ass'n Comm'n on Nonlawyer Practice, Nonlawyer Activity in Law-Related Situations 77 (1995) (reporting that between 70 and 80 percent of the poor's legal needs are unmet); Albistion & Sandefur, supra note 76, at 110 ("Studying access to justice by focusing only on the poor . . . limits our understanding of the relationship between legal services and inequality. In the United States, access to justice is often treated as an aspect of anti-poverty policy, which belies the fact that we know surprisingly little about inequalities in access to civil justice.").

88. Rhode, supra note 75, at 3; see Cooper, supra note 75, at 205-06; see also Alex J. Hurder, Nonlawyer Legal Assistance and Access to Justice, 67 Fordham L. Rev. 2241, 2241 (1999) (asserting that "many moderate-income households" are unable to access the justice system). Although the poor may be the most significant group concerning the unmet need for legal services, other population groups are eligible for aid, including approximately 55 million elderly, 2.5 million American Indians, over 22 million veterans, over 600,000 homeless people, more than 36 million people with disabilities, and more than 1 million people with HIV/AIDS. Sandefur & Smith, supra note 77, at 10.

89. Gillian K. Hadfield, Summary of Testimony Before the Task Force To Expand Access to Civil Legal Services in New York, Richard Zorza's Access to Justice Blog 1 (Oct. 1, 2012), http://zorza.files.wordpress.com/2012/10/hadfield-testimony-october-2012-final-2.pdf; see Cooper, supra note 75, at 205-09 (arguing that this scenario requires fundamental change in the way that the judiciary regulates the practice of law); see also Rhode, supra note 75, at 1330-31.

90. Hadfield, supra note 89; see Cooper, supra note 75, at 206.

91. Report to Chief Judge, supra note 73, at 50; see also infra notes 94-98 and accompanying text (discussing national funding for civil legal services).

92. Report to Chief Judge, supra note 73, at 50.

There is little prospect of a massive injection of governmental money to fund legal services for the poor. The trend seems to be in the opposite direction. Congressional funding for legal aid from the Legal Services Corporation (LSC) in fiscal year 2012 was reduced again from a total of $348 million to under $341 million. Some argue that allocating additional money for legal services alone will not resolve the access to justice crisis. For example, in 2012, Professor Gillian Hadfield testified before New York’s Task Force to Expand Access to Civil Legal Services in New York. She emphasized that the kind of legal services that ordinary New Yorkers need cannot be addressed by merely increasing the expenditure of public funds. She observed that the scale of the problem is too large—the legal services demand far outstrips both publicly funded and charitable supplies of lawyers’ services.

Instead, Hadfield argued that a fundamental restructuring of the delivery of legal services market is necessary to allow nonlawyers to deliver certain lower-cost legal services. Lawyers are too expensive for many low- and middle-income persons and the government cannot afford to subsidize enough lawyers to resolve the access to justice crisis.

Opening the legal services market to nonlawyers may seem like a radical proposal. Hadfield points to nurse practitioners in the medical field as an example of how lower-cost service providers have helped narrow that industry’s demand-supply gap. Hadfield argues that the legal profession needs to find nonlawyers to deliver lower-cost legal services and notes that increase in unrepresented or pro se litigants because “federal funding . . . [IOLTA] grants, and state financial support continues to decrease for many free legal services and pro bono organizations”).

94. The enormity of the kind of injection needed is highlighted by the fact that almost 57 million people were eligible for free legal services in 2009 according to a 2010 financial means test created by the federal Legal Services Corporation—the central funder of civil legal assistance in the United States. SANDEFUR & SMITH, supra note 77, at 10. Under the 2010 means test, a family of four making $27,641 or less would qualify for legal assistance. Id.


96. Hadfield, supra note 89, at 1.
97. Id.
98. Id. at 2–3.
99. Id.
100. Id.
101. Id. at 4.
Washington has already decided to do this and that other states are considering similar action.\(^\text{102}\)

The ABA Task Force on the Future of Legal Education (Task Force) recently echoed the concerns of Hadfield and others that many low- and middle-income populations cannot afford to hire lawyers and embraced the idea of nonlawyers delivering legal services. The Task Force noted that there are rarely alternatives to obtaining legal assistance other than from fully trained lawyers who have passed the bar.\(^\text{103}\) These populations will remain underserved because lawyers are unavailable to these clients unless the government or a private benefactor subsidizes their services—an unlikely prospect, especially in these difficult economic times.\(^\text{104}\)

The ABA Task Force reported that the high cost of lawyers’ services “has facilitated the use (or proposed use)” of nonlawyers “to deliver lower-cost legal services,” including issuing limited licenses to deliver categories of legal services.\(^\text{105}\) Moreover, the ABA Task Force recommended to state regulators of law practice to authorize nonlawyers to provide limited legal services, either by licensing systems or other mechanisms ensuring proper education, training, and oversight.\(^\text{106}\) This recommendation reflects the new momentum for resolving the access to justice crisis by opening the legal services market to nonlawyers, especially in light of recent developments in Washington.

\section*{B. Washington’s Limited License Legal Technicians Rule—Enhancing Consumer Welfare?}

On June 15, 2012, a divided Washington Supreme Court issued a landmark order, the new APR 28.\(^\text{107}\) For the first time in the nation’s history, a state’s high court opened the market for the delivery of legal services to nonlawyers—a new professional class of legal service providers

\begin{footnotes}
\item[102] Id. at 5–6.
\item[103] AM. BAR ASS’N TASK FORCE ON THE FUTURE OF LEGAL EDUC., DRAFT REPORT AND RECOMMENDATIONS 3 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legaleducation_draft_report_september2013.authcheckdam.pdf. The primary focus of the ABA Task Force’s draft report concerned the urgent problems confronting the U.S. legal education system and the diminished public confidence in the system. \textit{Id.}
\item[104] Id.; see REPORT TO CHIEF JUDGE, \textit{supra} note 73, 56 (stating that “millions of New Yorkers today cannot meaningfully protect their rights because they can’t afford to hire an attorney” and acknowledging that “two point three million mostly low income New Yorkers are unrepresented in civil proceedings . . . every year” (emphasis added)).
\item[105] AM. BAR ASS’N TASK FORCE ON THE FUTURE OF LEGAL EDUC., \textit{supra} note 103, at 12–13. The ABA Task Force acknowledged that the cost of a lawyer is unaffordable for many low- and some middle-income persons even though the supply of lawyers may exceed demand in some sectors of the economy. \textit{Id.}
\item[106] Id. at 30–31. The Task Force also recommended that they commit to establishing uniform national standards for admission to practice as a lawyer. \textit{Id.} at 30.
\end{footnotes}
titled limited license law technicians. LLLTs can open a professional practice giving some legal advice and assistance directly to clients without lawyer supervision—a radical paradigm shift because lawyer supervision is generally a prerequisite for nonlawyer legal services work. This judicially authorized incursion into the profession's monopoly over legal services, albeit in one state, is still very new and its impact is an open question. APR 28, however, has attracted significant attention from other states and scholars and it promises to be an important part of the ongoing dialogue addressing the access to justice problem. The Washington Supreme Court highlighted the state's "wide and ever-growing gap in necessary legal...services for low and moderate income persons." In issuing APR 28, the court also described Washington's

108. Holland, supra note 74, at 91. The court also established an LLLT board to oversee the implementation of the LLLT program. WASH. ADMISSION TO PRACTICE R. 28(C); see also Kristen Kyle-Castelli, Foreword, Poverty Access to Justice Symposium, 82 MISS. L.J. SUPRA, at i, iii (2013) (describing APR 28 as "Washington’s pioneering [LLLT] rule"). See generally Amy Yarbrough, Limited-Practice License Idea Faces Challenging Path, CAL. B.J. (May 2013), http://www.calbarjournal.com/May2013/TopHeadlines/TH1.aspx. In the late 1980s and early 1990s, the California Bar studied the idea of licensing legal technicians as did the American Bar Association in the mid-nineties. Id. The studies supported the idea but the licensure never occurred. Id.

109. See Yarbrough, supra note 108. Robert Hawley, deputy executive director of the California Bar, stressed that for years in the legal services marketplace, "the supply of lawyers has risen, the demand for legal services has risen and the cost of legal services has risen. ‘Under the economic laws of supply and demand, this is not possible.... It can occur only in a monopoly and perhaps it is time for lawyers to give up their monopoly on the practice of law.’" Id. (emphasis added).

110. In January 2013, California’s State Bar Board of Trustees expressed an interest in a limited-practice law licensing program, with one trustee stating that many consumers cannot afford market rates for a lawyer’s service. Laura Ernde, State Bar To Look at Limited-Practice Licensing Program, CAL. B.J. (Feb. 2013), http://www.calbarjournal.com/February2013/TopHeadlines/TH1.aspx. Assistant State Chief Trial Counsel Dane Dauphine reported that the state bar receives annually hundreds of complaints about the occurrence of UPL. Id. State Bar Executive Director Hawley noted that what constitutes the practice of law involves some difficult line drawing but "interpreting legal authorities and customizing them to fit a consumer’s specific needs does invoke the practice of law, at least theoretically." Id. Another trustee urged his colleagues to examine Washington’s LLLT program because many persons in California are forced to turn to unregulated nonlawyers to address the public’s need for legal services. Id.; see Press Release, Laura Ernde, State Bar Group To Hold Public Meeting on Limited-Practice Licensing (Apr. 4, 2013), available at http://www.calbar.ca.gov/AboutUs/News/Archives/2013NewsReleases/201306.aspx (reporting that the Limited License Working Group, involving a number of trustees and California Bar President Patrick M. Kelly, will review similar programs in Washington and Canada as a way to increase access to affordable legal services and protect the public). At an April hearing of the California Bar's Limited License Working Group, Washington State Bar Executive Director Littlewood described the state's adoption of APR 28 as "a 10-year, pretty hard-fought battle" to permit nonlawyers to provide limited legal services to clients. See Yarbrough, supra note 108. Littlewood stated that "consumer protection is one of the ‘highest ideals’ of her state’s program" and "cited figures indicating that eighty-five percent of indigent...families...are not being served anyway.” Id. "The needs of the consuming public have never been ‘one size fits all’... There is so much work to go around. How can you take it away from people?" Id.; see also Hadfield, supra note 89.

111. See, e.g., Cooper, supra note 75; Holland, supra note 74.

112. In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-10005 (stating that the 2003 Civil Legal Needs Study indicated
adversarial civil legal system as "complex [and] unaffordable," placing many pro se litigants at a disadvantage and "forcing [them] to seek help from unregulated, untrained, and unsupervised 'practitioners.'" The court and advocates of APR 28 hope that LLLTs will narrow the gap between the public's ever-increasing need for legal assistance and available resources.

The Washington Supreme Court also noted a particular need for legal assistance in the family relations area in part because it is governed by a myriad of statutes. "[T]housands of unrepresented (pro se) individuals seek to resolve important" matters in court and are unable to obtain legal assistance "from an overtaxed, underfunded civil legal aid system." As a result, the court subsequently approved regulations that became effective September 3, 2013, authorizing domestic relations as the first practice area for LLLTs.

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supervision of lawyers, to “advise and assist clients (1) to initiate and respond to actions and (2) regarding motions, discovery, trial preparation, temporary and final orders, and modifications of orders” in domestic relations.\textsuperscript{118}

The LLLT services permitted in the domestic relations area would generally constitute the practice of law in most states; this would be true for Washington too except for LLLT licensure.\textsuperscript{119} Nonlawyers who provide legal “advice and assistance” without the supervision of a lawyer would be subject to prosecution under state UPL statutes.\textsuperscript{120} UPL laws are designed to protect the public, the profession, and courts from incompetent or otherwise unscrupulous legal service providers. UPL laws are also seen by some as a construct for limiting competition from nonlawyers and unlicensed lawyers delivering legal services.\textsuperscript{121}

Washington’s LLLT program promises more affordable legal services. It also promises to protect consumers from harm. The Washington Supreme Court made the public’s interest its lodestar in issuing APR 28. “[T]he basis of any regulatory scheme including our exercise of the exclusive authority to determine who can practice law . . . , must start and end with the public interest . . . ensur[ing] that those who provide legal and law related service have the education, knowledge, skills and abilities to do so.” \textsuperscript{122} Washington State Bar Executive Director Paula Littlewood similarly emphasized that protecting the public is one of the bar’s “highest
ideals" when discussing APR 28 before a California bar committee considering nonlawyer legal service providers.123

Washington’s LLLT program appears to accomplish the state supreme court’s goal of protecting the public, in part, by requiring significant educational and experiential qualifications. These requirements provide assurances to the judiciary and the public that LLLTs possess adequate educational and experiential skills for acting as fiduciaries and delivering legal services—essentially practicing law in a limited capacity.124

LLLT applicants must have an associate of arts (AA) degree.125 They must also complete the LLLT core education requirement of forty-five credit hours in basic courses, such as contracts, civil procedure, and professional responsibility.126 The core education requirement also includes eight credit hours of legal research and writing—important skills courses.127 LLLT applicants can apply the forty-five credit hours of core LLLT courses towards earning their AA degree, generally a degree program that is two years or a total of sixty semester credit hours.128 “This will make the LLLT education even more affordable.”129

123. See Yarbrough, supra note 108. Littlewood stated that “consumer protection is one of the ‘highest ideals’ of her state’s program” and “cited figures indicating that 85 percent of indigent . . . families . . . are not being served anyway.” Id.

124. Qualifications for taking the licensing application were amended on July 14, 2013. APR 28 requires applicants to be eighteen years old and to demonstrate good character and fitness to practice as an LLLT. One also needs the following: “an associate level degree . . . ;” forty-five credits of core education requirements in legal studies at an ABA-approved law school or ABA-approved paralegal program; practice area courses in each practice area the applicant wishes to be licensed; and “3,000 hours of substantive law-related work experience.” WASH. ADMISSION TO PRACTICE R. 28.

125. Id.

126. The Washington curriculum regulations read as follows:
A. Core Curriculum. An applicant for licensure shall have earned the following course credits at an ABA approved law school or ABA approved paralegal program:
1. Civil Procedure, minimum 8 credits;
2. Contracts, minimum 3 credits;
3. Interviewing and Investigation Techniques, minimum 3 credits;
4. Introduction to Law and Legal Process, minimum 3 credits;
5. Law Office Procedures and Technology, minimum 3 credits;
6. Legal Research, Writing and Analysis, minimum 8 credits; and
7. Professional Responsibility, minimum 3 credits.

The core curriculum courses in which credit is earned shall satisfy the curricular requirements approved by the Board and published by the WSBA. If the required core curriculum courses completed by the applicant do not total 45 credits as required by APR 28D(3)(b), then the applicant may earn the remaining credits by taking legal or paralegal elective courses at an ABA approved law school or ABA approved paralegal program.

Id. R. 28 app. reg. 3(A).

127. Id.

128. See, e.g., OHIO ADMIN. CODE § 3333-1-04(C)(6) (2010) (listing the standards for approval of associate degree programs and requiring a minimum of sixty semester credits). An LLLT applicant is not required to earn an AA degree before enrolling in LLLT courses; both can be accomplished simultaneously. For example, an applicant “may obtain an AA degree in paralegal studies which includes completion of the 45 [core] credits.” See E-mail
In addition to satisfactory completion of the core, the LLLT applicant must complete the "practice area curriculum requirements." In the domestic relations practice area, an applicant must take a total of fifteen credit hours of domestic relations, with five of those credits in basic domestic relations subjects and another "ten credit hours in advanced and Washington specific domestic relations subjects." This intensive concentration in family law strongly suggests LLLT graduates are more knowledgeable about domestic relations than their law school counterparts, who may take one general family law course. In the law school curriculum, family law is typically a three-credit hour elective course.

The LLLT board and Washington’s three law schools are collaborating to provide the family law courses. The family law courses will be offered by a law school faculty member and probably at a law school. The courses will be available online at state community colleges and accessible from home. The easy access for the courses is in line with what one LLLT board member described as a three-prong approach, or the "Three As": affordability, accessibility, and academic rigor.

There should be a ready supply of recent community and baccalaureate college graduates who may find the LLLT career attractive, especially in these difficult economic times. LLLTs acquire professional status and


129. See E-mail from Thea Jennings, supra note 128.

130. WASH. ADMISSION TO PRACTICE R. 28 app. reg. 3(B).

131. The Washington regulations state:

B. Practice Area Curriculum. An applicant for licensure in a defined practice area shall have completed the prescribed curriculum and earned course credits for that defined practice area, as set forth below and in APR 28D(3)(c). Each practice area curriculum course shall satisfy the curricular requirements approved by the Board and published by the WSBA.

1. Domestic Relations.

a. Prerequisites: Prior to enrolling in the domestic relations practice area courses, applicants shall complete the following core courses:

Civil Procedure; Interviewing and Investigation Techniques; Introduction to Law and Legal Process; Legal Research, Writing, and Analysis; and Professional Responsibility.

b. Credit Requirements: Applicants shall complete five credit hours in basic domestic relations subjects and ten credit hours in advanced and Washington specific domestic relations subjects.

Id.


133. See Interview with Steve Crossland, supra note 112.

134. See id.

135. See id.

136. See id.

the ability to earn a living, either independently, or as an employee of a private or governmental entity. For example, LLLTs might work for a social services agency or a law firm. Law firms may find LLLTs attractive hires because, unlike paralegals and legal assistants, LLLTs will be able to assume more complete and direct responsibility for certain aspects of client matters—for example, advising clients on the selection of forms and how to respond to interrogatories. This should free lawyers to focus on other important aspects of practicing law, such as directly negotiating contracts or settling claims with opposing parties and participating in hearings and trials. One expert on Washington’s LLLT rule noted that “[n]ot surprisingly, we have found that some forward-looking lawyers are considering how employing or working with LLLTs may fit into their business model.”

C. LLLTs: Some Concerns

Some critics of LLLTs fear that they may be more likely to harm the public by committing fraud or engaging in unethical conduct. Like lawyers, there is no guarantee that LLLTs will avoid such offenses. However, LLLTs will be subject to an ethics code and a disciplinary regime that is modeled after the state’s lawyer disciplinary system with presumably similar consequences for violating professional norms. LLLTs are already subject to Washington’s attorney-client evidentiary privilege and its lawyer fiduciary obligations.

in Washington, 14 Other States; Recession Blamed, SEATTLE TIMES (July 12, 2012, 9:30 PM), http://seattletimes.com/html/education/2018675041_collegedegrees13.html (reporting that the recession and state cuts in higher education dollars were partly to blame for the drop in the number of college degrees held by twenty-five- to thirty-five-year-olds but that Washington still ranked fifteenth in the nation for college attainment).

138. See generally Rachel Zahorsky & William D. Henderson, Who’s Eating Law Firm’s Lunch?, A.B.A. J., Oct. 2013, at 33, 33 (highlighting the need to deliver legal services in an efficient manner and discussing how legal services companies are more efficiently performing some legal services by, for example, “review[ing], manag[ing,] and analyz[ing] documents for large-scale litigation” than law firms).

139. See E-mail from Thea Jennings, Ltd. License Legal Technician Program Lead, Regulatory Servs. Dep’t, Wash. State Bar Ass’n, to author (Dec. 10, 2013, 15:38 EST) (on file with author). The LLLT board recently considered possible business relationships for LLLTs while drafting LLLT Rules of Professional Conduct. The LLLT board concluded that LLLTs may not form business relationships with nonlawyers. For example, companies like Wal-Mart could not own and operate a chain of LLLTs. See id. However, at its November 2013 LLLT board meeting, the board approved joint ownership of firms with lawyers, provided that LLLTs (i) may not direct a lawyer’s professional judgment, (ii) have direct supervisory authority over a lawyer, or (iii) possess a majority interest or exercise controlling managerial authority in a firm. Id. It is important to note that such an LLLT provision is subject to further review by the LLLT board or state bar association and would only become effective upon additional review and approval by the Washington Supreme Court. Id.

140. See Yarbrough, supra note 108.

141. See Interview with Steve Crossland, supra note 112 (stating that an LLLT board committee is working on an ethics code and determining which lawyer ethics rules are transferable to LLLTs).

142. See WASH. ADMISSION TO PRACTICE R. 28(K)(3); Holland, supra note 74, at 112.
Another concern regarding LLLTs involves their ability to earn sufficient income from their limited type of law practice. The fear expressed by some is that LLLTs may “not find the practice lucrative and that the cost of establishing and maintaining [an LLLT] practice... will require them to charge rates close to attorneys”—which ultimately would not increase access to justice.\footnote{143}

The legal services market should deter LLLTs from charging rates near or at the same amount as lawyers. When the rates become similar, consumers will presumably hire lawyers given their ability to provide a fuller range of legal services—for example, appearing before tribunals. The ability of lawyers to offer a wider array of legal services should keep LLLT fees significantly below lawyer rates.

Whether LLLTs can find the legal services market sufficiently lucrative to sustain their practice is an important and open question. There are reasons to believe that LLLTs can survive economically and still offer affordable legal services.

First, LLLT's may serve a broader population than just low- to middle-income persons. Even if that is not the case, the unmet need or potential demand for LLLT services is high. Washington State Bar Executive Director Littlewood cited “figures indicating that 85 percent of indigent... families... are not being served” and asserted that “[t]he needs of the consuming public have never been ‘one size fits all’... There is so much work to go around. How can you take it away from people?”\footnote{144}

Second, LLLTs probably will not have the high debt burden that afflicts many law graduates. An LLLT graduate at a minimum will have to fund forty-five core credits and another fifteen credits in a practice area curriculum specialty. All or some of these credits can be applied to the LLLT applicant's completion of the required two-year AA degree.\footnote{145}

In contrast, a law graduate will have at least invested approximately twice as much—and probably much more—time and money as an LLLT, attending both a four-year baccalaureate program and then three years of law school. The average law student today graduates with a $77,728 debt burden.\footnote{146} The prospect of LLLTs earning sufficient money in their practice is enhanced by virtue of not having to pay down a high education debt like many law graduates and other professionals.

Third, there is an important lesson to be learned from the growing number of legal vendors or services companies assisting large corporate clients or law firms, for example, in managing and reviewing their documents. “[T]echnology and law are the wave of the future.”\footnote{147}
market is “developing even more concentrated engines of efficiency and scale.” Technology may provide—if it has not already—the means for LLLTs to realize economic success.

There is another related issue about the economics of LLLT practice that concerns equal justice. Some observers fear that the creation of LLLTs creates a two-tier justice system. One tier would be for the poor who rely on the more affordable and limited services of LLLTs, which might be, or at least is perceived as, inferior. A second tier would be for more affluent persons who would rely on lawyers, a more educated and versatile group of legal services providers. Unlike LLLTs, lawyers can engage in direct negotiations with opposing parties and appear before adjudicatory bodies.

Professor Brooks Holland provides an excellent discussion of the equal justice concern. He notes that the LLLT service is not inequitable simply because it offers a service at a better price. He cites the medical profession and nurse practitioners as a poignant example of less costly service providers who have become a “more widely used, professionalized, and respected component of the health care market.” Holland ultimately concludes that even if the “competitive market vision” for LLLTs does materialize as its proponents hope, then a more pragmatic approach should govern the debate about “equal-justice concerns.” “[M]ore exceeds less in the real world,” and if the LLLT program results in something less than equal justice but instead “adequate access to justice,” then that is positive achievement.

CONCLUSION

The assault continues on the profession’s monopoly of the legal services market. Various market forces, including advances in technology making access to legal services more readily available to the public; pressure from corporate and other clients to lower the cost of legal services, cutting into lawyers’ profit margins; global competition from lawyers and nonlawyers to provide legal assistance; and an oversupply of lawyers have compelled the profession to change its mode of doing business. As a result, the profession has already discarded, voluntarily or involuntarily, some of its

148. Id. (quoting Professor Oliver Goodenough of Vermont Law School). Goodenough further notes “that the traditional law firm ‘is no longer the best game in town for delivering high-quality legal service through scaling and flexibility. Rather . . . new [technology] service companies’” provide this kind of service. Id.

149. Id. at 38 (“[A] technology-driven revolution is overturning how America practices law, runs its government and dispenses justice.” (quoting Professor Goodenough)).

150. See Holland, supra note 74, at 118–27.

151. Id. at 124.


153. Id. at 128.

Byzantine rules of self-regulation crafted under the banner of protecting the public but more often serving the profession’s self-interests.\textsuperscript{155}

Resolution 15 and Washington’s LLLT rule also represent significant changes for the profession in the delivery of legal services. They both enhance competition, but they will do so in different ways.

Resolution 15 promotes competition from within the bar by facilitating movement of lawyers from one territorial market to another. For now, such movement is limited to the dependents of service members, a relatively small percentage of the bar. This small number should nevertheless not overshadow the significance of their being free from geographical restraints to earn a livelihood and offer the public additional service providers. More important, the CCJ has officially recognized that it is still possible to protect the public and simultaneously strike down these barriers by requiring moving lawyers to acquire knowledge of local law through mandatory education programs.\textsuperscript{156}

There is no reason why the same safeguard cannot work for other lawyers. Resolution 15’s mandate to further lawyer mobility for military spouse lawyers should be extended to the entire bar, given the potential economic and other benefits to lawyers, their families, and the public.

Washington’s LLLT rule promotes competition from professionals—nonlawyer technicians—who are outside the bar. For the first time, consumers have the opportunity to obtain legal assistance from nonlawyers free from lawyer supervision and related surcharges for such oversight. The nonlawyer service should cost less than retaining a lawyer for the same service. More important, it should open access to justice for many Americans.

Also, LLLTs may offer another benefit. Like Jeffersonian notions of democracy, having more persons participate in the economy and the legal system—in this case, LLLTs and hopefully some of those who previously have not accessed the justice system—is a good thing for the profession and society.\textsuperscript{157}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{155} See Wolfram, \emph{supra} note 1, at 776 (noting that the desire of some in the bar to control competition played a role in the profession’s resistance to advertising).
\item \textsuperscript{156} Another important safeguard not expressly stated in Resolution 15 is to make certain that the moving lawyers are in good standing in the profession; for example, there are no pending disciplinary investigations. This important qualification may be subsumed in another provision of Resolution 15. It recognizes that “state bar admission authorities and state supreme courts remain responsible for making admission decisions and enforcing their own rules for admission . . . .” Resolution 15, \emph{supra} note 14; see also Akron LawIT, Miller Becker: Navigating the Practice of Law in the Wake of Ethics 20/20 2013, \textsc{YouTube} (Apr. 5, 2013), http://www.youtube.com/watch?v=2pf_MxxQdCM (predicting a regulatory system in the next fifty years that permits lawyers who are admitted in one state to practice in other states after notifying them and taking a preparatory course on local law).
\item \textsuperscript{157} Luban, \emph{supra} note 121, at 251 (“[T]o deny someone [access and] equality before the law delegitimizes our form of government.”); see Renee Newman Knake, \emph{Democratizing the Delivery of Legal Services}, 73 \textsc{Ohio St. L.J.} 1, 3–10 (2012) (reporting that some experts argue that corporate ownership of law firms, such as ownership by Wal-Mart, may result in a more efficient and affordable delivery of legal services, increasing access to legal
\end{itemize}
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Both Resolution 15 and the LLLT rule are designed to promote consumer welfare by enhancing competition for and access to the delivery of legal services. Whether one or both will produce a net increase in consumer welfare remains an open question. As the Washington Supreme Court said, it has "[n]o . . . crystal ball" to predict the impact of APR 28.158 The same might be said of Resolution 15. At the very least, however, both developments loosen the profession’s monopolistic grip on the legal services market. They also both offer significant promise of enhancing competition in the delivery of legal services and overall consumer welfare.

representation, and identifying a First Amendment basis for corporations delivering legal services through ownership of law firms).

North Carolina’s Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” The Board’s principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is “the practice of dentistry.” Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board’s concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board’s motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in
all respects.

_Held:_ Because a controlling number of the Board’s decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 5–18.

(a) Federal antitrust law is a central safeguard for the Nation’s free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States’ power to regulate. Therefore, beginning with _Parker v. Brown_, 317 U. S. 341, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 5–6.

(b) The Board’s actions are not cloaked with _Parker_ immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys _Parker_ immunity only if “‘the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,’ and . . . ‘the policy . . . [is] actively supervised by the State.’” _FTC v. Phoebe Putney Health System, Inc_. , 568 U. S. ___, ___ (quoting _California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc_. , 445 U. S. 97, 105). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 6–17.

(1) An entity may not invoke _Parker_ immunity unless its actions are an exercise of the State’s sovereign power. See _Columbia v. Omni Outdoor Advertising, Inc_. , 499 U. S. 365, 374. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, _Parker_ immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own. _Midcal_’s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State’s considered definition of the public good and engage in private self-dealing. The second _Midcal_ requirement—active supervision—seeks to avoid this
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harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 6–10.

(2) There are instances in which an actor can be excused from Midcal's active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See Hallie v. Eau Claire, 471 U. S. 34, 35. That Hallie excused municipalities from Midcal's supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of Omni's holding that an otherwise immune entity will not lose immunity based on ad hoc and ex post questioning of its motives for making particular decisions, 499 U. S., at 374, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see FTC v. Ticor Title Ins. Co., 504 U. S. 621, 633, and Phoebe Putney, supra, at ___. The clear lesson of precedent is that Midcal's active supervision test is an essential prerequisite of Parker immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 10–12.

(3) The Board's argument that entities designated by the States as agencies are exempt from Midcal's second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing Midcal's supervision requirement was created to address. See Goldfarb v. Virginia State Bar, 421 U. S. 773, 791. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While Hallie stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy Midcal's active supervision standard. 445 U. S., at 105–106. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See Hallie, supra, at 39. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus,
the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy Midcal's active supervision requirement in order to invoke state-action antitrust immunity. Pp. 12–14.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure Parker immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking Parker immunity must be rejected, see Patrick v. Burget, 486 U. S. 94, 105–106, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 14–16.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive Parker immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists’ competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board’s actions against the nondentists. P. 17.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State’s review mechanisms provide “realistic assurance” that a nonsovereign actor’s anticompetitive conduct “promotes state policy, rather than merely the party’s individual interests.” Patrick, 486 U. S., 100–101. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see id., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see ibid.; and the “mere potential for state
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supervision is not an adequate substitute for a decision by the State,” Ticor, supra, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 17–18.

717 F. 3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.
This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker v. Brown*, 317 U. S. 341 (1943).

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. N. C. Gen. Stat. Ann. §90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” §90–22(b).

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See §§90–29 to
90–41. To perform that function it has broad authority over licensees. See §90–41. The Board’s authority with respect to unlicensed persons, however, is more restricted: like “any resident citizen,” the Board may file suit to “perpetually enjoin any person from . . . unlawfully practicing dentistry.” §90–40.1.

The Act provides that six of the Board’s eight members must be licensed dentists engaged in the active practice of dentistry. §90–22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. Ibid. The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. Ibid. The final member is referred to by the Act as a “consumer” and is appointed by the Governor. Ibid. All members serve 3-year terms, and no person may serve more than two consecutive terms. Ibid. The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See ibid.

Board members swear an oath of office, §138A–22(a), and the Board must comply with the State’s Administrative Procedure Act, §150B–1 et seq., Public Records Act, §132–1 et seq., and open-meetings law, §143–318.9 et seq. The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990’s, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board’s 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower
prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board’s hygienist member nor its consumer member participated in this undertaking. The Board’s chief operations officer remarked that the Board was “going forth to do battle” with nondentists. App. to Pet. for Cert. 103a. The Board’s concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is “the practice of dentistry.”

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease “all activity constituting the practice of dentistry”; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes “the practice of dentistry.” App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Dental Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an
administrative complaint charging the Board with violating §5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. §45. The FTC alleged that the Board’s concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ’s ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a “public/private hybrid” that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ’s ruling. The FTC rejected the Board’s public safety justification, noting, inter alia, “a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure.” Id., at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board’s cease-and-desist orders advising them of the Board’s proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F. 3d 359, 370 (2013). This Court granted certiorari. 571 U. S. ___ (2014).
Federal antitrust law is a central safeguard for the Nation’s free market structures. In this regard it is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” United States v. Topco Associates, Inc., 405 U. S. 596, 610 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 et seq., serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public’s welfare. See FTC v. Ticor Title Ins. Co., 504 U. S. 621, 632 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While “the States regulate their economies in many ways not inconsistent with the antitrust laws,” id., at 635–636, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States’ power to regulate. See Exxon Corp. v. Governor of Maryland, 437 U. S. 117, 133 (1978); see also Easterbrook, Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in Parker v. Brown interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350–351. That ruling

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board’s actions are cloaked with Parker immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys Parker immunity only if it satisfies two requirements: “first that ‘the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,’ and second that ‘the policy . . . be actively supervised by the State.’” FTC v. Phoebe Putney Health System, Inc., 568 U. S. ___, ___ (2013) (slip op., at 7) (quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 105 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

Although state-action immunity exists to avoid conflicts
between state sovereignty and the Nation’s commitment to a policy of robust competition, *Parker* immunity is not unbounded. “[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.’” *Phoebe Putney*, supra, at ___ (slip op., at 7) (quoting *Ticor*, supra, at 636).

An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State’s sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374 (1991). State legislation and “decision[s] of a state supreme court, acting legislatively rather than judicially,” will satisfy this standard, and “ipso facto are exempt from the operation of the antitrust laws” because they are an undeniable exercise of state sovereign authority. *Hoover*, supra, at 567–568.

But while the Sherman Act confers immunity on the States’ own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor. See *Parker*, supra, at 351 (“[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful”). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover*, supra, at 567–568. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791 (1975) (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members”). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of
Parker’s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See Ticor, 504 U. S., at 636.

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See Midcal, supra, at 106 (“The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U. S. 492, 501 (1988); Hoover, supra, at 584 (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence”); see also Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 672 (1991). So it follows that, under Parker and the Supremacy Clause, the States’ greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L. J. 486, 500 (1986).

Parker immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own.
See Goldfarb, supra, at 790; see also 1A P. Areeda & H. Hovencamp, Antitrust Law ¶226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See Ticor, supra, at 634–635. Rather, it is “whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws.” Patrick v. Burget, 486 U. S. 94, 100 (1988).

To answer this question, the Court applies the two-part test set forth in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, a case arising from California’s delegation of price-fixing authority to wine merchants. Under Midcal, “[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.” Ticor, supra, at 631 (citing Midcal, supra, at 105).

Midcal’s clear articulation requirement is satisfied “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” Phoebe Putney, 568 U. S., at ___ (slip op., at 11). The active supervision requirement demands, inter alia, “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” Patrick, supra, U. S., at 101.

The two requirements set forth in Midcal provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may
satisfy this test yet still be defined at so high a level of
generality as to leave open critical questions about how
and to what extent the market should be regulated. See
*Ticor*, *supra*, at 636–637. Entities purporting to act under
state authority might diverge from the State’s considered
definition of the public good. The resulting asymmetry
between a state policy and its implementation can invite
private self-dealing. The second *Midcal* requirement—
active supervision—seeks to avoid this harm by requiring
the State to review and approve interstitial policies made
by the entity claiming immunity.

*Midcal*’s supervision rule “stems from the recognition
that ‘[w]here a private party is engaging in anticompeti­
tive activity, there is a real danger that he is acting to
further his own interests, rather than the governmental
interests of the State.’” *Patrick*, *supra*, at 100. Concern
about the private incentives of active market participants
animates *Midcal*’s supervision mandate, which demands
“realistic assurance that a private party’s anticompetitive
conduct promotes state policy, rather than merely the
party’s individual interests.” *Patrick*, *supra*, at 101.

B

In determining whether anticompetitive policies and
conduct are indeed the action of a State in its sovereign
capacity, there are instances in which an actor can be
excused from *Midcal*’s active supervision requirement. In
*Hallie v. Eau Claire*, 471 U. S. 34, 45 (1985), the Court
held municipalities are subject exclusively to *Midcal*’s
“clear articulation” requirement. That rule, the Court
observed, is consistent with the objective of ensuring that
the policy at issue be one enacted by the State itself.
*Hallie* explained that “[w]here the actor is a municipality,
there is little or no danger that it is involved in a private
price-fixing arrangement. The only real danger is that it
will seek to further purely parochial public interests at the
expense of more overriding state goals.” 471 U. S., at 47. Hallie further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See id., at 45, n. 9. Critically, the municipality in Hallie exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See ibid. That Hallie excused municipalities from Midcal’s supervision rule for these reasons all but confirms the rule’s applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception Hallie identified. See 471 U. S., at 45.

Following Goldfarb, Midcal, and Hallie, which clarified the conditions under which Parker immunity attaches to the conduct of a nonsovereign actor, the Court in Columbia v. Omni Outdoor Advertising, Inc., 499 U. S. 365, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In Omni, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its Parker immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U. S., at 367–368. The Court disagreed, holding there is no “conspiracy exception” to Parker. Omni, supra, at 374.

Omni, like the cases before it, recognized the importance of drawing a line “relevant to the purposes of the Sherman Act and of Parker: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest.” 499 U. S., at 378. In the context of a municipal actor which, as in Hallie, exercised substantial governmental powers, Omni rejected a conspiracy exception for “corruption” as vague and unworkable, since “virtually all regulation benefits some
segments of the society and harms others” and may in that sense be seen as “‘corrupt.’” 499 U. S., at 377. Omni also rejected subjective tests for corruption that would force a “deconstruction of the governmental process and probing of the official ‘intent’ that we have consistently sought to avoid.” Ibid. Thus, whereas the cases preceding it addressed the preconditions of Parker immunity and engaged in an objective, ex ante inquiry into nonsovereign actors’ structure and incentives, Omni made clear that recipients of immunity will not lose it on the basis of ad hoc and ex post questioning of their motives for making particular decisions.

Omni’s holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court’s two state-action immunity cases decided after Omni reinforce this point. In Ticor the Court affirmed that Midcal’s limits on delegation must ensure that “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” 504 U. S., at 633. And in Phoebe Putney the Court observed that Midcal’s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has “an incentive to pursue [its] own self-interest under the guise of implementing state policies.” 568 U. S., at ___ (slip op., at 8) (quoting Hallie, supra, at 46–47). The lesson is clear: Midcal’s active supervision test is an essential prerequisite of Parker immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from Midcal’s second requirement. That premise, however, cannot be reconciled with the Court’s repeated conclusion that the need for supervision
turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing Midcal’s supervision requirement was created to address. See Areeda & Hovencamp ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals. See Patrick, 486 U.S., at 100–101.

The Court applied this reasoning to a state agency in Goldfarb. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had “joined in what is essentially a private anticompetitive activity” for “the benefit of its members.” 421 U.S., at 791, 792. This emphasis on the Bar’s private interests explains why Goldfarb, though it predates Midcal, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U.S., at 791; see also Hoover, 466 U.S., at 569 (emphasizing lack of active supervision in Goldfarb); Bates v. State Bar of Ariz., 433 U.S. 350, 361–362 (1977) (granting the Arizona Bar state-action immunity partly because its “rules are subject to pointed re-examination by the policymaker”).

While Hallie stated “it is likely that active state supervision would also not be required” for agencies, 471 U.S., at 46, n. 10, the entity there, as was later the case in Omni, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market partici-
pants are more similar to private trade associations vested by States with regulatory authority than to the agencies Hallie considered. And as the Court observed three years after Hallie, “[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.” Allied Tube, 486 U. S., at 500. For that reason, those associations must satisfy Midcal’s active supervision standard. See Midcal, 445 U. S., at 105–106.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See Hallie, supra, at 39 (rejecting “purely formalistic” analysis). Parker immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovencamp ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy Midcal’s active supervision requirement in order to invoke state-action antitrust immunity.

D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see Gregory v. Ashcroft, 501 U. S. 452, 460 (1991), and may conclude there are substantial benefits to staffing their
agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U. S. 48, 64 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility* (2014); R. Baker, *Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution* (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of “the privilege and obligation of self-government,” has “call[ed] upon dentists to follow high ethical standards,” including “honesty, compassion, kindness, integrity, fairness and charity.” *American Dental Association, Principles of Ethics and Code of Professional Conduct* 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today’s holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia*, 566 U. S. ___, ___ (2012) (slip op., at 12) (warning in the context of civil rights suits that the “most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts”). But this case, which does not
present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See Goldfarb, 421 U. S., at 792, n. 22; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure Parker immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking Parker immunity:

“[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own.” Patrick, 486 U. S. at 105–106 (footnote omitted).

The reasoning of Patrick v. Burget applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? 162 U. Pa. L. Rev. 1093 (2014).
The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists’ cheaper services, the Board’s dentist members—some of whom offered whitening services—acted to expel the dentists’ competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes “the practice of dentistry” and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni*, 499 U. S., at 371–372, there is no evidence here of any decision by the State to initiate or concur with the Board’s actions against the nondentists.

IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether the State’s review mechanisms provide “realistic assurance” that a nonsovereign actor’s anticom-
petitive conduct “promotes state policy, rather than merely the party’s individual interests.” *Patrick*, *supra*, at 100–101; see also *Ticor*, 504 U. S., at 639–640.

The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U. S., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” *Ticor*, *supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

*   *   *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

*It is so ordered.*
JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court’s decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker v. Brown*, 317 U. S. 341 (1943). In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352. The case now before us involves precisely this type of state regulation—North Carolina’s laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State’s dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff
them in this way.¹ Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.² But that is not what Parker immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by Parker, and the answer to that question is clear. Under Parker, the Sherman Act (and the Federal Trade Commission Act, see FTC v. Ticor Title Ins. Co., 504 U. S. 621, 635 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted Parker; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today’s decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

¹S. White, History of Oral and Dental Science in America 197–214 (1876) (detailing earliest American regulations of the practice of dentistry).
²See, e.g., R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid-19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).
In order to understand the nature of Parker state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate “their purely internal affairs.” *Leisy v. Hardin*, 135 U. S. 100, 122 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.3

The Sherman Act was enacted pursuant to Congress’ power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power “to the utmost extent.” *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, e.g., *Kidd v. Pearson*, 128 U. S. 1, 17–18 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it “exerts a substantial economic effect on interstate commerce.” *Wickard v. Filburn*, 317 U. S. 111, 125 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital

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Building Co. v. Trustees of Rex Hospital, 425 U. S. 738, 743, n. 2 (1976) ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in Parker.

In Parker, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U. S., at 346–347. Raisins were among the regulated commodities, and so the Commission established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. Id., at 347–348. The Parker Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California’s if it had chosen to do so. Id., at 350. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. Id., at 351.

The Court’s holding in Parker was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Con-
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gress 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.” 317 U. S., at 351. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the Parker Court refused to assume that the Act was meant to have such an effect.

When the basis for the Parker state-action doctrine is understood, the Court’s error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States’ sovereign police power. By that time, many States had established medical and dental boards, often staffed by doctors or dentists, and had given those boards the authority to confer and revoke licenses. This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent v. West Virginia*, 129 U. S. 114, 128 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker v. New York*, 170 U. S. 189, 192 (1898), the Court reiterated that a law

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4 Shrylock 54–55; D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23–24 (2012).

5 In *Hawker v. New York*, 170 U. S. 189 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1. See also *Douglas v. Noble*, 261 U. S. 165, 166 (1923) (“In 1893 the legislature of Washington provided that only licensed persons should practice dentistry” and “vested the authority to license in a board of examiners, consisting of five practicing dentists”).
specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the North Carolina Board of Dental Examiners is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry “affect[s] the public health, safety and welfare” of North Carolina’s citizens and that therefore the profession should be “subject to regulation and control in the public interest” in order to ensure “that only qualified persons be permitted to practice dentistry in the State.” N. C. Gen. Stat. Ann. §90–22(a) (2013).
- To further that end, the legislature created the North Carolina State Board of Dental Examiners “as the agency of the State for the regulation of the practice of dentistry in the State.” §90–22(b).
- The legislature specified the membership of the Board. §90–22(c). It defined the “practice of dentistry,” §90–29(b), and it set out standards for licensing practitioners, §90–30. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. §90–41(a).
- The legislature empowered the Board to “maintain an action in the name of the State of North Carolina to perpetually enjoin any person from ... unlawfully practicing dentistry.” §90–40.1(a). It authorized the Board to conduct investigations and to hire legal
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counsel, and the legislature made any “notice or statement of charges against any licensee” a public record under state law. §§ 90–41(d)–(g).

The legislature empowered the Board “to enact rules and regulations governing the practice of dentistry within the State,” consistent with relevant statutes. §90–48. It has required that any such rules be included in the Board’s annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature’s Joint Regulatory Reform Committee. §93B–2. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid*.

As this regulatory regime demonstrates, North Carolina’s Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State’s power in cooperation with other arms of state government. The Board is not a private or “nonsovereign” entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not “‘give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.’” *Ante*, at 7 (quoting *Parker*, 317 U. S., at 351). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co. v. United States*, 193 U. S. 197 (1904), to show what it had in mind. In that case, the Court held that a State’s act of chartering a corporation did not shield the corporation’s monopolizing activities from federal antitrust law. *Id.*, at 344–345. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and
Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are “controlled by active market participants,” ante, at 12, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California’s law first required the petition of at least 10 producers of the particular commodity. *Parker*, 317 U. S., at 346. If the Commission then agreed that a marketing plan was warranted, the Commission would “select a program committee from among nominees chosen by the qualified producers.” *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a “sovereign” when it “adopt[ed] and enfor[c]ed the prorate program.” *Id.*, at 352. This reasoning is irreconcilable with the Court’s today.

III

The Court goes astray because it forgets the origin of the
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Parker doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97 (1980), but the party claiming Parker immunity in that case was not a state agency but a private trade association. Such an entity is entitled to Parker immunity, Midcal held, only if the anticompetitive conduct at issue was both “‘clearly articulated’” and “‘actively supervised by the State itself.’” 445 U. S., at 105. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct by private parties can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore Midcal is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. And for purposes of Parker, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.

Our decision in Hallie v. Eau Claire, 471 U. S. 34 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In Hallie, the plaintiff argued that the two-pronged Midcal test should be applied, but the Court disagreed. The Court acknowledged that municipalities “are not themselves sovereign.” 471 U. S., at 38. But recognizing that a municipality is “an arm of the State,” id., at 45, the Court held that a municipality should be required to satisfy only the first prong of the Midcal test (requiring a clearly articulated state policy), 471 U. S., at 46. That municipalities
are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.


The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court’s approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court’s analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had
engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.*, at 374. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U. S., at 398. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U. S., at 374–379. But that is essentially what the Court has done here.

III

Not only is the Court’s decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States’ regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State’s interest in sensibly regulating a technical profession in which lay people have little expertise.

As a result of today’s decision, States may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because “active market participants” constitute “a controlling number of [the] decisionmakers,” ante, at 14, but this test raises many questions.

What is a “controlling number”? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circum-
stances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an “active market participant”? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person “active” in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court’s approach raises a more fundamental question, and that is why the Court’s inquiry should stop with an examination of the structure of a state licensing board. When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways. So why ask only whether

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6See, e.g., R. Noll, Reforming Regulation 40–43, 46 (1971); J. Wilson, The Politics of Regulation 357–394 (1980). Indeed, it has even been
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the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today’s decision.

IV

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the Parker doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

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