BY THE COURTS, FOR THE BAR: JUDICIAL EXEMPTION OF LAWYERS FROM THE SCOPE OF CONSUMER PROTECTION LAWS

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ABSTRACT

The highest courts in a number of states have invoked the principle of separation of powers in order to insulate lawyers from liability under consumer protection laws. The courts have held that regulation of the bar is a judicial function and cannot be exercised by the legislature through consumer protection statutes prohibiting deceptive trade practices (often called Deceptive Trade Practices Acts, or DTPAs). This article exposes a number of problems with these state court decisions. First, courts rely on the assumption that these DTPAs "regulate" lawyers in a way that treads on the judicial branch's authority. An explicit justification of this assumption would have broader consequences. Second, courts fail to ask whether *judicial* regulation of lawyers fares any better under separation of powers analysis than *legislative* regulation of lawyers. A systemic bias of judges in favor of lawyers is at work in these opinions, which courts should counteract by giving deference to the constitutional and statutory interpretations of other branches. Courts should increase deference to legislatures by abandoning the "clear statement rule" that reads lawyers out of DTPAs as written. Finally, courts should seriously consider the statutory interpretation undertaken by state attorneys general, both because these officers are often charged with enforcing DTPAs and because they are the most obvious officials to look to for the executive branch's interpretation of a statutory provision.

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I.
INTRODUCTION

When Richard and Gloria Preston retained the law firm Richardson, Stoops, Richardson & Ward, they assumed that the firm had licensed attorneys who could represent them in their medical malpractice lawsuit. Using this law firm, the couple sued the doctors who had left broken screws and a broken drill bit in Mr. Preston's leg during a surgery.[1] When the Oklahoma-based law firm filed suit in Arkansas, however, the court dismissed the complaint because none of the lawyers in the firm were licensed to practice in Arkansas.[2] By the time of the dismissal, the statute of limitations had run, so the Prestons were unable to re-file the lawsuit. Ms. Preston, whose husband had passed away by this time, decided to sue the Oklahoma law firm under the Arkansas Deceptive Trade Practices Act (DTPA), a consumer protection statute that provides a cause of action to any consumer who "suffers actual damage or injury" from "[d]eceptive and unconscionable trade practices."[3] She also brought a more traditional breach-of-contract malpractice claim, but the court dismissed that claim on the formalistic grounds that it was impermissibly worded as a tort claim, despite the fact that both parties understood it to be a contract claim.[4] The Arkansas Supreme Court never reached the issue of whether or not the law firm's conduct towards the

1. Preston *ex. rel.* Preston v. Univ. of Ark. for Med. Scis., 128 S.W.3d 430, 431 (Ark. 2003).

2. *Id.* at 433.

3. ARK. CODE ANN. § 4-88-107, 4-88-113 (2012).

4. Substituted Brief and Addendum on Behalf of Appellees Fred E. Stoops, Sr., et al. at 2, Preston *ex. rel.* Preston v. Stoops, 285 S.W.3d 606 (Ark. 2008) (No. 07-805), 2008 WL 5686751 (acknowledging that Ms. Preston had raised a contract claim). The Arkansas Supreme Court concluded that Ms. Preston had raised a tort claim in part because she alleged "damages suffered as a proximate 'result' of Stoops's action." Preston *ex. rel.* Preston v. Stoops, 285 S.W.3d 606, 610 (2008). The court appeared to conclude that the complaint referred to proximate causation, which is a tort concept, and so her claim must be a tort one. *Id.*

Prestons was "deceptive." Instead, it held that the consumer protection statute did not apply to lawyers or law firms in the first place because such application would violate the separation of powers principle in the state's constitution.[5] The court reasoned that the regulation of lawyers was a judicial power, and so the legislature could not create a source of attorney liability. This ruling left the Prestons without a remedy after suffering from clear medical malpractice and even clearer legal malpractice.

In Georgia, after receiving complaints of abusive collection tactics, the Governor's Office of Consumer Protection issued an investigatory subpoena to a debt-collection law firm pursuant to its authority to enforce the state's DTPA.[6] The law firm resisted the subpoena on the grounds that it was exempt from the DTPA and thus the state consumer protection office had no authority to investigate the firm's practices. The state, through the attorney general, sued to enforce the subpoena. In the trial court, the law firm presented the state's former chief justice, who had rejoined the bar after leaving the bench, as an expert on the state's DTPA.[7] He testified to his opinion that the DTPA was unconstitutional as applied to lawyers, an opinion that the trial court credited.[8] The Georgia Supreme Court agreed, relying on a separation of powers argument.[9]

While it may seem odd that a state constitutional doctrine would result in the exemption of a single industry from consumer protection laws, the Arkansas and Georgia decisions are not unique. Almost every state supreme court to address the separation of powers issue has limited the application of DTPAs to lawyers in some way.[10] The typical argument of most of these courts proceeds in three steps. First, the state supreme court says that, as the head of the judicial branch, it has either a textually derived or an inherent constitutional power to

5. *Preston*, 285 S.W.3d at 609.

6. State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., 695 S.E.2d 612, 613–14 (Ga. 2010). The agency is given enforcement power by GA. CODE ANN. § 10-1-395 (2012). The subpoena asked for the firm's debt-collection policies and for information about all consumers targeted for collection between 2006 and 2008, but the request was later limited to the files of only 750 consumers. State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., No. 08-1-11567-34, at 3–4 (Ga. Super. Ct. Sept. 4, 2009), *available at* http://scogblog.files.wordpress.com/2010/02/ga-v-frederick-hannah-cobb-county-order.pdf. The alleged abuses were never outlined.

7. State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., No. 08-1-11567-34, at 4–6 (Ga. Super. Ct. Sept. 4, 2009), *available at* http://scogblog.files.wordpress.com/2010/02/ga-v-frederick-hannah-cobb-county-order.pdf. As of April 2013, that former chief justice, Norman Fletcher, was practicing at a law firm and as a mediator. BRINSON, ASKEW, BERRY, SEIGLER, RICHARDSON, & Davis, http://www.brinson-askew.com/index.php?src=gendocs&ref=Norman%20S.%20Fletcher &category=Attorneys (last visited Apr. 8, 2013); THE GEORGIA ACADEMY OF MEDIATORS & Arbitrators, http://www.georgiamediators.org/norman-fletcher (last visited Apr. 8, 2013).

8. State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., No. 08-1-11567-34, at 4–8 (Ga. Super. Ct., Sept. 4, 2009).

9. State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., 695 S.E.2d 612, 615 (Ga. 2010).

10. *See infra* notes 56–65 and accompanying text.

regulate the practice of law. Then, the court infers that it is the *only* entity permitted to regulate the practice of law. Finally, the court asserts that subjecting lawyers to liability under consumer protection legislation would amount to regulation of the practice of law by the legislative branch. From these three propositions flows the conclusion, according to these courts, that the consumer protection statutes are unconstitutional as applied to lawyers due to the separation of powers principle that one branch cannot exercise the power of another branch.[11]

Other courts take a different approach altogether. Instead of confronting the separation of powers issue directly, these courts avoid the issue by interpreting the text of the DTPAs not to reach lawyers, despite the lack of any evidence to suggest that the legislature intended such a limitation. These courts presume that in light of the serious constitutional question that would be raised by applying the law to lawyers, if the legislature had intended such a consequence, it would have stated so clearly. Finding no such clear statement, these courts avoid the serious constitutional issue by concluding that the scope of the DTPA as written does not include the practice of law.[12]

This article addresses these state court decisions on two levels. It both challenges the decisions on their own terms and suggests that deference by courts to the other branches will produce fairer adjudications of these separation of powers cases. First, the courts' opinions incorporate assumptions that might not be justified. One questionable assumption is that DTPAs actually *regulate* the practice of law.[13] On the contrary, a strong argument can be made that DTPAs do not *regulate* lawyers and thus do not encroach on the judicial power.[14] Courts also narrowly focus on the legitimacy of legislatively created rules as applied to lawyers while failing to ask whether judicially created rules applied to lawyers are any more legitimate. In fact, judicial regulation of the bar frustrates the purposes of separation of powers. Instead of dividing the tasks of rulemaking, enforcement and adjudication among bodies well-equipped to perform those duties, judicial regulation of lawyers places all three duties in the hands of the state supreme court, which is poorly designed to act as a regulatory body.[15] These two criticisms do not focus on the outcomes of the cases, but rather address the reasoning of the courts' decisions. Nonetheless, a revision of the judicial arguments in these cases would likely require reevaluation of the outcomes as well, and because these cases are already so lawyer-friendly, any change would be in the direction of more consumer protection.

This article then suggests that the poor judicial reasoning is a product of the

11. *See infra* Part III.
12. *Id.*
13. *See infra* Part III.A.1.
14. *See infra* Part III.A.2.
15. *See infra* Part III.B.

biases of courts in favor of lawyers and argues that courts should counteract this bias by giving deference to the other branches of government.[16] Conferring immunity upon lawyers becomes a way to entrench into the law a self-important and elitist view of the legal profession as superior to other commercial professions. Courts should recognize their bias and defer to the legislature by forgoing the use of a clear statement rule, a rule that limits the scope of DTPAs without sufficient justification.[17] Courts should also counterbalance the pro-lawyer bias by giving some deference to the interpretation of state attorneys general.[18] This deference would be based both on the administrative law principle that executives charged with enforcing a statute have authority to interpret that statute[19] and the position of attorneys general as democratically accountable executive officers charged with interpreting state constitutions. The adoption of these deferential methods would improve procedural fairness to consumer litigants by allocating part of the decision-making authority to less biased actors, and would likely result in more protection for consumers.

II.
DECEPTIVE TRADE PRACTICES ACTS COMPARED TO OTHER FORMS OF ATTORNEY LIABILITY

DTPAs exist in every state, and broadly prohibit deceptive practices.[20] For example, the main provision of Washington state's DTPA states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[21] Washington's DTPA mirrors the Federal Trade Commission (FTC) Act,[22] while other DTPAs are based on a variety of model acts, such as the Unfair Trade Practices and Consumer Protection Law, the Uniform Deceptive Trade Practices Act, and the Uniform Consumer Sales Practices Act.[23] In addition to the general prohibition, many laws contain a list of specific practices that are deemed to be "unfair or deceptive," such as a seller's making misrepresentations about price reductions

16. *See infra* Part IV.A.

17. *See infra* Part IV.C.1.

18. *See infra* Part IV.C.2.

19. *See infra* notes 181–183 and accompanying text.

20. Randall S. Hetrick, *Unfair Trade Practices Acts Applied to Attorney Conduct*, 18 J. LEGAL PROF. 329, 329–30 (1993). The titles of the laws vary by state. These include "Deceptive Trade Practices Act" (Alabama), "Consumer Fraud Act" (Arizona), "Consumer Protection Act" (Colorado), "Unfair Trade Practices Act" (Connecticut), "Fair Business Practices Act" (Georgia) and other similar permutations. CAROLYN L. CARTER, JONATHAN SHELDON, JOHN W. VAN ALST, ELIZABETH DE ARMOND & STEPHEN GARDNER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES app. A at 1033–54 (7th ed. 2008 & Supp. 2011) [hereinafter UDAP TREATISE].

21. *See* WASH. REV. CODE ANN. § 19.86.020 (West 2012).

22. 15 U.S.C. § 45(a)(1) (2011) (prohibiting "unfair or deceptive acts or practices in or affecting commerce").

23. UDAP TREATISE, *supra* note 20, at §§ 3.4.2.2–3.4.2.5, provides a taxonomy of these laws.

or about the quality of a product.[24] The statutes often specifically exclude certain entities, most commonly insurers and banks,[25] as well as practices permitted under a regulatory scheme.[26] A few states explicitly exempt professional services from the scope of their laws,[27] although most do not. DTPAs themselves often direct courts to construe the statutes liberally and consistent with their remedial purpose.[28] DTPAs often have longer statutes of limitations than common law contract or tort claims, and some DTPAs allow recovery of treble damages and attorneys' fees by a prevailing consumer.[29]

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24. For example, see Georgia's DTPA, which provides:

> (a) Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful.
> (b) By way of illustration only and without limiting the scope of subsection (a) of this Code section, the following practices are declared unlawful:
> . . .
> (7) Representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;
> . . .
> (11) Making false or misleading statements concerning the reasons for, existence of, or amounts of price reductions.

GA. CODE ANN. § 10-1-393 (2012).

25. *See* UDAP TREATISE, *supra* note 20, at §§ 2.3.3.2.

26. *Id.* The New Hampshire Supreme Court previously held that the practice of law fell under this exception because of the court's regulation of the field, but the state legislature disapproved of that interpretation and amended the statute. *See* UDAP TREATISE, *supra* note 20, at §§ 2.3.3.3.2 (describing the 10-year history of the exception in New Hampshire law and criticizing the court's interpretation).

27. *E.g.*, N.C. GEN. STAT. § 75-1.1(b) (2011) (excluding "professional services rendered by a member of a learned profession" from the definition of "commerce"); OHIO REV. CODE ANN. § 1345.01(A) (LexisNexis 2012) (exempting "transactions between attorneys, physicians, or dentists and their clients or patients" from the definition of "consumer transaction"); TEX. BUS. & COM. CODE § 17.49(c) (2012) (excluding "rendering of a professional service" from the scope of the act); MD. CODE ANN., COM. LAW § 13-104(1) (West 2012) (exempting "professional services of a certified public accountant, architect, clergyman, professional engineer, lawyer, [etc.]").

28. DTPAs also sometimes tell courts to construe them consistently with the Federal Trade Commission (FTC) Act. For example, Georgia's DTPA includes both rules of construction:

> (a) The purpose of this part shall be to protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state. It is the intent of the General Assembly that such practices be swiftly stopped, and this part shall be liberally construed and applied to promote its underlying purposes and policies.
> (b) It is the intent of the General Assembly that this part be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended.

GA. CODE ANN. § 10-1-391 (2012).

29. *See, e.g.*, Daniela Ronchetti, *Opening the Door:* Crowe v. Tull *and the Application of the Colorado Consumer Protection Act to Attorneys*, 79 U. COLO. L. REV. 295, 297 (2008) ("[Colorado's DTPA] provides for a longer statute of limitations, mandates treble damages in certain circumstances, and allows a successful plaintiff to recover both the costs of the action and attorney fees.").

To see how DTPAs would apply to lawyers, it is helpful to understand what forms of attorney liability already exist. Rather than a single, comprehensive law of legal malpractice, the landscape of attorney liability is a patchwork of many distinct and often overlapping causes of action. The various causes of action can be categorized by whether the client is suing her own lawyer or whether the plaintiff is suing a litigation opponent's lawyer. When the plaintiff is the lawyer's former client, the most common claims are professional negligence and breach of contract, but can also include such claims as breach of fiduciary duty and fraud.[30] On the other hand, when the plaintiff is suing the lawyer of a legal opponent, the claims are generally limited to fraud, malicious prosecution, and abuse of process.

DTPAs can be more favorable to consumers who are suing their own lawyers. A DTPA claim must allege that the attorney's conduct was "deceptive" or "unconscionable" from the consumer's perspective, so these claims most often arise out of the personal interactions between lawyers and their clients. For example, clients have used DTPAs to sue their lawyers over situations involving fees[31] and the attorney's handling of the client's money.[32] In contrast, a client's complaint about the quality of services rendered would be hard to frame as a DTPA violation.[33] For this reason, the DTPA claims are more likely to supplement a client's claims of fraud and breach of contract, rather than claims of professional negligence.[34] Ms. Preston's case[35] shows how a DTPA claim might differ from other forms of attorney liability because of its focus on the consumer's perspective. In that case, her attorneys' defense to the professional negligence claim would likely have been that the firm had previously practiced across the Arkansas-Oklahoma border; therefore, they were not at fault because

30. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 704–19 (8th ed. 2009).

31. *See, e.g.*, Short v. Demopolis, 691 P.2d 163 (Wash. 1984). In *Short*, an attorney sued his client to recover fees and the client countersued, alleging, among ten different causes of action, that the lawyer engaged in a deceptive trade practice by misrepresenting which lawyer in the firm would work on the client's case, and by attempting to collect fees in excess of the amount agreed upon. *Id.* at 164–65.

32. *See, e.g.*, Beyers v. Richmond, 937 A.2d 1082, 1084 (Pa. 2007) (bringing a case where an attorney admitted to converting a client's settlement funds).

33. Most courts do not allow DTPA claims against attorneys for incompetence or poor legal strategy. UDAP TREATISE, *supra* note 20, at § 2.3.9.

34. DTPAs would be unlikely to apply to legal advice given to a client as long as the lawyer was honest about the nature of and basis for the opinion. *See* Donna S. Harkness, *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*, 11 J.L. & POL'Y 525, 572 (2003). Indeed, in the case of legal advice, DTPAs might provide less protection than the professional negligence standard. For example, a lawyer is required to do some research before giving a legal opinion. If a lawyer gives a legal opinion without doing research, she would fall below the professional standard, but this would not be deceptive if she told the client that the opinion was not based on research.

35. *See supra* Part I.

this was a common practice in the area.[36] This argument might have been raised as a defense to a legal negligence suit because common practice within the profession is relevant to establish the relevant standard of care. The common practice, however, might not have been relevant to the issue of whether or not the lawyers behaved deceptively towards the Prestons. The focus on the consumer rather than on the lawyer is a fundamental difference that makes DTPAs more favorable to consumers in suits against their lawyers.

The DTPA theory also significantly expands the possibility of attorney liability to a litigation opponent. So far, consumers have most often raised DTPA claims in this context when alleging wrongful debt collection.[37] This situation most commonly arises when an attorney attempts to collect a debt[38] and the consumer alleges that the methods used are deceptive or that the debt itself is either illegally usurious or nonexistent.[39] In these situations, fraud or abuse of process would be the most analogous common law claims and both would require the consumer to show an impermissible intent on behalf of the attorney.[40] DTPA claims, however, would be easier to prove because they generally do not require the consumer to prove that the attorney's conduct was intentionally or knowingly deceptive, only that it was deceptive from the perspective of the consumer.[41] Although it could be argued that this standard is

36. Preston *ex. rel.* Preston v. Univ. of Ark. for Med. Scis., 128 S.W.3d 430, 433 (Ark. 2003). A legal negligence claim would require Ms. Preston to prove the professional standard and also prove that the attorneys' conduct fell below that standard. *See* GILLERS, *supra* note 30, at 722–23. Another benefit of consumer protection laws is that they do not require a consumer to present an expert to establish the professional standard in the field. Harkness, *supra* note 34, at 541–42, 551–52.

37. *See, e.g.*, Born v. Hosto & Buchan, PLLC, 2010 Ark. 292, at 2, 372 S.W.3d 324, 328 (addressing a claim of wrongful collection of third-party debt); Jackson v. Whipple, 627 A.2d 374, 375 (Conn. 1993) (addressing a claim of wrongful eviction against a landlord's attorney).

38. The attorney may be collecting debt on behalf of a third party, on her own behalf after purchasing the debt, or on her own behalf for services rendered by the attorney. The federal Fair Debt Collection Practices Act, discussed *infra* at note 147 and accompanying text, would apply only to the first two of these situations. 15 U.S.C. § 1692a(4), (6)(A) (2012). Another situation in which a plaintiff sued the lawyer of his legal adversary is *Jackson v. Whipple*, where the consumer alleged that the lawyer aided a wrongful eviction. 627 A.2d 374 (Conn. 1993).

39. *See, e.g.*, State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., 695 S.E.2d 612, 615 (Ga. 2010) (alleging abusive collection practices); Born v. Hosto & Buchan, PLLC, 2010 Ark. 292, at 2, 372 S.W.3d 324, 328 (class action alleging abusive collection practices); Short v. Demopolis, 691 P.2d 163, 164–65 (Wash. 1984) (alleging that the lawyer attempted to collect legal fees in excess of the amount agreed upon).

40. In *Born* and *Jackson*, the consumers brought claims of fraud and abuse of process in addition to their DTPA claims. *Born*, 2010 Ark. 292, at 2, 372 S.W.3d 324, 328; *Jackson*, 627 A.2d at 376.

41. The Eighth Circuit found that the prohibition of an "unconscionable, false, or deceptive act or practice in business, commerce, or trade" in Arkansas's DTPA did not require intentional or even knowing deception. Curtis Lumber Co. v. Louisiana Pac. Corp., 618 F.3d 762, 776–77 (8th Cir. 2010). DTPAs specify the level of intent in the few situations in which intent is required. Below is part of the laundry list of prohibitions in the Arkansas DTPA. Note that subsection (10), the catchall prohibition, does not have an intent or knowledge requirement:

too low and might subject lawyers to liability for good faith conduct, the lower standard might also be preferable because impermissible intent, even when present, is often very difficult to prove.[42]

The possibility of governmental enforcement is another distinctive feature of DTPAs that can make them more effective than other causes of action. The scenario of the debt-collecting attorney best illustrates this benefit. It is unlikely that consumers targeted by debt-collectors would be able to retain an attorney, but the fact that one firm's practices affect many consumers might make it a priority for government enforcers. Indeed, the governmental entities charged with enforcing DTPAs have brought these sorts of cases in Arkansas and Georgia.[43] Government enforcement of this kind is not possible with other causes of action against lawyers because the government generally lacks standing to sue on behalf of an individual unless that standing is granted by a statute such as a DTPA.

Applying DTPAs to the field of legal services also makes sense because the problems that consumer protection laws were designed to address are also present in the legal services industry. One purpose of these laws—protecting consumers who are at an informational disadvantage in consumer transactions—certainly applies to interactions between attorneys and consumers. For example, when a consumer is searching for a lawyer, she often does not know how strong

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> Deceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, but are not limited to, the following:
> (1) *Knowingly* making a false representation as to the characteristics . . . of goods or services . . . ;
> (2) Disparaging the goods, services, or business of another by false or misleading representation of fact;
> (3) Advertising the goods or services with the *intent* not to sell them as advertised;
> . . .
> (6) *Knowingly* failing to identify flood, water, fire, or accidentally damaged goods as to such damages;
> (7) Making a false representation that contributions solicited for charitable purposes shall be spent in a specific manner or for specified purposes . . .;
> (8) *Knowingly* taking advantage of a consumer who is reasonably unable to protect his or her interest because of [physical infirmity, ignorance, illiteracy, inability to understand the language of the agreement, or any similar factor];
> . . .
> (10) Engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade . . .

ARK. CODE ANN. § 4-88-107(a) (2012) (emphasis added).

42. An analogy would be equal protection law, where the requirement that a plaintiff prove conscious intent to discriminate is a huge barrier to successful litigation even when discrimination is surely present. *See, e.g.*, Miriam Kim, *Discrimination in the Wen Ho Lee Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Race Discrimination Cases*, 9 ASIAN L.J. 117, 137–43 (2002).

43. Hanna & Assocs., 695 S.E.2d 612; Bennett & DeLoney, P.C. v. State *ex. rel.* McDaniel, 388 S.W.3d 12 (Ark. 2012).

her case is or how much work the lawyer will have to do; therefore, plaintiffs' lawyers are able to charge large contingency fees for cases that require relatively little work.[44] This situation is similar to the facts of *Crowe v. Tull*, in which a Colorado consumer brought a DTPA claim against his law firm.[45] The consumer alleged that the firm had advertised that it would recover the "full value [of] its clients' personal injury claims," but that his lawyer then recommended that he accept a grossly insufficient settlement offer.[46] Indeed, a law review article by Nora Freeman Engstrom specifically characterized the defendant firm, Frank Azar & Associates, as a "settlement mill" that operated by settling its clients' claims as quickly as possible.[47] Among other characteristics that support her characterization, Professor Engstrom noted that compensation at the firm was based entirely on commissions from fees charged by the attorney, and that the firm took only 0.3% of its cases to trial.[48] Firms such as this one can continue to operate with this business model because the complexity of legal practice puts consumers at a disadvantage when negotiating services with attorneys.

In sum, DTPAs create a cause of action that considers the interaction between a consumer and an attorney from the perspective of the consumer. This form of liability is not an alternative to "regular" forms of attorney liability because the law of attorney liability is already a collection of distinct yet overlapping causes of action. If applied to lawyers, DTPAs would become just another one of the causes of action that already exist, but the consumer-focus of DTPAs would be an important addition.

III.
STATE SUPREME COURT DECISIONS ABOUT THE APPLICABILITY OF DTPAS TO LAWYERS

Unlike the federal Constitution, many state constitutions have explicit separation of powers clauses.[49] For example, Louisiana's Constitution states that "[t]he powers of government of the state are divided into three separate branches: legislative, executive, and judicial. . . . Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in

44. Victor E. Schwartz, Mark A. Behrens, Cary Silverman & Rochelle M. Tedesco, *Consumer Protection in the Legal Marketplace: A Legal Consumer's Bill of Rights Is Needed*, 15 LOY. CONSUMER L. REV. 1, 3–8 (2002) (citing multiple examples of this practice).

45. Crowe v. Tull, 126 P.3d 196, 199 (Colo. 2006).

46. *Id.*

47. Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1488 n.13 (2009).

48. *Id.* at 1496–97. In addition, the attorney in the firm who brought in the most fees each month was given the "shark" award. *Id.* at 1501.

49. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 337 (2003).

one of them, shall exercise power belonging to either of the others."[50] These clauses often raise as many questions as they answer, leaving judges to create each state's separation of powers doctrine.[51] Many state constitutions also explicitly give their state supreme courts the power over admission to the bar and discipline of those admitted.[52] These clauses are, however, fairly unimportant in determining the outcomes in separation of powers cases, in part because even state supreme courts not explicitly assigned this power have invoked the "inherent powers doctrine" to conclude that they have this power implicitly.[53]

State courts have greatly expanded their power in this area by ruling that their authority to make rules concerning the practice of law is exclusive of the legislature. Professor Charles Wolfram has often criticized this argument, labeling it the "negative inherent powers doctrine" because it is the negative inference of the inherent powers doctrine.[54] In other words, state supreme courts say that because they have an inherent power to regulate the practice of law, any entity that is *not* the supreme court *cannot* have that power. In an extreme application of this doctrine, Pennsylvania courts went so far as to use it to exempt lawyers from the state's Lobbying Disclosure Act even though, as the name suggests, the law had little to do with the courts.[55] This seemingly absurd application of the negative inherent powers doctrine reveals the lack of a coherent theory to support it.

When faced with the question of whether DTPAs can be applied to lawyers, courts take one of three approaches to the constitutional separation of powers

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50. LA. CONST. art. II, §§ 1–2.

51. *Cf.* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 402 (2d ed. 1998). Vile suggests that when deciding a separation of powers case, even "arch-formalist" judges such as Justice Scalia must define what governmental tasks are judicial, legislative and executive, a task for which they have little guidance. *Id.*

52. *See, e.g.*, N.J. CONST. art. VI, § 2, para. 3 (conferring the state supreme court with "jurisdiction over the admission to the practice of law and the discipline of persons admitted"); PA. CONST. art 5, §10(c) (giving the supreme court "the power to prescribe general rules governing practice, procedure . . . and for admission to the bar and to practice law").

53. *See* Benjamin H. Barton, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 105 (2011) ("The legal profession . . . is governed in all fifty states by state supreme courts."). Indeed, courts have historically found the inherent power to admit and disbar lawyers. Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 533–36 (1983) (analyzing the period from 1776 to 1876 and noting that California and New York found that both the state legislatures and the supreme courts had concurrent, but not identical, authority over admission and disbarment).

54. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2.3 (Practitioner's ed. 1986) [hereinafter MODERN LEGAL ETHICS] ("The doctrine is . . . both two dimensional and one-way."); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 6–7 (1989–1990).

55. Gmerek v. State Ethics Comm'n, 807 A.2d 812 (Pa. 2002) (holding that the Lobbying Disclosure Act infringed on the supreme court's exclusive jurisdiction to regulate attorneys because its broad definition of lobbying included the practice of law). The Pennsylvania Supreme Court was evenly divided, so the lower court decision was affirmed.

issue.[56] One approach is a straightforward constitutional analysis: courts first decide whether the DTPA as written would apply to lawyers and then ask whether the application of DTPAs to lawyers would violate any constitutional principle, namely separation of powers. Three state supreme courts have used this approach. All three found that their respective DTPA, as written, would apply to lawyers, but came to different conclusions about the constitutionality of that application. The Colorado Supreme Court has held that applying the state's DTPA to lawyers would *not* violate separation of powers, while the Arkansas and Pennsylvania Supreme Courts have held that imposing liability *would* violate separation of powers.[57]

Using a second approach, Illinois,[58] New Hampshire,[59] and New Jersey[60] read lawyers out of DTPAs in order to avoid the constitutional question. These courts agree that applying DTPAs to lawyers implicates separation of powers concerns, and then check whether the state legislature specifically intended to have the statutes apply to lawyers. In each of these states, the state legislature was silent on the issue, and so the courts concluded that the laws would not apply to legal services, in order to avoid the constitutional question.

The third approach, adopted by Washington,[61] Alaska,[62] Connecticut,[63] and Georgia,[64] adds a complication by bifurcating the issue according to whether the challenged activity falls within the "actual practice of law," which involves the

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56. This article focuses solely on states whose highest courts have used some form of a separation of powers rationale when addressing whether these laws apply to lawyers and the practice of law. Decisions that resolve the issue on purely textual grounds are not discussed here. *E.g.*, Reid v. Ayers, 531 S.E.2d 231, 235 (N.C. Ct. App. 2000) (acknowledging an explicit textual exemption for the learned professions).

57. Crowe v. Tull, 126 P.3d 196, 208 (Colo. 2006) (holding that the Colorado Consumer Protection Act complements, rather than contradicts, the Colorado Supreme Court's implementation of the professional rules for attorneys); Born v. Hosto & Buchan, PLLC, 2010 Ark. 292, at 14–15, 372 S.W.3d 324, 334; Preston *ex. rel.* Preston v. Stoops, 285 S.W.3d 606, 609 (Ark. 2008); Beyers v. Richmond, 937 A.2d 1082, 1093 (Pa. 2007).

58. Cripe v. Leiter, 703 N.E.2d 100, 106 (Ill. 1998).

59. Rousseau v. Eshleman, 519 A.2d 243, 245 (N.H. 1986). *Rousseau* employed a variation of the clear statement rule. It said that the practice of law *did* fall within one of the statute's exceptions because there was no clear statement of legislative intent that the statutory exception did not cover the practice of law. *Id.* This is no longer the law. See UDAP TREATISE, *supra* note 20, at § 2.3.3.3.2, for an account of the back-and-forth between the legislature and the courts over the applicability of New Hampshire's DTPA to lawyers.

60. Macedo v. Dello Russo, 840 A.2d 238, 242 (N.J. 2004); Vort v. Hollander, 607 A.2d 1339, 1342 (N.J. Super. Ct. App. Div. 1992).

61. Short v. Demopolis, 691 P.2d 163, 168–70 (Wash. 1984).

62. Pepper v. Routh Crabtree, APC, 219 P.3d 1017, 1024–25 (Alaska 2009).

63. *See* Haynes v. Yale-New Haven Hosp., 699 A.2d 964, 972–73 (Conn. 1997) (holding that the DTPA does not apply to the actual practice of the "learned professions," including law or medicine). *See also* Heslin v. Conn. Law Clinic of Trantolo & Trantolo, 461 A.2d 938, 945–46 (Conn. 1983) (holding that separation of powers does not prevent the DTPA's application to entrepreneurial aspects of the practice of law).

64. State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., 695 S.E.2d 612, 615 (Ga. 2010).

exercise of legal judgment, or the "entrepreneurial aspects of the practice of law," which include business-like activities such as advertising and billing clients.[65] This method effectively divides the issue and allows the courts to decide each half of the issue differently. As an illustration of the bifurcated approach, Connecticut[66] and Washington[67] hold that the "actual practice of law" is exempt from DTPA liability because it does not fall within the statutory definition of "trade or commerce." These courts only reach the constitutional separation of powers issue with respect to the "entrepreneurial" aspects of the practice of law and hold that separation of powers presents no bar in these situations.

A. Courts Fail to Examine Their Assumption that DTPAs "Regulate" the Practice of Law in a Way that Implicates Separation of Powers

Despite the varied outcomes of cases that question whether DTPAs apply to lawyers, many share a surprisingly similar line of analysis. Once these analytical steps are examined, it becomes clear where courts rely on questionable assumptions and how their reasoning could be improved.

1. The Reasoning in State Court Opinions

When determining the applicability of DTPAs to the practice of law under the constitutional approach, courts must address three issues. First, the court must define the scope of the judicial power over the practice of law.[68] Courts characterize this power in different ways, such as the power to "discipline"[69] attorneys, the power to "regulate the practice of law,"[70] and the power to "regulate attorney conduct and to discipline the members of the bar."[71] Courts must then ask whether subjecting lawyers to the DTPA constitutes "regulation" of the practice of law as the court has just defined it—in other words, whether the statute creates an overlap between judicial and legislative power. Finally, courts must ask whether this overlapping judicial and legislative regulation would violate separation of powers. In practice, courts focus solely on the permissibility of this overlap and in so doing miss an opportunity to resolve the

65. Short, 691 P.2d at 170 (holding that application of the DTPA to the entrepreneurial aspects of the practice of law "does not trench upon the constitutional powers of the court to regulate the practice of law."). *Short* was the first case to draw this distinction.

66. *See* Heslin, 461 A.2d at 943 (Conn. 1983) (finding that Connecticut's DTPA's "regulation of 'the conduct of any trade or commerce' does not totally exclude all conduct of the profession of law.").

67. Short, 691 P.2d at 168.

68. All courts have found that they have a textually based (or even an inherent) judicial power to exercise some amount of control over the conduct of attorneys.

69. Pepper v. Crabtree, 219 P.3d 1017, 1025 (Alaska 2009).

70. Beyers v. Richmond, 937 A.2d 1082, 1086 (Pa. 2007).

71. Heslin v. Conn. Law Clinic of Trantolo & Trantolo, 461 A.2d 938, 944 (Conn. 1983).

case on the question of whether there is overlap at all.

The Arkansas Supreme Court's unanimous decision in *Preston ex. rel. Preston v. Stoops*[72] provides a prime example of a court skipping the necessary step of determining whether the DTPA overlaps with the judicial power. The court devotes only a single paragraph to the separation of powers issue:

> Stoops undertook legal representation of the Prestons when Stoops was not authorized to practice law in Arkansas. Thus, the unauthorized practice of law is at issue. The unauthorized practice of law falls within this court's constitutional authority to control and govern the practice of law. The suggestion that the practice of law can be regulated by an Act of the General Assembly is without merit. Oversight and control of the practice of law is under the exclusive authority of the judiciary. Under *Ark. Const. amend. 28*, "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." That responsibility could not be discharged if it were dependent upon or controlled by statutes enacted by the General Assembly. Further, any action by the General Assembly to control the practice of law would be a violation of the separation-of-powers doctrine. *See Ark. Const. art. 4, §§ 1 & 2.*[73] We affirm the circuit court's finding that the ADTPA does not apply to the practice of law.[74]

Here, the court defines the scope of the judicial power as the "authority to control and govern the practice of law," including the unauthorized practice of law. The court completely skips the step of determining whether or not the DTPA actually does "control and govern the practice of law." The omission is obvious because the DTPA is not even mentioned until the last sentence in the

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72. Preston *ex. rel.* Preston v. Stoops, 285 S.W.3d 606 (Ark. 2008). *See also supra* Part I.

73. These state:

> The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another. No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

ARK. CONST. art. 4, §§ 1–2.

74. Preston, 285 S.W.3d at 609 (internal citations omitted). In *Campbell v. Asbury Auto., Inc.*, the Arkansas Supreme Court quoted this paragraph in its entirety, but then mentioned a different rule by noting that in the past it had "chosen to recognize and apply certain statutes which are not necessarily inconsistent with, or repugnant to, court rules, and do not hinder, interfere with, frustrate, pre-empt or usurp judicial powers." 2011 Ark. 157, at 9, 381 S.W.3d 21, 29 (internal citation omitted). The court did not attempt to reconcile the obvious inconsistency between this rule, which is analogous to conflict preemption, and the rule of *Preston*, which is analogous to field preemption.

paragraph where the court concludes that "the [DTPA] does not apply to the practice of law." Although the court must have at least implicitly concluded that applying the DTPA to the practice of law would "control" or "govern" the practice of law, the opposite conclusion was also plausible, and the issue warranted discussion.

Numerous other state court DTPA decisions have made the same assumption. The Pennsylvania Supreme Court and a Louisiana appellate court have used an argument very similar in structure to that of the Arkansas Supreme Court and have omitted the same step of the reasoning.[75] The Colorado Supreme Court adopted a variation of this pattern in *Crowe v. Tull*.[76] The court started from the premise that the DTPA "overlap[s]" with judicial regulation of lawyers and that the statute "attempt[s] to regulate the same conduct" that the judiciary already regulates.[77] For the court, the case turned entirely on the question of whether the assumed overlap was permissible. On this question, the Colorado court upheld the law as applied to lawyers because it "complements, rather than contradicts," judicial regulation.[78] The court's decision, however, would not benefit many consumers of legal services because of the requirements imposed on plaintiffs raising DTPA claims. In a previous case, the Colorado Supreme Court held that any alleged deceptive practice must also have a public impact,[79] which might be hard to demonstrate outside of the attorney-advertising scenario

75. Beyers, 937 A.2d at 1091 ("The General Assembly has no authority under the Pennsylvania Constitution to regulate the conduct of lawyers in the practice of law. Thus, we conclude that any application of the [DTPA] to the facts of this case would purport to regulate the conduct of attorneys and would be an impermissible encroachment upon the power of this Court."); Thibaut, Thibaut, Garrett & Bacot v. Smith & Loveless, Inc., 576 So. 2d 532, 537 (La. Ct. App. 1990) (on rehearing) ("The Louisiana [DTPA] is an act of the *legislature*. The legislature cannot enact laws defining or regulating the practice of law in any respect; the Louisiana Supreme Court has the exclusive and plenary power to define and regulate all facets of the practice of law, including the conduct of attorneys and the attorney-client relationship . . . . Thus, the [DTPA] is not applicable to the facts of this case.").

76. 126 P.3d 196 (Colo. 2006). The Connecticut Supreme Court took an almost identical approach in *Heslin*, 461 A.2d 938.

77. This assumption appeared in the second sentence of the analysis. 126 P.3d at 205–06 ("The separation-of-powers doctrine 'does not require a complete division of authority among the three branches . . . and the powers exercised by different branches of government necessarily overlap.'") (citation omitted). *See also id.* at 206 ("[S]ome overlap between judicial rulemaking and legislative policy is constitutionally permissible as long as the overlap does not create a substantial conflict."). The court also drew an analogy to statutory construction, noting that "[w]hen two statutes attempt to regulate the same conduct the more specific statute preempts the general statute." *Id.* at 206. The court's unexamined assumption is particularly glaring because the plaintiff specifically argued that the DTPA did *not* "regulate" the practice of law. *Id.* at 206 ("The [plaintiff] would have it that the [DTPA] does not regulate the practice of law and does not interfere with this court's regulatory powers.").

78. *Id.* at 208.

79. *See* Hall v. Walter, 969 P.2d 224, 234 (Colo. 1998) (recognizing a "public interest" component of a claim under the Colorado DTPA).

of *Crowe v. Tull*.[80] Apart from the limited benefit it provided to consumers, the Colorado court's opinion would have been stronger if the court had examined its assumption that the DTPA and judicial regulation were actually overlapping.

2. Corrections to the Courts' Reasoning

A valid argument exists supporting the theory that DTPAs do not regulate the practice of law and that there is no need to reach the question of whether overlapping regulation is permissible. When a court claims the power to *regulate* the practice of law and then implies that DTPAs *regulate* the practice of law, it is employing two different conceptions of "regulation." When a court asserts the authority to "regulate" the practice of law, it means that it has the power to make rules that *only* apply to the practice of law. This power makes sense. For example, courts could surely make rules directed at Limited Liability Partnerships (LLPs) that engage in the practice of law,[81] but would not be able to make rules that apply to all LLPs simply because some such partnerships are law firms. In contrast, when courts say that a DTPA "regulates" the practice of law, they mean that the DTPA applies to the practice of law, among many other activities. In this situation, courts are using "regulate" as a synonym for "affect." The courts' reasoning thus rests upon the logical fallacy of equivocation, where a term is used in subtly different ways in order to draw a false conclusion.[82]

One solution to this equivocation would be to simply conclude that DTPAs do not "regulate" the practice of law, as they do not apply to lawyers alone.[83] This holding would allow the legislature to pass general laws that apply to everyone, including lawyers, without treading on the court's arguably exclusive domain of making rules that apply only to lawyers. However, no court has adequately made this argument in a DTPA case. Although two dissenting opinions have hinted at this argument, neither explained it fully. In a Georgia Supreme Court case, three dissenters argued that "the [DTPA] is a law of general

80. Ronchetti, *supra* note 29, at 295 (arguing that "in most cases, a client will not be able to successfully pursue a [DTPA] claim against his or her attorney [in part because] a client will have difficulty proving the public impact of [the deceptive] trade practice").

81. *See, e.g.*, N.J. CT. R. 1:21-1C (2013) (creating rules for Limited Liability Partnerships that engage in the practice of law).

82. PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 160–62 (5th ed. 1994). One example of the fallacy is the following argument: "Any law can be repealed by the legislative authority. But the law of gravity is a law. Therefore, the law of gravity can be repealed by the legislative authority." *Id.*

83. There are other definitions of "regulation" that would similarly include normal judicial oversight of lawyers, but would not include DTPAs. For example, DTPAs might not "regulate" the practice of law because they do not disproportionately affect lawyers, and were not actually intended by legislatures to affect lawyers in particular. The courts could also ask the factual question of whether or not the prohibition of deceptive trade practices *actually* affects lawyers' behavior. Instead, courts simply speculate that strengthening the incentives against deception that are already in place is "regulation." No court has put the burden on a litigant challenging DTPAs to show that the laws actually affect attorney conduct.

application that has nothing to do with impermissibly regulating the practice of law in violation of separation of powers."[84] Another dissent raised the issue briefly in a Pennsylvania case, arguing that "[t]he [DTPA] is not a law directed at regulating attorneys; rather, it is a law of general applicability."[85] Still, these dissenters seem to merely be expressing their intuitions and do not develop the argument enough to connect it to the logical missteps made by the respective majority opinions.

A second solution would be to decouple the scope of what the judiciary can do from the scope of what the legislature cannot do. This would essentially be a renunciation of the inference used by courts to justify the negative inherent powers doctrine and would require a new theory for why the legislature cannot pass laws that apply to lawyers. The current rationale—that because the judicial branch has the power, the legislature cannot exercise the same power—would not suffice.

The United States Supreme Court's "Negative Commerce Clause" jurisprudence is a good analogue and illustrates some of the principles that would need to be developed if this type of logic were used to analyze the validity of laws affecting lawyers. The Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[86] The Supreme Court has interpreted this clause extremely broadly such that it can justify almost any congressional statute.[87] The Supreme Court has also inferred from this grant of power to Congress a corresponding prohibition on the states. Yet in doing so, the Court did not just draw a negative inference, as the state courts have done in the DTPA context. If the Court had done no more than that, the rule would have been that, because Congress *can* regulate interstate commerce, the states *cannot* regulate interstate commerce. Such a rule would invalidate a huge number of state laws. Instead, the Court has only invalidated the few state laws that discriminate against or impose an undue burden on interstate commerce.[88] The Court arrived at this conclusion by first determining that the Commerce Clause was designed to

84. State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., 695 S.E.2d 612, 616 (Ga. 2010) (Melton, J., dissenting). Alternatively, the dissent can be read as drawing a questionable distinction between *investigating* a possible DTPA violation and *imposing liability* for a DTPA violation. *Id.*

85. Beyers v. Richmond, 937 A.2d 1082, 1094 (Pa. 2007) (Eakin, J., dissenting). A third opinion has invoked the idea of "general applicability," but linked it to the second issue of whether or not overlap is permissible. Heslin v. Conn. Law Clinic of Trantolo & Trantolo, 461 A.2d 938, 945 (Conn. 1983) ("That the [DTPA], a statute of general applicability, may overlap with disciplinary rules specific to attorney conduct does not render the statute unconstitutional.").

86. U.S. CONST. art. I, § 8, cl. 3.

87. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that the Commerce Clause, along with the Necessary and Proper clause, allows Congress to prohibit growing marijuana at home for personal use as a valid "regulation" of interstate commerce).

88. Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1926–27 (2011).

prevent interstate trade barriers and state protectionism and then creating a doctrine that prohibited only those sorts of laws.[89]

In order to adapt these principles to the regulation of lawyers, courts would have to come up with a new theory that considers the purpose of giving the judiciary the power to regulate the practice of law. Courts would likely find that they were given this regulatory power to protect their independence and to aid them in efficiently administering justice. Indeed, this observation served as the original justification for the negative inherent powers doctrine.[90] However, the doctrine was soon untethered from this rationale and instead transformed into the broader stand-alone principle that only the state supreme court could regulate lawyers.[91] Some commentators have argued that courts should return to a rule invalidating only those legislative acts that can arguably affect the administration of justice.[92] Courts could also arrive at this same rule by analyzing the separation of powers issue using the same analytical steps used in the negative commerce clause jurisprudence. However, courts have not accepted this approach in DTPA cases. The closest any court has come to providing such a justification was a vague speculation in a Connecticut case that, if the law could be used against the lawyers of legal adversaries, it would "chill" justiciable claims.[93] Other than this one weak suggestion, courts continue to engage in incomplete constitutional analyses by arguing that legislatures *cannot* regulate deceptive legal practice simply because courts *can*, without attempting to explain how such regulation would distort the judicial function.

B. Judicial Regulation of the Practice of Law Frustrates Separation of Powers Purposes

Courts should frame the separation of powers issue in DTPA cases differently. Courts often approach the issue of whether DTPAs apply to lawyers by asking whether the legislative branch has encroached on a judicial power. This treats judicial regulation as the default without questioning whether judicial assertion of an exclusive right to regulate the practice of law itself violates separation of powers. By analyzing state supreme courts' regulation of lawyers, it becomes clear that this power is inconsistent with the "liberty" and

89. *See id.* at 1880.

90. *See* Alpert, *supra* note 53, at 536–50.

91. *Id.* Alpert also notes that it was the bar associations that pushed for the expansion of the court's power. *Id.* at 537.

92. Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 796–804 (1976). An interesting variation of this proposal suggests that the legislature and judiciary should have concurrent jurisdiction over the practice and procedure of the courts, but that before the legislature can make such a rule, it must give the state supreme court's chief justice a chance to be heard. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 42 (1958).

93. Jackson v. Whipple, 627 A.2d 374, 381 n.11 (Conn. 1993).

"institutional competence" rationales for separation of powers.[94] Judicial regulation violates the "liberty" principle justifying the separation of powers because it concentrates the powers of rulemaking, enforcement, and adjudication all in the state supreme court. Judicial regulation also frustrates the "institutional competence" principle justifying the separation of powers because a court is poorly designed to act as a regulatory body. This is not to say that state supreme courts should abstain from regulating lawyers altogether, only that the shakiness of judicial regulation under separation of powers theory should be a countervailing consideration against the deficiencies of legislative regulation of the practice of law. In order to take a more balanced perspective, courts should ask how the power to make legal rules that apply to lawyers should be allocated between the judicial and legislative branches.[95]

1. The Liberty Purpose

Judicial regulation of lawyers is questionable under the "liberty" rationale for separation of powers. This component of separation of powers theory is concerned with the threat of tyranny that results when two or more of the basic powers of government are consolidated in a single branch.[96] This rationale is best illustrated in the criminal context. In order for a person's liberty to be taken away for committing a crime, the legislature must first make a general law prohibiting the act.[97] Next, the executive must decide, within her prosecutorial discretion, that the law is worthy of enforcement against the particular person. Finally the courts perform the "particularization" function of deciding whether the general law is properly applied to the specific person.[98] This division of responsibilities is a structural check on government power, because any one of the three branches can stop the force of the government from acting on the citizen. This check only works if each branch is able to exercise its power

94. These two rationales have been the basis for separation of powers since the principle was set out by Montesquieu. C. MONTESQUIEU, THE SPIRIT OF THE LAWS (T. Nugent trans. 1949). *See* Burt Neuborne, *In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to Separation of Powers*, 26 LAND & WATER L. REV. 385, 389 (1991).

95. This broad framing of the question is adopted in a number of scholarly articles. *See, e.g.*, Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation–Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799, 805–09 (1992).

96. One formulation of this principle is that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

97. *See* U.S. CONST. art. I, § 9-10 (prohibiting Congress and the states from passing bills of attainder and ex post facto laws); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 137 (8th ed. 2007) ("[N]early all American jurisdictions . . . have now abolished the common law doctrine that courts can create new crimes.").

98. Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 67 N.Y.U. L. REV. 363, 370 (1982).

independently of the other branches. It is this principle of inter-branch independence that is codified by the separation of powers clauses in state constitutions.[99]

A separation of powers analysis of judicial regulation of lawyers must take account of how the rulemaking, enforcement, and adjudicatory functions are carried out. The mechanics of attorney regulation differ among the states, but the ABA Model Rules for Lawyer Disciplinary Enforcement provides a useful model.[100] Under this system, the investigation and prosecution tasks are delegated to an agency in the judicial branch.[101] A board of nine members appointed by the state supreme court leads this agency.[102] The board members are removable only for cause and at the end of their three-year terms may be reappointed for a second term.[103] The board then appoints the members of three-person hearing committees, which hear disciplinary cases.[104] The prosecutorial function is performed by a disciplinary counsel chosen and removable by the state supreme court.[105] The agency's board sits in appellate review of the hearing committees on issues of fact and law, and the supreme court exercises discretionary review over the board's decisions. [106] Thus, although the supreme court is insulated from selecting the trial-level hearing committees, it appoints and can dismiss the prosecutor, and has final review over adjudications.

When this is combined with the fact that state supreme courts also create the rules,[107] this arrangement may violate separation of powers principles because the court can change the rules ex ante, control prosecutorial discretion, or change the rules ex post through adjudication.[108] This model structure looks similar to that of executive agencies, which regularly exercise rule-making, enforcement, and adjudicative functions. But to draw the analogy does little to defend this institutional structure from separation of powers critiques. Indeed, the

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99. *See supra* notes 49–50 and accompanying text.

100. *See* GILLERS, *supra* note 30, at 804.

101. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2.1 (2002). There is no good survey of state practices.

102. *Id.* at R. 2.2.

103. *Id.*

104. *Id.* at R. 3.1.

105. *Id.* at R. 4.1, 4.2. The Rules do not mention removal, so the disciplinary counsel is likely removable at will. The Disciplinary Counsel's use of prosecutorial discretion to dismiss a complaint is appealable by the consumer to the head of one of the Hearing Committees, but the committee member can only order more investigation, rather than being able to order that the counsel actually prosecute. *See id.* at R. 31.

106. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11.5, 11.6 (2002).

107. *See, e.g.*, *In re* Ark. Bar Ass'n Petition, 2005 Ark. LEXIS 787 (Ark. 2005) (per curiam) (adopting the bar association's suggested rules of professional conduct).

108. *See* MODERN LEGAL ETHICS, *supra* note 54, at § 2.2.1 ("One uncomfortable consequence [of judicial regulation of the bar] is that the same body that promulgates comprehensive sets of rules regulating the conduct of lawyers must also sit as the body that determines their validity if later attacked.").

administrative state is often criticized as violating separation of powers principles, although courts have sustained its constitutionality by requiring the legislature to provide guiding principles to agencies and requiring judicial review of agencies' actions.[109] Even these minimal external protections are absent when the supreme court regulates the practice of law.

This argument that judicial regulation of the bar frustrates the "liberty" purpose of separation of powers is similar to the familiar criticisms of lawyer "self-regulation."[110] These criticisms focus on the fact that bar associations often end up writing the rules by which lawyers must abide, leading to an obvious incentive to make lenient and self-interested rules.[111] The intuition that lawyer regulation is too friendly is correct, but the separation of powers criticism is slightly different. The self-regulation criticism is driven by a fear of weak and self-serving rules, while the separation of powers criticism is driven by a fear of arbitrary regulation as a result of one entity's control over all three governmental functions. In many states, this negative separation of powers principle is violated because the supreme court has the ultimate authority over the rulemaking, prosecutorial, and adjudicative functions of lawyer regulation.

2. The Institutional Competence Purpose

The "institutional competence" rationale (also called the "efficiency"[112] rationale) says that each governmental function should be exercised by the branch best designed for that task, as determined by its organizational structure, its mode of action, and its method for selecting members.[113] Within this

109. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236–1237 (1994) (arguing the administrative state is now unconstitutional because of the "death[s]" of the non-delegation doctrine and independent judicial review of administrative action).

110. There is some variation on how the term "self-regulation" is used. Gillers, for example, says that the bar "self-regulates" because state supreme courts rubber-stamp the bar's proposed rules and delegate enforcement to the bar, making the bar the real regulatory body. *See* GILLERS, *supra* note 30, at 9–10. Other commentators say that lawyers "self-regulate" even when the state supreme court takes an active role in the process, because the justices themselves are lawyers. *See, e.g.*, Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 461 (2008) ("[T]he state supreme courts, and not state legislatures, govern lawyer regulation. Thus lawyers have the only true claim to professional self-regulation: from top to bottom they are governed by lawyers."). This article uses the former meaning.

111. *See* GILLERS, *supra* note 30, at 9.

112. W.B. GWYN, THE MEANING OF SEPARATION OF POWERS 127 (Tulane Univ. Press 1965) (concluding that separation of powers has been urged, in part, to "create greater governmental efficiency"). Use of this term, however, can be confusing because the liberty rationale contains "a degree of purposeful inefficiency." Neuborne, *Judicial Review*, *supra* note 98, at 368. This inefficiency required by the liberty rationale is the inefficiency of requiring coordinated, rather than unilateral action, while the so-called "efficiency" aim of separation of powers refers to the efficiency gained through specialization, such as the efficiency of an assembly line. *Id.*

113. *See* Neuborne, *Seventh-Grade Civics*, *supra* note 94, at 389–90 (describing how each branch of the federal government is formed and organized to suit the task that it is assigned).

framework, the legislature is the best branch for making general laws because it is large, bicameral, deliberative, and accountable to the people. The executive, on the other hand, is the unitary head of a hierarchical branch and may take action with few procedural limitations. This allows for quick action and secrecy when necessary. Finally, the judiciary is made up of judges who are highly trained and relatively insulated from political pressure, which allows them to make decisions independently.[114]

A state supreme court's regulation of lawyers is inconsistent with the institutional competence purpose justifying the separation of powers because a court is not well designed to act as a regulatory body. State supreme courts are designed to perform their core task of providing deliberative and fair decisions in cases that come to the court. All state supreme courts have five, seven, or nine justices,[115] making them large enough to average out idiosyncratic beliefs of individual members, but small enough to announce clear rules of law.[116] In order for this averaging to occur, each justice must come to her conclusion independently. For this reason, justices have isolated chambers rather than a more collaborative organizational structure.[117] The justices also remain isolated from the public by design so that they will ideally decide cases based on the law rather than on political pressure or public opinion. However, these design features also make it difficult for the court to act as a regulatory body.

The first problem is that the courts are not good at deciding when to take action. Under a *Marbury* model of judicial review, courts are passive institutions

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114. *Id.* at 390.

115. *See* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 204–05 (2011) [hereinafter BOOK OF THE STATES]. The odd number of justices in each state supreme court is a reflection of the fact that they are designed to operate by majority rule. Another reason that supreme courts might be bad at regulation is because judicial rulemaking requires a consensus, as courts normally adopt rules in unanimous per curiam decisions.

116. *See* F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 648 (2009) (arguing that the ideal size for a supreme court depends on balancing the different purposes, which include "reach[ing] not only 'correct' decisions, but also decisions that the lower courts and others can understand and apply").

117. Although the justices' chambers are not kept as independent as those in the United States Supreme Court, all state supreme courts use in-chambers clerks who work only for one justice, with a an average of about two clerks per judge. Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24, 26 (2008). A common practice seems to be that one of the clerks for the judge assigned to write the opinion produces a bench memorandum, which is circulated among all the justices. *See, e.g.*, Kermit V. Lipez, *Some Reflections on Dissenting*, 57 ME. L. REV. 313, 318 (2005) (Maine Supreme Judicial Court); Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 446, 453–54 (2005) (Florida Supreme Court). The results of one survey showed that, "In short, the large majority of the state supreme court justices interviewed perceived other justices on their courts as playing a substantial role in their decision-making processes. It seems to be primarily only when a court suffers from a marked lack of collegiality that judges do not significantly affect each other's decision-making processes." Rick A. Swanson, *Judicial Perceptions of Voting Fluidity on State Supreme Courts*, 28 JUST. SYS. J. 199, 203 (2007).

that sit idly until litigants come forward with a case that demands judicial resolution.[118] State courts are not necessarily limited to hearing cases and controversies, but even in states that allow their supreme courts to issue advisory opinions, these opinions generally must be solicited by another branch.[119] To illustrate the difference, legislators have constituencies to whom they must be accessible in order to survive relatively frequent elections, so they are constantly under pressure to address certain problems. Thus, because courts are not institutionally designed to initiate action on a particular problem, they may be slow to adopt needed regulation.

State supreme courts also lack the investigative and fact-finding tools that are necessary for adequate regulation. Rule-making bodies such as legislatures typically hold hearings and summon experts and interested parties to give testimony about an issue before promulgating rules. In the adversarial judicial system, however, judges rely on the litigants to investigate and bring evidence to the court. Still, some commentators have argued that state supreme court justices have expertise in the area of lawyer regulation because they know what the needs of the court are and, as former lawyers themselves, know how regulations will affect the legal market.[120] This suggests that judges can make rules based on personal experience rather than outside fact-finding. This is unlikely, however, given the diverse contexts of legal practice.[121] Furthermore, this "expertise" argument focuses only on lawyers and seems to ignore the needs of clients and the general public. Thus, because courts are accustomed to having facts presented to them in adversarial proceedings, they not well adapted for investigating the need for lawyer regulation. This might be one reason why supreme courts often turn to bar associations to write the rules.

In sum, when supreme courts attempt to make rules regulating the practice of law, they are both forced to do a job that the institution of the court is not structured for and forced to conduct this regulation through a process that is contrary to their normal means of functioning.[122] These considerations suggest that judicial regulation of attorneys frustrates the institutional competence purpose of separated powers. This is not to say that supreme courts should be prohibited from regulating the practice of law. The argument only suggests that courts should not invoke separation of powers to place exclusive regulatory authority within the judiciary without recognizing countervailing considerations,

118. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72–73 (6th ed. 2009).

119. *See, e.g.*, Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 213–16 (1997) (surveying the procedural requirements and limitations on advisory opinions in the states where such opinions are allowed).

120. Barton, *supra* note 95, at 1210.

121. *See* GILLERS, *supra* note 30, at 11.

122. For an article rejecting many of these arguments on empirical grounds in the context of procedural rule-making by state courts, see Levin & Amsterdam, *supra* note 92, at 12–14.

also drawn from separation of powers principles, which suggest that it is less than ideal to vest a state supreme court with regulatory authority.

IV.
THE NEED FOR NEW JUDICIAL TOOLS

In addition to the two modifications to judicial analyses suggested above, new tools of judicial deference are also needed. Courts should acknowledge that they are affected by systemic biases favoring the interests of lawyers and should correct for this by exercising increased deference to the other two branches of government that may be less affected by this bias. State attorneys general should present the courts with their independent evaluation of the constitutional separation of powers issue and courts should seriously consider these executive-branch interpretations. As deference to the legislative branch, courts should refrain from using a clear statement rule and should instead presume that generally applicable statutes apply to lawyers unless the courts can articulate why they should not apply.

A. The Problem: Judicial Favoritism Towards Lawyers

Systemic biases in favor of lawyers arise from a combination of three relationships between judges and lawyers. First, judges are past and future legal practitioners; therefore, by favoring lawyers, judges favor themselves. Second, even where judges and practitioners have divergent interests, they are both members of a common legal fraternity and the status of judges depends in part on the prestige of lawyers. Third, judges depend on political and financial support from the legal community to further their judicial careers. These factors combine to explain the incentive for state court judges to favor lawyers.

The first reason that judges might favor the interests of the legal community is that judges are lawyers themselves.[123] Not only have judges been legal practitioners in the past, but also state supreme court justices do not serve for life,[124] so judges can foresee rejoining the ranks of practicing attorneys if they are not reappointed or lose an election.[125] Indeed, former justices are not immune from ethical violations. For example, after stepping down from the Montana Supreme Court, Justice Dan Shea returned to practice and was later

123. All the justices on every state supreme court have been trained as lawyers. Barton, *supra* note 95, at 1185 n.64. Of course justices do not practice while they are on the bench, and are often prohibited from doing so. *See, e.g.*, ARK. CONST. amend. LXXX, § 14.

124. Rhode Island is an exception, where the justices are appointed for life. *See* BOOK OF THE STATES, *supra* note 115, at 204–05. In Massachusetts the justices serve until the age of 70. *Id.* In all other states, the justices serve for a term of years. *Id.*

125. In one example, the president of the Texas state bar and a former Texas Supreme Court justice started a private practice together. *See* Kelley Jones King, *New State Bar President Blazes Her Own Trail: Betsy Whitaker of Dallas: "What a Fun Time We Live In,"* 66 TEX. B. J. 494, 496 (2003).

disbarred for mishandling cases and then continuing to practice while he was suspended.[126] The defendants in the Georgia DTPA case of *State ex. rel. Doyle v. Frederick J. Hanna & Associates* highlighted this connection between judges and practicing lawyers when they presented the testimony of the state's former chief justice, Norman Fletcher, who had returned to practice.[127] In this context, the justices deciding that case were surely aware of how thin the line is between judge and practicing attorney.

Judges' actions may also be influenced by the fact that they have an interest in supporting lawyers in order to maintain the prestige of the profession.[128] The cultivation of solidarity among the legal profession starts in law school, where students are taught to "think like a lawyer" over the course of a three-year training with a highly standardized curriculum.[129] Another persistent trope that reveals elitist attitudes in the legal profession is the invocation of lawyers as "officers of the court."[130] Of course lawyers are not "officers" at all, unless the word is completely redefined for the purpose of including lawyers within its definition.[131] The label is often justified by pointing to the duty of honesty and good faith the lawyer owes to the court,[132] but lawyers are hardly unique in having such a duty of good faith. Another linguistic example is the idea that law is a "learned profession" and so it cannot be regulated as if it were a lesser occupation. The United States Supreme Court put to rest the "learned professions" exception to federal antitrust law in 1975,[133] but the phrase and the privilege that the label bestows are still alive in state court decisions.[134]

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126. *See Commission on Practice Says Ex-Justice Dan Shea Should Be Disbarred*, 32-JAN MONT. LAW. 19, 19 (Dec. 2006–Jan. 2007) ("Mr. Shea was a Montana Supreme Court justice from 1977 to 1984. He agreed to have his attorney's license suspended in 1989 after mishandling some cases as a private lawyer."). The commission recommended disbarment when he continued to practice without a license after the suspension. *See id.* Shea was disbarred on March 21, 2007. OFFICE OF DISCIPLINARY COUNSEL FOR THE STATE OF MONTANA, PUBLIC DISCIPLINE OF ATTORNEYS, *available at* http://www.montanaodc.org/Portals/ODC/Public%20Discipline%20List.pdf.

127. State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., No. 08-1-11567-34 at 4–6 (Ga. Super. Ct. Sept. 4, 2009), *available at* http://scogblog.files.wordpress.com/2010/02/ga-v-frederick-hannah-cobb-county-order.pdf. As of April 2013, Fletcher was practicing at a law firm and as a mediator. BRINSON, ASKEW, BERRY, SEIGLER, RICHARDSON, & Davis, http://www.brinson-askew.com/index.php?src=gendocs&ref=Norman%20S.%20Fletcher&category=Attorneys (last visited Apr. 8, 2013); THE GEORGIA ACADEMY OF MEDIATORS & Arbitrators, http://www.georgiamediators.org/norman-fletcher (last visited Apr. 8, 2013).

128. Barton, *supra* note 95, at 1195.

129. Barton, *supra* note 110, at 456.

130. *See generally* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989).

131. *Id.* at 42–43 (arguing that the "characterization of lawyers as officers of the court has no meaning independent of the term 'lawyer'").

132. *Id.*

133. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975).

134. *See, e.g.*, Macedo v. Dello Russo, 840 A.2d 238, 242 (N.J. 2004) ("[T]oday, forty years after the [DTPA] was enacted, our jurisprudence continues to identify learned professionals as

It should not be surprising that bar associations often file briefs in DTPA cases arguing against attorney liability. Still, one example of lawyers breaking rank with this mutually self-protecting alliance is in the Washington DTPA case, *Short v. Demopolis*. In that case, the National Lawyers Guild, the National Conference of Black Lawyers, and La Raza Lawyers Association filed an amicus brief in favor of holding lawyers accountable under the Washington DTPA, stressing the needs of the public.[135] The coalition in Washington rejected the practice of "[singling] out lawyers for special immunity," and suggested that "if any distinction were to be drawn, greater responsibility should be imposed upon the legal profession."[136] Perhaps as organizations acutely aware of white male cronyism within the legal community,[137] they could see that the privilege that they were being offered came at the expense of others. The Washington Supreme Court did not acknowledge the brief in its opinion, and instead held that the DTPA could not be applied to the "actual" practice of law, but could be applied to its "entrepreneurial aspects."[138]

Judges also have an incentive to protect lawyers because those lawyers are often judges' biggest supporters. Judges recognize that they may need to curry favor with the bar in order to maintain their positions, and making pro-lawyer decisions is one way to accomplish this. Professor Benjamin Barton gives a good summary of the multiple ways in which judges need support from the bar for their careers:

> Most state judges are elected (either in contested or retention elections), and lawyers provide most of the elected judiciary's campaign donations. In states where judges are elected, bar associations endorse judicial candidates and publish "bar polls" ranking the judges. In states that feature a judicial merit plan, judges are selected through processes that grant state and local bar associations substantial selection authority. Moreover, judges need a favorable rating from the ABA if they have hopes of being confirmed to the federal bench. Bar associations have further massaged the judicial salary incentive by working tirelessly for higher salaries for judges.[139]

Thus, regardless of the state's method of selecting supreme court justices,

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beyond the reach of the Act so long as they are operating in their professional capacities.").

135. Brief for National Lawyers Guild (Seattle Chapter), National Conference of Black Lawyers (Seattle Chapter), & La Raza Lawyers Association as Amici Curiae Supporting Petitioner, Short v. Demopolis, 691 P.2d 163 (Wash. 1984) (No. 49617-0).

136. *Id.* at 5–6.

137. *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976) (discussing the history of discrimination and stratification along race, class, and gender lines within the legal community).

138. Short v. Demopolis, 691 P.2d 163, 168–70 (Wash. 1984).

139. Barton, *supra* note 110, at 458.

those who get the job are likely to be indebted to the bar.

There is good reason to suspect that these incentives for judges to favor the interests of lawyers actually affect the outcomes of cases. A number of studies have found that motivational incentives of judges do translate into how cases are decided.[140] Specifically with respect to favoritism toward lawyers, Professor Barton has surveyed the law of professional responsibility, evidence, constitutional law, criminal procedure, employment law, and torts, looking for such a pattern.[141] The pattern he found was so strong that he proposed that the outcome of any case can be predicted by asking, "is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession."[142] These studies suggest that the motivational biases felt by judges are more than just incentives and that they do translate into decisions that favor the interests of lawyers.

B. The Inadequacy of Alternative Sources of Correction

The need for self-imposed judicial constraints might be lessened if there were an entity that could correct the courts' bias in favor of lawyers. However, once a state supreme court has ruled on state constitutional issue, there are only a limited number of ways that the decision can be overturned or superseded. At the federal level, each branch of government could conceivably weigh in on the issue in order to overrule state courts. Federal courts could use federal constitutional law to overrule state decisions on a federal question, and Congress or the executive branch could craft new statutes or regulations that supersede or preempt state law. At the state level, the state constitution would have to be amended to supersede the state supreme court's decision, because of judicial supremacy. All of these alternatives, however, are inadequate.

First, the federal Constitution, as enforced by federal courts, is inadequate because, although it anticipates some form of tripartite state government,[143] it does not require any specific separation of powers between the three branches.[144] The federal Constitution's guarantee that all state governments be

140. *See, e.g.*, Katharine Goodloe, *A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations*, 35 N.Y.U. REV. L. & SOC. CHANGE 749, 750 (2011) (finding that in states where judges are more politically accountable, judges were less likely to extend rights to politically unpopular criminal defendants).

141. Barton, *supra* note 110, at 453.

142. *Id.*

143. *See, e.g.*, U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.").

144. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 225 (1908) ("We shall assume that when... a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.").

"republican" seems to be the most likely source of a limit on the states, but almost any separation of powers scheme would likely meet this requirement.[145] Furthermore, that clause is not justiciable in federal courts.[146]

Second, Congress has imposed DTPA-like liability on a narrow segment of lawyers without any separation of powers issues, but it is unlikely to provide broader protection. The federal Fair Debt Collection Practices Act (FDCPA) mirrors state DTPAs by prohibiting "unfair or unconscionable means" in the field of debt collection.[147] A violation of the FDCPA is also a per se violation of the FTC Act,[148] upon which many DTPAs were modeled.[149] In *Heintz v. Jenkins*, the United States Supreme Court held that the term "debt collector" in this statute included lawyers.[150] Tellingly, the Court only engaged in ordinary methods statutory interpretation, such as analyzing the text's purpose and legislative history, which suggests that there were no constitutional issues to be avoided. There was no federal separation of powers issue because the federal judicial branch does not claim a constitutional power to regulate the practice of law broadly, much less an exclusive power to do so.[151] The court also did not employ the federalism avoidance canon, which it had previously used in *Gregory v. Ashcroft* to read state court judges out of the scope of the federal Age Discrimination in Employment Act.[152] *Heintz* therefore shows that Congress has the authority to make lawyers liable under consumer protection laws. The problem with this line of reasoning is that Congress has generally left lawyer regulation to the states.[153] Although Congress has forayed into the field of lawyer regulation, it has been slow to do so and has met with resistance from the

145. U.S. CONST. art. IV, § 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government.").

146. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

147. 15 U.S.C. § 1692f (2011).

148. 15 U.S.C. § 1692l(a) (2011).

149. *See supra* notes 22–26 and accompanying text.

150. Heintz v. Jenkins, 514 U.S. 291 (1995).

151. Rule 11 of the Federal Rules of Civil Procedure authorizes federal courts to sanction lawyers appearing before them, but the power to make the federal rules was given to the United States Supreme Court by Congress. 28 U.S.C. § 2072(a) (2012) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

152. Gregory v. Ashcroft, 501 U.S. 452, 467 (1991). The Supreme Court found that there was a federalism value at stake because the state's authority to set a maximum age limit for judges went to "the heart of representative government." *Id.* at 461–462. Although it is possible that the court in *Heintz* simply found (implicitly) that the statute was not ambiguous and did not apply the federalism canon for that reason, that is unlikely because *Gregory v. Ashcroft* suggests that only a minimal amount of ambiguity is enough to trigger the federalism canon and the statute in Heintz was at least minimally ambiguous.

153. One exception is the Sarbanes-Oxley Act that contains provisions that apply specifically to lawyers. 15 U.S.C. § 7245 (2013). That law is exceptional in that it came out of corporate scandals, which Congress saw as a national problem.

bar.[154] Congress is therefore unlikely to tackle the issue of consumer protection in the legal services field, even though it has the authority to do so.

Third, the executive branch could similarly use its authority to interpret the FTC Act,[155] in order to impose DTPA-like liability on lawyers through regulations. Still, even if that were to happen, it would likely have little effect because the FTC Act does not provide a private right of action and can only be enforced by government entities. It seems unlikely that the Attorney General would intervene on behalf of a private consumer against an individual law firm.

Alternatively, a court's self-interested interpretation of the state constitution could be corrected by amendment to the state constitution. In contrast to an amendment of the federal Constitution, state constitutional amendments are politically feasible and actually occur relatively frequently.[156] Still, lawyer immunity from consumer protection laws is unlikely to arouse enough passion in the electorate to fuel a state constitutional amendment eliminating favorable treatment provided to a politically powerful group. It would also be difficult to draft such a constitutional amendment because the courts do not purport to be interpreting constitutional text in DTPA cases. In sum, none of these entities—federal courts, Congress, the federal executive, or the state electorate—are adequate to correct the bias of state courts in favor of lawyers; therefore, courts should impose the correction on themselves.

C. A Solution: Judicial Deference to Coordinate Branches

Courts will make better decisions if they shift some of the task of constitutional interpretation to the other branches because those branches do not share the judicial branch's self-interest in the outcome of such interpretation. First, under traditional theories of administrative law, a court should give some deference to the interpretation of the executive charged with enforcement of the statute, which is often the state's attorney general. In addition, the state attorney general should receive deference because her interpretation represents the executive branch's opinion of the constitutional issue. Courts should also be more respectful of the legislative branch by forgoing use of the clear statement rule and adopting the opposite presumption. Although a clear statement rule is often a tool of judicial humility, in these cases it is being used as a tool of judicial aggrandizement.

Professor Adrian Vermeule has put forward a more extreme version of the

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154. Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 580-81 & nn. 19–21 (2011); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U.L. REV. 559, 570–75 (2005) (describing the federal government's increased activity in regulating lawyers in recent decades).

155. *See* 15 U.S.C.A. § 57a(a)(1) (2013).

156. Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward A State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1640–42 (2010).

argument for judicial restraint in similar situations. He argues that "state judges should declare nonjusticiable any claim that legislation intrudes upon . . . the 'judicial power' vested in state courts under a separation-of-powers scheme."[157] Regardless of whether courts would ever adopt his proposal, his insight is correct that the natural tendency towards judicial overreaching in this area calls for a new tool of judicial restraint. Vermeule reached his conclusion after analyzing cases determining the validity of "(1) statutes altering common-law rules of liability or remedy; (2) statutes altering procedural and evidentiary rules; (3) statutes that alter the legal effect of judicial judgments; and (4) appropriations statutes that, in the judiciary's view, provide insufficient funding for the exercise of judicial functions."[158] He justified his proposal by pointing to the "cognitive rather than motivational" biases of state judges.[159] The argument for restraint is stronger in cases challenging statutes that allegedly regulate the practice of law, such as DTPA cases, because in these cases both cognitive and motivational biases are present.[160]

1. Deference to the Legislature: Renunciation of a Clear Statement Rule

As mentioned above, some state courts do not address the constitutional issue directly when deciding DTPA cases, but instead address the constitutional issue only enough to conclude that there is a possible separation of powers problem.[161] These courts then presume that the statute does *not* apply to the practice of law, unless the legislature specifically says that it *does* apply. Courts defend clear statement rules through some combination of four arguments.[162] First, judges defend them as tools for deciphering ambiguous statutory language, by claiming that the rules reflect an empirical fact that legislatures generally use explicit language when a statute might raise serious constitutional problems.[163] Second, they defend the rule as a pragmatic tool that allows courts to enforce constitutional values flexibly or light-handedly, rather than with hard-edged constitutional rulings.[164] Third, they require the legislature to be more specific and deliberate when making laws, which is desirable in part because it makes the

157. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 361 (2000).

158. *Id.* at 373–74.

159. *Id.* at 361.

160. *See infra* note 193 and accompanying text.

161. Courts do not always explain how they chose whether to use the constitutional or clear statement method.

162. *See, e.g.*, Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 38–39 (2008).

163. *Id.* at 38; *See, e.g.*, Cripe v. Leiter, 703 N.E.2d 100, 106 (Ill. 1998) (arguing that "had the legislature intended the [DTPA] to apply in this manner, it would have stated that intention with specificity").

164. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 422 (2010); Stephenson, *supra* note 162, at 39.

legislature more accountable.[165] Fourth, the rules are considered an aspect of judicial minimalism, according to which courts avoid constitutional issues altogether when possible.[166] In DTPA cases, courts often apply clear statement rules improperly, and even when they do apply the rules correctly, these applications fail to serve the purposes of clear statement rules because of the peculiarity of DTPA cases.

Among the DTPA cases, the Illinois Supreme Court's opinion in *Cripe v. Leiter* articulates the mechanics of the clear statement rule in its most defensible form:

> The legislature did not . . . specify that it intended the [DTPA's] provisions to apply to the conduct of attorneys in relation to their clients. Given this court's role in that arena, we find that, had the legislature intended the [DTPA] to apply in this manner, it would have stated that intention with specificity.[167]

This reasoning is consistent with the standard formulation of a clear statement rule: the court first determines that the legislative intent is not clear, then identifies the constitutional principle at risk, and then presumes the existence of whatever legislative intent would avoid the constitutional issue.[168]

Yet, some courts do not even apply clear statement rules correctly on their own terms. The four justifications for clear statement rules summarized above all require some amount of ambiguity in the statutory text to trigger application of the rule.[169] A New Jersey appellate court in a DTPA case, however, skipped this requirement, applying the clear statement rule *after* concluding that "it is clear that attorney's [sic] services do not fall within the intendment of the [DTPA]."[170] In this context, it makes no sense to use the clear statement rule. The court probably thought it could use the clear statement rule to bolster its conclusion about legislative intent, but it is illogical to use a tool for deciding close interpretative questions after having concluded that the meaning of the statute is clear. Although this was only an intermediate appellate court, the New Jersey Supreme Court later relied on this case as a predicate for a determination that the legislature had acquiesced to a judicially-created exemption for lawyers.[171]

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165. Manning, *supra* note 164, at 420–21; Stephenson, *supra* note 162, at 39.

166. Stephenson, *supra* note 162, at 39.

167. 703 N.E.2d at 106.

168. The phrase "the court's role in this area" refers to earlier in the opinion where the court claimed "the inherent and exclusive authority to prescribe rules governing attorney conduct and the discipline attorneys for violating those rules." *Id.* at 105.

169. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 352–55 (2d ed. 2006).

170. Vort v. Hollander, 607 A.2d 1339, 1342 (N.J. Super. 1992).

171. Macedo v. Dello Russo, 840 A.2d 238, 242 (N.J. 2004) (confirming that there is a judicially-created "learned professionals" exemption from the DTPA). One can also question

Another cost of using clear statement rules is that even when applied correctly, the rules result in ambiguous opinions. Too often this ambiguity is used to hide sloppy reasoning and the resulting opinions fail to indicate what changes to the statute or the constitution would have resulted in a different outcome.[172] In *State ex. rel. Doyle v. Frederick J. Hanna & Associates*, the Georgia Supreme Court held that lawyers were exempt from the state's DTPA, reasoning that there was a "public policy" of protecting "the attorney's primary duty of robust representation of the interests of his or her client."[173] This invocation of "public policy" sounds like common law reasoning and would be anathema to statutory construction.[174] Still the court showed that it was relying in part on a constitutional separation of powers argument by saying, "only this Court has the inherent power to govern the practice of law in Georgia,"[175] and by using the clear statement rule.[176] The court purported to base its decision on statutory interpretation, saying that it "need not address" the constitutional separation of powers issue, but the court never identified any statutory language that it might have been interpreting.[177] In this case, the use of the clear statement rule and an unjustified invocation of public policy allowed the court to mix common law, statutory, and constitutional arguments, which are normally mutually exclusive, in a single decision. Besides being an example of muddled decision-making, results like this are likely to sap the motivation of legislators and citizens who want to overturn the rulings because there's no indication of how that could be accomplished.

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whether a legislature can acquiesce to a judicial decision that is based on semi-constitutional logic. Furthermore, the argument for acquiescence is weak in this situation because even if the legislature originally intended for the law to apply to lawyers, it would be extremely difficult to amend the statute to explicitly include a politically powerful group such as lawyers.

172. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 169, at 363 (suggesting that when a court uses a clear statement rule, "the court may well do a slipshod job of constitutional analysis, failing to think through the constitutional issues because, after all, it is supposedly avoiding them").

173. State *ex rel.* Doyle v. Hanna & Assocs., 695 S.E.2d 612, 615 (Ga. 2010).

174. In fact, the court's reference to public policy can be traced to a torts treatise. *Frederick J. Hanna & Associates* cites *Haynes v. Yale-New Haven Hospital*, 699 A.2d 964, 973 (Conn. 1997), which cites *Krawczyk v. Stingle*, 543 A.2d 733 (1988), which cites 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 18.6 (2d Ed. 1986) ("The ultimate question is whether . . . a duty [in negligence cases] *should* be imposed as a matter of policy."). Although the court never pointed to any statutory text that it might have been interpreting, the reference to public policy could be read generously as a subtle invocation of the rule of statutory construction whereby statutes in derogation of the common law should be read narrowly. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 169, at 298 (defining the non-derogation canon, but noting that it "has been extensively criticized and, in many jurisdictions, rejected").

175. Hanna & Assocs., 695 S.E.2d at 615.

176. *Id.* ("Absent a clear indication by the legislature, we will not conclude that the legislature intended to regulate attorney-client relationships through the [DTPA].") (citing Cripe v. Leiter, 703 N.E.2d 100, 105–106 (1998)). The dissenters pointed out that the majority had actually relied on a "thinly-veiled separation of powers analysis." *Id.* at 617 (Melton, J., dissenting).

177. *Id.* at 616.

Finally, DTPA cases fall into a narrow class of cases for which one of the primary justifications for clear statement rules does not apply. As mentioned above, clear statement rules are justified as a technique of judicial self-restraint. Rather than striking down a law or the application of a law as unconstitutional, which is the most aggressive use of a court's power of judicial review, courts use the rule as a way to decide the case without using the full extent of their power. Based on this reasoning, the justification for using a clear statement rule is weakest when the rule is used to protect the judicial power. The DTPA cases fall into this narrow set of scenarios. The judicial modesty rationale for clear statement rules makes sense in cases where the constitutional problem is unrelated to the judicial power, such as a vagueness or free speech challenge to a criminal law. The justification even applies to separation of powers issues where the dispute is between the executive and legislative branches and thus the judiciary does not have an interest in the outcome and can use a clear statement rule to minimize its own counter-majoritarian involvement.[178] In DTPA cases, however, the judiciary is not simply sitting in review of a legislative act to determine whether the legislature properly accomplished its goals without crossing constitutional lines. In DTPA cases the judicial branch is also the victim of the alleged constitutional overreach by the legislature. Using judicial restraint as a justification for invoking the clear statement rule seems insincere in these cases because it is being used to protect, rather than restrict, the judicial power. At the very least, the rule is only modest with respect to one judicial power (judicial review) in order to protect and expand another judicial power (regulation of the practice of law).[179]

To use an analogy that others have drawn, a clear statement rule puts the burden on the legislature to overcome a presumption before its law can take

178. *See, e.g.*, Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 465–67 (1989) (using the avoidance canon to interpret the statutory phrase "or utilized" in a way that avoided potential conflict with the executive power to appoint federal judges).

179. The aggressive, rather than modest, nature of the clear statement rule has been unwittingly highlighted by one scholar in a paper presented at the Forum for State Appellate Court Judges, a conference attended by 143 judges from thirty-nine states. Richard H. Marshall, *Introduction* to STILL COEQUAL?: STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS 3, 3 (2006). Professor Robert Williams argued that techniques such as clear statement rules are a tool of the judiciary to nullify undesirable legislation that affects the courts. Robert F. Williams, *Keeping Coequal: State Court Responses to Legislative Encroachment*, *in* STILL COEQUAL?: STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS 5, 13. Professor Williams calls these techniques "limited statutory interpretation," which "'saves' a statute that partially encroaches on judicial powers by 'interpreting' it as not conflicting with judicial power." *Id.* It is telling that Professor Williams justifies the rule in the name of the judiciary's self interest, rather than by judicial minimalism or as an invitation for inter-branch dialogue with the legislature. This is the same phenomenon that Professor Adrian Vermeule observed, which led him to call for the nonjusticability of these claims. Vermeule, *supra* note 157, at 361. Although they take differing views of the ultimate desirability, both professors agree that courts' decisions in this area, including the use of clear statement rules, show anything but judicial humility.

effect.[180] But when the issue is separation of powers between the legislature and the judiciary, it seems unfair for the judiciary to put the burden on the legislature. It would seem fairer for the state court judges who write opinions to accept the burden of explaining why a legislative act encroaches on a judicial power, rather than to place the burden on the absent legislature to explicitly state that lawyers are covered. Thus, courts should eliminate the clear statement rule and use normal statutory construction when construing DTPAs. This would almost certainly bring lawyers within the scope of DTPAs as written and would put the burden of addressing the constitutional issue on the courts.

2. Deference to the Executive: Considering the Attorney General's Opinion

Courts could also try to correct for their biases by deferring to the executive. Most courts addressing attorney coverage under state DTPAs have seen it as a separation of powers issue involving only the judicial and legislative branches, but in many cases the executive is involved in the dispute, making it a three-way standoff. Deference to the attorney general could be grounded in both administrative law and constitutional law principles. First, an agency, such as the attorney general's office, charged with enforcing or implementing a statute is often given some deference on matters of statutory interpretation. Second, as the democratically accountable legal advisor for the executive branch, an attorney general's opinion should be given some weight on constitutional separation of powers issues.

Deference should be given to attorneys general based on their intimate involvement in the enforcement of DTPAs, drawing on the administrative-law theories of *Chevron* and *Skidmore* deference at the federal level.[181] The Court in *Chevron* justified deference primarily on the theory of implied delegation of interpretive authority from the legislature to the executive agency.[182] *Skidmore* deference was justified by agency expertise and experience gathered from non-judicial enforcement of the statute.[183] This is not to say that deference in DTPA

180. Some commentators have argued that the clear statement rule essentially reverses the presumption of constitutionality. This comes from the fact that the clear statement rule applies when there is a serious constitutional concern. The scholars argue that in these borderline cases, the court presumes that the statute is unconstitutional and then the subsequent reading of the statute is effectively a remedy akin to severance of the unconstitutional part.

181. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944). *Chevron* deference to administrative agencies has been criticized on separation of powers grounds as an abdication of the judicial function to the executive branch. *See, e.g.*, Neuborne, *Seventh-Grade Civics*, *supra* note 94, at 396. On issues of lawyer immunity, however, this abdication is necessary, because courts are biased in these cases.

182. Chevron, 467 U.S. at 843–44.

183. Skidmore, 323 U.S. at 139–40 ("[T]he Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy that will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public

cases would fit neatly into one or the other doctrine, but that the same principles that justify deference in those cases apply in DTPA cases as well. Indeed, these administrative law justifications support the constitutional justifications for deferring to the state attorneys general as the constitutional interpreters within the executive branch. Deference on statutory matters would be relevant to issues such as exemptions for both the learned professions and lawyers based on a clear statement rule because those issues are determined at least partly through statutory interpretation.

A substantial majority of DTPAs gives the responsibility of enforcing the statutes to state attorneys general,[184] who are the natural delegates for consumer protection enforcement because of their common law powers to protect the public in litigation.[185] Lawsuits, however, are only a small fraction of DTPA enforcement activities by attorneys general. Most offices handle consumer complaints,[186] and approximately two-thirds of state offices also mediate disputes between consumers and businesses.[187] In some cases, attorney general offices mediate over 90% of the consumer complaints that they receive.[188] This allows the attorney general offices to amass broad expertise about the concerns

enforcement and those for determining private rights shall be at variance only where justified by very good reasons.").

184. *See* UDAP TREATISE, *supra* note 20, at app. A. Some states give concurrent enforcement power to both the attorney general and an agency under the control of the governor. Two examples are Connecticut and Nevada. The Connecticut DTPA allows the attorney general to recover civil penalties for violations. *See* CONN. GEN. STAT. § 42-110o(a). It also allows the Commissioner of Consumer Protection to hold administrative adjudications. *See id.* at § 42-110d. The Commissioner is appointed by the governor. *See id.* at § 21a-1. In Nevada, the attorney general can enforce the DTPA in court upon request from the commissioner of consumer affairs, or can seek equitable relief on her own. *See* NEV. REV. STAT. § 598.0963 (2011). The Commissioner serves under the governor. *See id.* at §§ 232.515, 232.520 (2011). Only Georgia and Utah grant enforcement authority solely to a subordinate of the governor. In Georgia, the DTPA gives broad authority to the "administrator" to seek a judicial remedy. *See* GA. CODE ANN. § 10-1-397(b)(2) (2012). That administrator serves at the pleasure of the governor. *Id.* at § 10-1-395. But apparently the Georgia attorney general represents the agency in litigation. *See* State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., 695 S.E.2d 612 (Ga. 2010). In Utah, the Division of Consumer Protection can seek judicial remedies. *See* UTAH CODE ANN. §§ 13-11-3, -17 (LexisNexis 2012). The head of the division serves at the pleasure of the governor. *Id.* at § 13-2-2.

185. STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 33–35 (Emily Myers & Lynne Ross eds., 2d. ed. 2007) [hereinafter STATE ATTORNEYS GENERAL].

186. *See* BOOK OF THE STATES, *supra* note 115, at 254, *available at* http://knowledgecenter.csg.org/drupal/system/files/Table_4.22_0.pdf. Only the Georgia and Tennessee attorneys general do not handle consumer complaints at all. *See id.* The South Carolina, Utah, and Virginia attorneys general share this role with administrative agencies. *See id.*

187. STATE ATTORNEYS GENERAL, *supra* note 185, at 237–38.

188. In 1997, the South Dakota Attorney General's office resolved 92% of consumer complaints through mediation. In 2001, that number had risen to 96%. *Id.* at 238. A survey done in 1984 shows that in many other states, the agencies charged with enforcing DTPAs receive and resolve large numbers of consumer complaints and that those numbers dwarf the number of lawsuits filed. Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 430–39 (1984).

and needs of local consumers as well as knowledge about the scope of recurring consumer protection issues. Attorneys general also have the power to issue pre-litigation subpoenas, allowing them to conduct investigations and resolve disputes without resorting to the courts.[189] In both Connecticut and Georgia, the question of lawyer immunity from the states' DTPAs arose when the enforcing agency subpoenaed a law firm and the attorney general sued to enforce the subpoenas after the firms refused to comply.[190] In 37 states, the executive entity assigned to enforcement has also been given rulemaking authority.[191] Under a *Chevron* analysis, this provision of rulemaking power is an indication that the legislature intended to delegate interpretive authority to that entity, thus justifying judicial deference to that entity.[192]

Courts should also defer to an attorney general's interpretation of the constitutional separation of powers question because she typically provides legal opinions for the executive branch. Unlike the unitary executive branch of the federal government that is organized under the President, most state constitutions direct that a number of executive branch officials be elected.[193] In 43 states, attorneys general are elected.[194] Some state constitutions specifically identify the attorney general as the representative of the executive branch in legal matters.[195] Although there could be debate about whether the governor or the attorney general gives the definitive legal interpretation or opinion on behalf of the executive branch, this would only make a difference if the governor and attorney general disagreed.[196] Diverging opinions between executive branch officials, however, have generally only arisen over hot-button issues[197] and so it is unlikely to matter in these consumer protections cases. Deference to the attorney general by the courts would also introduce an amount of democratic

189. STATE ATTORNEYS GENERAL, *supra* note 185, at 234–35. The subpoena is usually called a civil investigative demand (CID). *Id.*

190. Heslin v. Conn. Law Clinic of Trantolo and Trantolo, 461 A.2d 938 (Conn. 1983); State *ex. rel.* Doyle v. Frederick J. Hanna & Assocs., 695 S.E.2d 612 (Ga. 2010).

191. *See* UDAP TREATISE, *supra* note 20, at app. A.

192. 467 U.S. at 843–44.

193. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1400 (2008).

194. *See* BOOK OF THE STATES, *supra* note 115, at 176 (listing the method of selection of each attorney general).

195. *See, e.g.*, GA. CONST. art. V, § 3, para. 4 ("The Attorney General shall act as the legal advisor of the executive department.").

196. *See* Michael B. Holmes, *The Constitutional Powers of the Governor and Attorney General: Which Officer Properly Controls Litigation Strategy When the Constitutionality of A State Law Is Challenged?*, 53 LA. L. REV. 209, 224–26 (1992) (arguing that the attorney general's legal position should be controlling in litigation).

197. *See, e.g.*, Joseph Kanefield & Blake W. Rebling, *Who Speaks for Arizona: The Respective Roles of the Governor and Attorney General When the State Is Named in A Lawsuit*, 53 ARIZ. L. REV. 689, 691 (2011) (identifying conflicts on the topics of bilingual education, the Affordable Care Act, and Arizona's immigration law); Holmes, *supra* note 196, at 209 (noting potentially divergent opinions on anti-abortion legislation).

accountability into the decision in the many states where the attorney general is independently elected.[198] A few courts, such as the Washington state Supreme Court, already claim to give some deference to formal opinions issued by the attorney general, in part because "such opinions represent the considered legal opinion of the constitutionally designated 'legal adviser of the state officers.'"[199]

In practice, however, courts have not deferred to attorney general opinions in DPTA cases. For example, the Arkansas Attorney General sued a debt-collection law firm, but was unsuccessful because of the immunity that the Arkansas Supreme Court conferred upon lawyers.[200] The court explicitly rejected the idea that the attorney general was in a stronger position in DTPA litigation than a private litigant.[201] In addition to initiating their own lawsuits, attorneys general often participate in private DTPA cases. In Colorado, New Jersey, and Washington, the attorneys general filed amicus briefs in support of the plaintiffs when the issue reached their state supreme courts.[202] Only in *Short v. Demopolis* did the court even arguably give the attorney general's interpretation more weight than that of a private litigant.[203] There, the Washington Supreme Court acknowledged that "amicus curiae, Washington State Attorney General, relying on *In re Bruen*, argues the separation of powers doctrine does not create an impenetrable barrier through which the Legislature may not venture."[204] Still, the court countered the argument in the same way that it would address the argument of a private litigant and did not treat the attorney general's amicus as an entry of the executive branch into the fray.

In neither the Washington nor the Arkansas case did the attorney general ask for deference from the court, so it is unsurprising that they did not get it. To illustrate, the Washington Attorney General noted that the case was one of first impression, but then he only used this point to justify citing precedent from other jurisdictions.[205] He also argued that the *only* correct interpretation of the

198. Berry & Gersen, *supra* note 193, at 1403–06.

199. Five Corners Family Farmers v. State, 268 P.3d 892, 899 (2011).

200. Bennett & DeLoney, P.C. v. State *ex. rel.* McDaniel, 388 S.W.3d 12, 15–16 (Ark. 2012).

201. Bennett & DeLoney, P.C. v. State *ex rel.* McDaniel, 388 S.W.3d 12, 16 (Ark. 2012) ("While the State avers that the fact that the instant action was brought by the Attorney General somehow precludes any application of the foregoing case law, we disagree.").

202. *See* Brief for John W. Suthers, Attorney General, & Jan M. Zavislan, Deputy Attorney General, as Amici Curiae Supporting Petitioner, Crowe v. Tull, 126 P.3d 196 (Colo. 2006) (No. 04SA385); Brief of Peter C. Harvey, Attorney General, Andrea M. Silkowitz, Assistant Attorney General, & Steven N. Flanzman, Senior Deputy Attorney General, as Amici Curiae Supporting Plaintiffs, Macedo v. Dello Russo, 840 A.2d 238, 242 (N.J. 2004) (No. 54,593); Brief for Kenneth O. Eikenberry, Attorney General, John R. Ellis, Deputy Attorney General, Jon P. Ferguson & Betsy R. Hollingsworth, Assistant Attorneys General as Amici Curiae Supporting Petitioner, Short v. Demopolis, 691 P.2d 163 (Wash. 1984) (No. 49617-0).

203. 691 P.2d 163, at 169–79 (addressing the Attorney General's amicus brief).

204. *Id.* at 169 (citation omitted).

205. Brief for Kenneth O. Eikenberry, Attorney General, John R. Ellis, Deputy Attorney General, Jon P. Ferguson & Betsy R. Hollingsworth, Assistant Attorneys General as Amici Curiae

supreme court's precedent was a rule that would allow attorney liability under the DTPA.[206] If the attorney general had asked for deference, however, his argument would have sounded different. He could have argued that because it was a case of first impression, his views should be given some weight. Then he would have presented his independent interpretation of the state's separation of powers doctrine and would have then argued that the court should have accepted his interpretation because it was *consistent* with the court's precedent.[207]

Of course, in some cases the attorney general will not provide any additional insight, but that should not deter courts from being open to such input when it is helpful. One reason an attorney general might not help the courts is that she might choose not to request deference to her opinion or even express an opinion at all. Indeed, the attorney general is an independent constitutional actor who can interpret the DTPA and the constitution to either allow or disallow attorney liability. In fact, electoral accountability may very well lead the attorney general to either favor immunity or stay away from the issue completely. Just like judges, the attorneys general are almost all lawyers who need the support of the legal community in order to get elected, and many have aspirations to hold higher office. Still, the attorneys general are likely to have a different perspective on the issue and will not suffer from the same cognitive biases as state supreme court justices.[208] Courts can also tailor the amount of deference they give to an attorney general depending on what insights she brings to the discussion. An attorney general, whose office receives, investigates, and mediates a large number of complaints directly from consumers, will know the relative prevalence of consumer complaints against attorneys, allowing her to predict the consequence of subjecting attorneys to the DTPA.[209] Attorneys general should not be shy about interjecting their own constitutional interpretations into this debate, and when they do, courts should give those interpretations more weight

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Supporting Petitioner at 30, Short v. Demopolis, 691 P.2d 163 (Wash. 1984) (No. 49617-0) ("This is an issue of first impression in the state of Washington. It is appropriate, therefore to look to the decisions in other jurisdictions.").

206. *Id.* at 28 (arguing that under the court's precedent of *In re Bruen*, it would be "patently in error" to hold that separation of powers would require lawyer immunity).

207. *Cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (requiring only that the agency's interpretation be "permissible" if the court finds that the statute is ambiguous).

208. For example, the attorney general will not suffer from the cognitive biases that Vermeule identified, particularly that of differential information. Vermeule, *supra* note 157, at 390–95. Vermeule notes that "judges in the state cases have far better information about the structural judicial interests affected by legislative action than about the statute's aims and social consequences." *Id.* at 391–92.

209. *See* Dunbar, *supra* note 188, at 430–39 (summarizing an empirical survey of state agencies charged with enforcing DTPAs, and tabulating the number of complaints received, number of "assurances of voluntary compliance" obtained, number of lawsuits filed, number of injunctions or similar orders obtained, and amount of restitution awarded as a result of the agencies' work).

than the arguments of other litigants.

V.
CONCLUSION

State supreme courts across the country have addressed the issue of lawyers' liability under consumer protection statutes, and many have exempted them from the law using a form of separation of powers argument that reflects an elitism among judges and the legal profession. Courts have used separation of powers doctrine to justify concentrating regulatory power in the branch of government that is least able to wield that power well. In doing so they have cut an important corner by assuming without explanation that a generally applicable statute can be considered "regulation" of the practice of law. This oversight is part of a pattern of overprotecting lawyers' interests, which is caused by cognitive and motivational biases that favor judges towards the legal profession. Once acknowledging this leaning, courts should employ the common practice of involving other institutions without the same leaning. In this case, courts should give some deference to the coordinate branches. They can defer to the legislature by abandoning the clear statement rule used by some courts. They can also defer to the state's attorney general, who has statutory and constitutional authority to introduce her legal opinion. A number of courts have not addressed,[210] much less definitively settled, the separation of powers issue and so when they do, they should engage in a thorough separation of powers analysis and involve the coordinate branches in order to reach more well-founded conclusions.

210. For example, the North Dakota Supreme Court held in *Ackre v. Chapman & Chapman, P.C.* that attorneys could be liable under the state's DTPA, but did not address the separation of powers issue. 788 N.W.2d 344, 352 (N.D. 2010). The law firm defendant-appellee filed only a short reply brief and did not raise the issue. Appellee's Brief, Ackre v. Chapman & Chapman, P.C., 788 N.W.2d 344 (N.D. 2010) (No. 20100044), 2010 WL 1857868. Nonetheless, the firm won the case on the grounds that the alleged conduct was not deceptive. 788 N.W.2d 344, 353. As another example, the South Carolina Supreme Court resolved the case of *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.* without reaching the separation of powers issued. 732 S.E. 2d 166, 174–75 (S.C. 2012). The court reversed the lower court on statutory grounds and remanded the case. *Id.*