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Outsourcing Self-Regulation

Marsha Griggs
Saint Louis University School of Law, marsha.griggs@slu.edu

Outsourcing Self-Regulation

Marsha Griggs*

Abstract

Answerable only to the courts that have the sole authority to grant or withhold the right to practice law, lawyers operate under a system of self-regulation. The self-regulated legal profession staunchly resists external interference from the legislative and administrative branches of government. Yet, with the same fervor that the legal profession defies non-judicial oversight, it has subordinated itself to the controlling influence of a private interest. By outsourcing the mechanisms that dictate admission to the bar, the legal profession has all but surrendered control of the most crucial component of its gatekeeping function to an unregulated industry that profits at the expense of those seeking entry.

The judicial outsourcing of the bar exam has privatized bar admission in ways that can be detrimental to the goal of public protection and damaging to those seeking licensure. The manner in which state courts have fostered privatized bar admission brings into question whether the delegation of judicial power is

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consistent with Constitutional prerogatives. This Article applies the lenses of multiple political-economic theories to the normative framework of attorney self-regulation and bar admission. In so doing, it seeks to identify justifications for outsourcing an exclusive judicial power that is essential to the goals of self-regulation. This Article ultimately questions whether the legal profession has surrendered, or will soon lose, the ability to regulate itself. The Article concludes with multiple recommendations to reverse the directional flow of power in attorney licensure in a manner that will yield more transparency and public accountability.

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INTRODUCTION

Self-regulation is a formative cornerstone of a lawyer's professional identity and of the legal profession as a whole. By design, the legislative and executive branches do not oversee the admission or discipline of attorneys so that the practice of law is

not subject to the control of external politics.[1] Such independence enables attorneys to effectively represent those who seek to challenge laws and administrative mandates without repercussion.[2] The protectional autonomy of attorney self-regulation serves to safeguard both the rule of law and the citizens subject to the rule of law.

Judicial oversight of the legal profession is an American paradigm. It is an inseverable component of attorney self-regulation, so much so that attorney self-regulation and judicial regulation of lawyers are viewed as interchangeable terms.[3] Regulation of the practice of law is an inherent power of the judiciary[4]—specifically, the state supreme court or the highest court within the jurisdiction.[5] State supreme courts are gatekeepers empowered to set competency and fitness standards for licensing attorneys, to develop ethical rules for attorney conduct, and to sanction attorneys who violate the established rules of professional responsibility.[6] Deference to the bench and judicial process has deep roots in all facets of law practice, from litigation to practices that are transactional or

1. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. d (AM. INST. L. 2000) ("Together with lawyers who work on disciplinary and similar committees within state-and federal-court systems, bar associations have become the chief embodiment of the concept that lawyers are a self-regulated profession. Self-regulation provides protection of lawyers against political control by the state.").

2. *See* MODEL RULES PRO. CONDUCT Pmbl. & Scope para. 11 (AM. BAR ASS'N 2023) ("Self-regulation . . . helps maintain the legal profession's independence from government domination.").

3. *See* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1153 (2009) (describing regulation by state judiciaries as self-regulation because lawyers participate in it).

4. *See, e.g.*, *In re* Z.H., 975 N.W.2d 142, 148 (Neb. 2022) (recognizing that the Nebraska Supreme Court has sole power to fix qualifications for admission to bar); *see also* Editorial Board, Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 784–85 (1976) ("The constitutional creation of a 'court' implies that it must have the identical powers necessary to its dignity, functioning, and survival.").

5. Hereinafter, this Article uses the term "state supreme court" to refer to the highest judicial court of a state or jurisdiction where lawyers are admitted to practice in the United States.

6. *See* LISA G. LERMAN CAREY ET AL., ETHICAL PROBLEMS IN THE PRACTICE OF LAW 69 (5th ed. 2020).

advisory in nature.[7] Our inherited common law system that is steeped in case precedent further amplifies the hierarchical roles of the bench and the bar.[8] The profession's reverence of judicial authority and oversight is matched only by its disdain for outside influence in the practice of law.[9]

The regulatory responsibility of state supreme courts is divided into two distinct roles: admission to practice law and discipline of those who have been admitted.[10] While these two roles are interdependent and equally important in the aim of public protection, the attention of the courts and scholars in the area of attorney regulation has been concentrated on the latter. Scholarly analysis and inquiry into judicial oversight of lawyers has centered primarily around the courts' exercise of authority over lawyer discipline and the courts' delegation of that authority to state bar associations.[11] Judicial delegation is an important concern in lawyer discipline because, inter alia, the very nature of delegation to a regulated body invites capture, and because the integrity and transparency of the disciplinary process directly serve to protect the public.[12]

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7. *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 477 (2021) (engaging in an evolutionary analysis of deference within politics and law over the last five decades).

8. *See* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 216 (2007) ("Among other features, the common law is distinguished by its reliance on bench-made law. Common law systems authorize courts and judges to speak and even make law where legislatures are silent or don't speak clearly." (citation omitted)).

9. *See* Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2794 (2012) (situating the legal profession's preference for not working with outside influences as being "undeniably motivated by a legitimate desire to protect clients, the public, and the professionalism and integrity of the legal profession by ensuring lawyers' independent judgment").

10. *See* Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 768 (2004).

11. *See* LERMAN, *supra* note 6, at 87 (explaining that in most states, the highest court runs the disciplinary system and sets up an independent disciplinary office to investigate and prosecute misconduct charges against lawyers). Some, but not all, disciplinary offices are administered by state bar associations. *Id.*

12. *See* Claude Balthazard, *#9 Regulatory Capture: The Achilles' Heel of Professional Self-Regulation*, LINKEDIN (June 14, 2017), https://perma.cc/6X4D-C5B5.

Focus on the delegation of courts' disciplinary powers has overshadowed the growing urgency of the delegation and outsourcing of the courts' admission powers, both in the literature and within the legal profession. Until recently. Within the last decade, there have been four formative developments with respect to the means, method, and meaningfulness of the process by which attorneys are admitted to practice. They are: (1) the content and source of the bar exam;[13] (2) the standardization of the process to license attorneys for multijurisdictional practice;[14] (3) the first remotely delivered online bar exam;[15] and (4) the (limited) judicial adoption of nonexam pathways to licensure.[16] These developments in bar admission as well as the propriety, process, and results of judicial outsourcing have gone understudied, leaving a sizeable gap in scholarly discussion of judicial regulation. This Article now stands in that gap.

The same risks presented by the delegation of regulatory authority over attorney discipline are also present in the delegation of regulatory authority over attorney admission.[17] This Article draws urgent attention to those risks. As I describe in Part III, those risks are particularly consequential when the court's regulatory authority over entry into the legal profession is outsourced to private industry. Through outsourcing, judicial oversight of the attorney licensure process has devolved in a manner that has placed a private body at the helm of admission

13. *See Bar Exams*, AM. BAR ASS'N, https://perma.cc/6HS9-5LSK (last visited Nov. 10, 2023) (overviewing typical bar exam structures).

14. *See* Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 14–18 (2019) [hereinafter Griggs, *Building a Better Bar Exam*].

15. *See* Eric Cervone, *What to Know About Online Bar Exams in Your Jurisdiction*, QUIMBEE (Feb. 8, 2022), https://perma.cc/H2G5-3LFV (listing states that have announced remote bar exams).

16. *See* Jonna Perlinger, *States Look Beyond Bar Exam to License Lawyers*, UNIV. DENVER: INST. FOR ADVANCEMENT AM. LEGAL SYS. (July 19, 2022), https://perma.cc/FC28-C2HW ("[A] growing number of states are now exploring permanent implementation of alternative licensure approaches . . . .").

17. *See* William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 616–20 (identifying the factors leading to voluntary and involuntary loss of self-regulatory control).

to the bar.[18] This devolution has left the public without the protection or accountability that democratic governance is expected to provide, and it has subjected a once self-regulated profession to the external influence of private interest.[19]

Creating an account of the substantial shift in the regulation of attorneys will provide an important historical map for state court decision makers if they are to retain control of attorney licensing. This Article adds a new dimension of inquiry into the self-governed legal profession by evaluating political-economic justifications for outsourcing the regulatory function of bar licensure. It also opens the door for future inquiry into the role and appropriateness of judicial review of administrative agency decisions, particularly in the context of judicial agencies.

Part I offers a framework for exploring outsourced regulation of bar admission by juxtaposing the inherent power of self-regulation and resistance to external influence against a long history of delegation and outsourcing. Part II assesses the degree to which state courts have privatized critical components of their regulatory authority. Such assessment strengthens the scholarly literature on regulatory process by incorporating the understudied responsibility of regulating entry into the legal profession. Part II also applies traditional cost-benefit analyses to the decision to outsource the bar exam. An economic analysis of a key judicial function is important to public accountability and our standards for democratic governance.

Part III abstracts the political-economic theories of public-private partnerships, path dependence, capture, and hold-up to examine courts' decisions to outsource regulation of attorney licensing. This interdisciplinary analysis is necessary to evaluate the long-term risks and benefits of judicial outsourcing. As the literature of regulation expands to include attorney admission, such a comparative lens will allow us to find parallels and points of contrast to other regulated industries and practices.

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18. *See id.* at 492–93 ("Bar associations do many things. In addition to attorney discipline, . . . it may lobby state legislatures or other governmental agencies, it may file amicus curiae briefs in pending cases, and it may take positions on pressing social and political issues of the day or participate in law reform activities.").

19. *See infra* note 89 and accompanying text.

This Article concludes with important questions about what must be done to allow state courts to carry out their intended function in the regulation of bar admission while avoiding the costly consequences of path dependency and hold-up. A new model is essential to restore public protection in a way that will include both the nonlawyer public and those seeking licensure.

I. RESOLUTE SELF-GOVERNANCE

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.[20]

Lawyer self-regulation is deeply anchored in the history and tradition of the legal profession.[21] The declared independence from external control has stood the test of time and continues to be procedurally affirmed into the twenty-first century. The American Bar Association ("ABA") promulgates model rules of professional conduct that, inter alia, prohibit nonlawyer ownership of law firms and that prohibit attorneys from sharing fees with nonlawyers.[22] Despite the growing availability of technology and nonlawyer legal services, the ABA remains unmoved in its stance against nonlawyer encroachment into the legal profession, as demonstrated by two recent resolutions. In 2022, the ABA House of Delegates reaffirmed a longstanding Resolution that discouraged states from adopting any rule that would allow nonlawyers to have an ownership

20. MODEL RULES PRO. CONDUCT Pmbl. & Scope para. 12 (AM. BAR ASS'N 2023).

21. *See* Eli Wald, *Should Judges Regulate Lawyers*?, 42 MCGEORGE L. REV. 149, 149–50 (2010) (describing how the history of self-regulation has been "long invoked" within the legal profession "as a shield against external regulation of the bar").

22. *See* MODEL RULES PRO. CONDUCT r. 5.4(a)–(b) (AM. BAR ASS'N 2023) (providing that "[a] lawyer or law firm shall not share legal fees with a nonlawyer" except in very limited circumstances and that a lawyer shall also "not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law").

interest in law firms.[23] The Resolution followed a similar measure approved in 2000 resolving that lawyers sharing law firm ownership or legal fees with nonlawyers is inconsistent with the core values of the legal profession.[24]

By refusing to allow investment firms and tech companies to buy or own law firms and thereby influence a lawyer's "independent legal judgment,"[25] the 2022 and the 2000 Resolutions manifest more than just the ABA's unwillingness to depart from Model Rule 5.4 dictating the professional independence of lawyers[26]—they reflect the profession's foundational attitude about the importance of autonomous self-regulation. The ABA has no regulatory authority over lawyers, but it has considerable influence within the legal profession, and that influence has regulatory repercussions.[27] It was the ABA's growing support for the imposition of barriers to entry into the legal profession that ultimately persuaded the courts to rely so heavily on bar examinations and, more

23. *See* H.D., AM. BAR ASS'N, RESOLUTION 402 & REPORT (2022), https://perma.cc/T46Y-RJW9 (PDF) ("The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession."). The District of Columbia has permitted shared ownership with nonlawyers for decades. *Id.* at 5 n.7. The House Resolution was in response to organized plans by Arizona and Utah to permit such a practice. *Id.* at 2 n.1.

24. *See id.* at 1 (overviewing and reaffirming the 2000 ABA House of Delegates' Resolution 00A10F); *see also* L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10f*, 36 WAKE FOREST L. REV. 133, 133–36 (2001) (explaining the significance of Resolution 10f and its impact on the Model Rules).

25. Sam Skolnik, *ABA Sides Against Opening Law Firms up to New Competition*, BLOOMBERG L., https://perma.cc/TQZ9-6G5M (last updated Aug. 9, 2022).

26. *See* MODEL RULES PRO. CONDUCT r. 5.4 cmt. 1 (AM. BAR ASS'N 2023) ("These limitations are to protect the lawyer's professional independence of judgment.").

27. One example of the ABA's considerable influence in the regulation of the practice of law is the wide adoption of the ABA's Model Rules of Professional Conduct. *See generally Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N, https://perma.cc/WQ6Q-DMYF (last updated Mar. 28, 2018). All state supreme courts in the United States (except for Puerto Rico) have adopted the Model Rules as the primary code of authority for attorney conduct. *Id.* Attorneys who are found in violation of the state adopted rules of professional conduct risk disciplinary sanctions ranging from reprimand to suspension to disbarment. *See* MODEL RULES LAW. DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2020) (types of sanctions).

specifically, on bar examinations created by a private provider.[28] Therein lies the inescapable contradiction: the ABA staunchly insists on an autonomous, self-regulated legal profession that is free from external interference; but it was the ABA that paved the seemingly irretractable pathway for nonlawyer regulators to decide who is worthy of bar admission.

A. *Judicial Regulation*

Judges are the internal regulators of the legal profession. State supreme courts are deemed better positioned to regulate lawyer conduct than the legislative or executive branches of state government[29] and even the federal courts.[30] A perceived irony of judicial regulation is that state supreme courts generally place a low priority on attorney admission. Exploring how state supreme court justices are selected across jurisdictions can help make sense of how the high courts prioritize and dispatch their regulatory authority.

In twenty-four of the U.S. jurisdictions, state supreme court justices are elected to the bench.[31] Of the states where supreme court justices are seated by gubernatorial appointment, many

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28. *See* JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING 24–25 (2022) (connecting the pursuit of elitism in law schools to increased hurdles to licensure, including "states increasingly limit[ing] licensure to those who passed a bar exam"); *see also* Richard L. Abel, *Lawyer Self-Regulation and the Public Interest: A Reflection*, 20 LEGAL ETHICS 115, 116 (2017) (criticizing, from a historical perspective, the "arbitrariness of additional hurdles" to entering the legal profession, such as removal of the "diploma privilege," in which in-state law school graduates were not required to take the bar exam).

29. *See Judicial Oversight of the Legal Profession*, AM. BAR ASS'N., https://perma.cc/X46C-6QY6 (last visited Oct. 14, 2023)

> [T]he ABA believes that primary regulation and oversight of the legal profession should continue to be vested in the court of highest appellate authority of the state in which the attorney is licensed, not federal agencies or Congress, and that the courts are in the best position to fulfill that important function.

30. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market*, 37 GA. L. REV. 1167, 1215 (2003) (asserting that placing federal district courts in charge of lawyer regulation would "create a patchwork of regulation that would cripple the legal market").

31. *How State Supreme Court Justices Are Selected*, DEMOCRACY DOCKET (Mar. 21, 2023), https://perma.cc/P4JS-V24Z.

still require election by popular vote to retain the office upon expiration of the appointed term.[32] Those seeking election to the state supreme court direct their campaigns almost exclusively to attorneys because public interest in and understanding of judicial elections is limited.[33] Candidates seeking to claim or retain a position on a state supreme court will naturally prioritize issues that are important to the practicing bar.[34] It follows that a judicial candidate's attention to the attorney licensure process will be proportionate to the interests of her attorney constituents.

Attorney disinterest in bar admission rules has logical grounding. Licensed attorneys have already satisfied the state's threshold requirements for admission to the bar. As such, they may have little, if any, interest in revisiting the entry process for those seeking admission. Once licensed, attorneys will be understandably more concerned with regulations that affect their continued practice and potential discipline than with those dictating entry.

Additionally, some of the disinterest may be associated with an attorney's negative experience with the bar exam. Taking and preparing for the bar exam is best described by a great majority of attorneys as a harrowing ordeal.[35] Even after years in practice, it is not uncommon for attorneys to recount their stressful or traumatic experiences with the bar.[36] Attorneys who

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32. *See Retention Election*, BALLOTPEDIA, https://perma.cc/5P6D-2QKA (last visited Nov. 12, 2023) (listing Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming as states that use retention elections for supreme court justices).

33. *See* Benjamin H. Barton, *Do Judges Systematically Favor the Legal Profession?*, 59 ALA. L. REV. 453, 458 (2008) (recognizing the "inevitable conclusion" that judges favor the interests of lawyers when facing elections or seeking appointments).

34. *See id.* ("In states where judges are elected, bar associations endorse judicial candidates and publish 'bar polls' ranking the judges." (citations omitted)).

35. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 5–7 (discussing the anxiety induced by the high stakes of the bar exam, the sleep deprivation, and the fear of failure associated with awaiting results).

36. *See Your Worst Career Anxiety, Bar None*, FORBES (July 25, 2007), https://perma.cc/V6PH-4UUZ (exploring the anxiety, nighttime panic attacks,

do not pass on their first attempt or on subsequent attempts commonly combat stigma and career setbacks attributed to failing the bar exam.[37] Those negative consequences are compounded by the financial and mental burdens of having to repeat the exam-taking process.[38] For these and other reasons, many attorneys choose to cognitively dissociate from the taxing experience of taking a bar exam.

Whether or not trauma-induced, the intentional disconnection between the content and methodology of the bar exam threatens to erode the cornerstone principle of a self-regulated legal profession. Attorneys come to view the bar exam—once dreaded for its arduousness—as a revered and essential gatekeeper. Prelicensure, the bar exam is seen as a hazing ritual or a rite of passage.[39] Postlicensure, the bar exam is treated as a sacred "crucible" through which all who are fit to practice law must pass.[40] From this lens, the who, what, and how of the bar exam become far less important than the sentiment that "we had to pass a bar exam, and so must you." From the perspective of the practicing bar, concerns about licensure requirements, if any, are focused on ensuring that those requirements and pathways are restrictive so as to minimize unnecessary market competition and protect the income interests of those already in the profession.[41]

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and post-exam stress disorder that come from studying and taking the bar exam).

37. *See* Kathryn Rubino, *Biglaw Associate That Failed the Bar Exam? You're Out.*, ABOVE THE L. (Dec. 9, 2016), https://perma.cc/Q4HY-629Z (demonstrating the heightened stress in taking the bar due to fear of law firm offer revocation if the test taker fails).

38. *See Your Worst Career Anxiety*, *supra* note 36 (reiterating the mental trauma that comes with the bar exam).

39. *See* Jane Gross, *Bar Exam: Ordeal and Rite of Passage*, N.Y. TIMES (July 30, 1987), https://perma.cc/PDQ9-WBQR ("At sites around the city where students took the exam . . . some compared it to a fraternity hazing and others to the ordeal of medical interns and residents.").

40. Jeremiah Ross, *Being a Lawyer: Is It Difficult to Become an Oregon Lawyer? Oregon Bar Exam's Historically Low Pass Rate*, ROSS L. PDX: BLOG (Sept. 22, 2016), https://perma.cc/9PDZ-ZTMS.

41. *See* William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 L. & SOC. INQUIRY 547, 556 (2004) (observing pressure on bar associations "to control the labor market" in light of the increase in total lawyers in the United States).

This shift in perspective is particularly concerning because the bar exam has undergone multiple and monumental changes in the last fifty years.[42] Changes to the bar exam have been so substantial that even attorneys licensed just ten years ago would not recognize the bar exam today.[43] The planned debut of the NextGen bar exam in 2026 threatens to widen the gap between the current licensure exam and the bar exams from the days of old.[44] Attorney awareness of these changes is far more important than the changes themselves. Members of a profession that hails itself as self-regulated should have a responsibility to know at least the format and scope of the regulatory exam. However, a significant number of practicing attorneys and judges will continue to assume that the format and content of the bar exam are unchanged from their last experience taking the exam.[45] Such a disconnect, attributed to assumptions and inattentiveness, makes way for an impactful disruption in our regulatory scheme.

For the foregoing reasons, the regulation of attorneys is not as central to judicial duties as is the administration of justice. Once seated on the bench, judges navigate concerns about caseload, capacity, budget, and re-election.[46] Accordingly, the courts' decision to delegate aspects of attorney regulation is politically prudent. Even though uniquely independent, courts are accountable to the public. Courts are also constrained in size, by budget, and by statutory subject matter jurisdiction.[47]

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42. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 7 ("The uniform [bar] exam has almost no resemblance to the bar exams administered to a majority of attorneys who today comprise our judiciary, practicing bar, and legal academy.").

43. *Id.*

44. *See NCBE Announces NextGen Exam Structure, Sunset of Current Bar Exam*, NAT'L CONF. BAR EXAM'RS (Aug. 28, 2023), https://perma.cc/ZZL3-6BJD (summarizing the key changes adopted in the NextGen Bar Exam).

45. See, e.g., Robert Pinel (@PintsForThePoor), X (Jul. 13, 2023), https://perma.cc/PD4F-QXTE, for an illustration of my point. In 2023, Robert Pinel, an attorney licensed for more than thirty years, made a public comment about the comparative ease of the New Jersey bar exam, apparently unaware that New Jersey adopted the UBE in 2017 and has, for at least the last six years, used the same bar exam as forty other jurisdictions. *Id.*

46. *See supra* note 33.

47. *See* Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 430–31 (2012) (examining the connection between judicial budgets and judicial capacity).

Given the limited fiscal and human resources available to them, it makes economic sense that courts will prioritize their dockets and matters of statutory interpretation or state substantive law over tasks that can be efficiently delegated. In this regard, delegation of tasks associated with bar admission is economically prudent because it allows the courts to focus on their primary role of case review and judicial decision-making.

B. *Judicial Delegation*

Delegation involves the intentional assignment of one's duties or roles to a third party.[48] The judiciary, like other branches of state government, has the power to create administrative agencies to which the courts may delegate aspects of their regulatory function.[49] The power to issue a license to practice law within a state is a nondelegable authority vested exclusively in the state supreme court.[50] Threading a fine needle, the courts have delegated the authority to assess a candidate's qualification and fitness for that law license (that only the courts may issue).[51]

Unified state bar associations are agencies authorized, most commonly by the judiciary, to assist state supreme courts in their exercise of regulation and oversight of members of the

48. *Cf. Delegation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The act of entrusting another with authority or empowering another to act as an agent or representative . . . .").

49. *Cf.* William W. Patton, *The Dangers of Delegating Attorney Licensing to Private and Non-Profit Corporations: The Inapplicability of Public Records Laws and Abdication of Government Protection During Health Crises*, 58 CAL. W. L. REV. 125, 131 (2021) ("Boards of bar examiners were created as governmental administrative agencies by state supreme courts or legislatures, and they were tasked with adhering to rules approved by the supreme courts.").

50. *See, e.g.*, TEX. GOV'T. CODE ANN. § 82.021 (West 2023) ("Only the supreme court may issue licenses to practice law in this state as provided by this chapter. The power may not be delegated.").

51. *See, e.g.*, HAW. SUP. CT. R. § 1.1 ("The Hawai'i Supreme Court . . . shall appoint a Board of Examiners . . . . Nothing in this rule, however, shall be construed to alter or limit the ultimate authority of the Supreme Court to oversee and control the privilege of the practice of law in this state."); *State Bar of California*, CAL. CTS., https://perma.cc/HJ5E-9SEE (last visited Nov. 13, 2023) ("Candidates for admission to practice law are examined by the State Bar, which certifies to the Supreme Court those who meet admission requirements.").

bar.[52] These associations seek to advance and improve the legal profession, to provide accountability to attorneys, and to assure public confidence in the legal profession.[53] Although mandatory state bar associations function as government-sanctioned regulatory bodies in all but a few jurisdictions, they are more commonly associated with attorney discipline and have little, if any, role in attorney admission. The State Bar of Texas, for example, describes itself as "a public corporation and an administrative agency of the judicial department" charged with managing procedures for grievance, administering a mandatory continuing legal education program, and providing general education programs for both the legal profession and the public.[54]

In a majority of jurisdictions, there is no regulatory interrelation between the state bar and the board that oversees attorney admission.[55] In Connecticut, for example, the Bar Association does not regulate admission to law practice for the state; rather, bar admission is a function of the Connecticut Bar Examining Committee, part of the Connecticut Judicial Branch.[56] Other state bar associations function similarly.[57] Only in the few states where the bar admission boards are administratively joined with the state bar associations do we see

52. Patton, *supra* note 49, at 131.

53. *State Bar Associations*, LAW. LEGION, https://perma.cc/V3WM-ZVJP (last updated Jan. 3, 2019). As of 2019, twenty states did not have mandatory unified bar associations. *See generally id.* (summarizing the agencies that regulate the legal profession in every state).

54. *Our Mission*, STATE BAR TEX., https://perma.cc/FM62-5DQQ (last visited Sept. 26, 2023).

55. *Cf.* Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33, 37 n.24 (1996) (describing how state or local bar associations in some jurisdictions have lost administrative control over discipline of attorneys due to boards that have been established by the state supreme court).

56. *See Connecticut Bar Examining Committee*, CONN. JUD. BRANCH, https://perma.cc/VR8S-TUNM (last visited Nov. 13, 2023) ("The [Connecticut Bar Examining] Committee recommends to the court those who have passed the bar examination, possess good moral character, and have complied with the rules of court and the regulations of the Committee governing admission to the bar.").

57. *See, e.g.*, *State Bar Associations*, *supra* note 53 ("The [Arkansas Bar A]ssociation does not, however, handle the licensing and regulation of law practice, which is governed by the Supreme Court of Arkansas.").

the dual roles of regulating entry and regulating attorney conduct postadmission. The state bar associations in California,[58] Oregon, Nevada, North Carolina, South Dakota, Utah, Washington,[59] and Wyoming possess regulatory authority in attorney admission.[60]

In all other jurisdictions, state supreme courts have established separate boards to carry out the function of regulating the admission of new lawyers.[61] These judicially created agencies are given a moniker that denotes their roles in the regulation of attorney admission, commonly titled Board of Law Examiners, Board of Bar Examiners, or Committee on Bar Admission ("examining board" or "BBE"). These examining boards coexist with state bar associations, but they serve different roles.[62] Members of state examining boards are not elected; instead, they are hand-picked by a process rarely disclosed to the public.[63] Even in the small number of states

58. The State Bar of California is one of the rare unicorns to take on both regulatory functions. *See* Gallagher, *supra* note 17, at 485–91. It manages the admission of lawyers into practice, investigates complaints of professional misconduct, and prescribes appropriate discipline for misconduct. *See State Bar Associations*, *supra* note 53.

59. The Washington State Bar Association is another such unicorn. *See State Bar Associations*, *supra* note 53 ("[T]he Washington State Bar Association is both an administrative arm of the Washington State Supreme Court and the official statewide professional association for Washington attorneys. In duty to the state supreme court, the WSBA is responsible for the admission, license, and discipline functions for Washington attorneys.").

60. *See id.*

61. *See* Bobbi Boyd, *Do It in the Sunshine: A Comparative Analysis of Rulemaking Procedures and Transparency Practices of Lawyer-Licensing Entities*, 70 ARK. L. REV. 609, 613 n.17 (2017) [hereinafter Boyd, *Do It in the Sunshine*] (referring to the establishment of such boards in Ohio, Florida, Oklahoma, and Oregon).

62. *See* Zacharias, *supra* note 3, at 1158–59

> [A]round the turn of the twentieth century, central bar examining boards became more common, creating a mandate of education that helped regularize practice. . . . [B]ar associations began to develop—partly in reaction to the uncertainty spawned by the ongoing debate regarding the role of lawyers and partly as an effort by elite lawyers to raise the economic and social status of the bar organizations' members.

63. *See, e.g.*, HAW. SUP. CT. R. 1.1 ("The Hawai'i Supreme Court . . . shall appoint a Board of Examiners . . . ."); DEL. SUP. CT. R. 51 ("The Court shall appoint a Board of Bar Examiners . . . consisting of such number of members of the Bar as the Court shall determine."); *Board of Bar Examiners*, STATE BAR

where the examining boards are established by legislative act, the ultimate composition, supervision, and oversight of these boards is charged to the courts.[64]

Appointed members of bar examining boards are typically attorneys licensed within the state, although the boards' administrative functions may be directed by nonattorney administrators.[65] It was once fairly common practice for professors at law schools within a state to serve as bar examiners, but today many states prohibit that practice, either formally or informally.[66] Some states include judges from a state trial or appellate court.[67] Although ostensibly supervised by the state supreme court, the common practice is that one justice from the state supreme court will serve as a liaison between the examining board and the court without a great deal of day-to-day supervision.[68] The state supreme courts promulgate

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NEV., https://perma.cc/WJ7B-JK5W (last visited Nov. 13, 2023) ("Eight members [of the Board of Bar Examiners] are appointed by the Supreme Court and six members are appointed by the [Nevada State Bar] Board of Governors.").

64. *See, e.g.*, Caranchini v. Mo. Bd. of L. Exam'rs, 447 S.W.3d 768, 775 (Mo. Ct. App. 2014) ("The Governor does not appoint the members of the Board; rather, Board members are appointed by the Missouri Supreme Court, Rule 8.01(a); thus, the Board falls under the umbrella of judicial and not executive power."); VA. CODE ANN. § 54.1-3920 (2023) ("The members of the Board [of Bar Examiners] shall be appointed by the Supreme Court for five-year terms.").

65. *See, e.g.*, TEX. GOV'T. CODE ANN. § 82.001(a) (West 2023) ("The Board of Law Examiners is composed of nine attorneys who have the qualifications required of members of the supreme court."); Job Posting for Executive Director, Missouri Board of Law Examiners (Oct. 24, 2011), https://perma.cc/VL7Z-WRCS (listing J.D. degree as a "[p]referred qualification[]").

66. *See, e.g.*, R. LA. S. CT. XVII § 1(E) ("No full time member of any law school faculty shall serve as a member of the Committee on Bar Admissions or as an Assistant Examiner. No member of the adjunct faculty of any law school shall serve as an Examiner or Assistant Examiner for any examination subject that such person teaches in law school.").

67. *See* Marsha Griggs, *An Epic Fail*, 64 HOWARD L.J. 1, 47 (2020) [hereinafter Griggs, *Epic Fail*] ("Judicially appointed state bar examiners typically balance their roles with their full-time role as a practicing attorney, law professor, or judge.").

68. *See, e.g.*, *Jurisdiction News*, 87 BAR EXAM'R, no. 3, 2018, https://perma.cc/5JU7-JTWH (referencing a recently retired Iowa Supreme Court Justice who served as "one of the Court's liaison justices to the Iowa Board of Law Examiners").

specific rules to govern both the conduct of the bar examining boards and the qualifications, requirements, and procedures for bar applicants.[69] In theory, these rules create a degree of transparency and allow the boards' appointed members and administrative employees to function with delineated operational autonomy within the agency's mandate. But, in practice, the delegation of authority to state examining boards, coupled with outsourcing to private providers, has birthed questions about whether the legal profession has irrevocably surrendered the power to regulate itself.

The principal power of these judicially appointed examining boards is to determine who meets the criteria that have been set by the state high court for entry into the legal profession.[70] The court's nondelegable duty is the issuance of a law license, but virtually every conceivable detail in assessing whether or not an applicant has met the requirements for the issuance of that law license has been delegated away. In those isolated instances in which a state supreme court reviews and issues an opinion on a matter of attorney admission, the court almost routinely sides with the position of the state examining board.[71] Even the attorney oath may be sworn before an inferior court judge or

69. *See* Zacharias, *supra* note 3, at 1162 ("[S]tate supreme courts (and in some cases the legislatures) adopted the bar-promulgated norms . . . ."); *see also* Benjamin H. Barton, *Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 434 n.16 (2001) ("Generally, state supreme courts control both admission to the bar and the conduct of practicing lawyers, with assistance from court appointed administrative agencies, the ABA, and state bar associations.").

70. *See* Ashley London, *Who Watches the Watchmen? Using the Law Governing Lawyers to Identify the Applicant Duty Gap and Hold Bar Examiner Gatekeepers Accountable*, MICH. ST. L. REV. (forthcoming 2023) (manuscript at 20) ("Today, every jurisdiction has a board of law examiners charged with determining whether or not an applicant meets the qualifications for licensure set by that jurisdiction's state supreme court."). These boards are appointed to ensure the competence of future attorneys by examining their educational credentials and inquiring extensively into their character and fitness to practice law. *See* Keith W. Rizzardi, *Excess Confidentiality: Must Bar Examiners Defy Administrative Law and Judicial Transparency?*, 34 GEO. J. LEGAL ETHICS 423, 431 (2021).

71. *See* HOWARTH, *supra* note 28, at 31 (describing the 1970s as an era that produced a "series of federal court decisions that gave bar examiners impenetrable protection from judicial scrutiny"); *e.g.*, *In re* Application of Griffin, 943 N.E.2d 1008, 1008 (Ohio 2011) (siding with the state Board of Commissioners on an issue of character and fitness).

even a notary public in most jurisdictions.[72] From this lens, the state supreme court role in attorney licensure appears more symbolic than significant.

When the court delegates substantial parts of its admission function to an examining board, the board becomes the de facto gatekeeper to the practice of law and, as such, is positioned to shape the future of both the legal profession and the judiciary.[73] As one author states, "For this reason alone, fair procedures and transparent operations for lawyer-licensing entities affect more than an individual's ability to pursue a chosen occupation."[74] Improper, excessive, or unsupervised delegation contravenes due process, as it deprives the public of an opportunity to investigate and hold accountable those responsible for attorney licensing.[75] Confronting this reality makes "fair procedural process[es] and transparent operations" all the more crucial.[76]

The determination of competence to practice law has for decades been equated to earning a passing score on a state administered bar examination.[77] Thus, a major function of each examining board is the creation, administration, and grading of a bar exam. The role of the examining boards will also include conducting investigations and making an assessment or recommendation to the state supreme court as to a bar

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72. *See, e.g.*, GA. R. GOVERNING ADMISSION TO PRAC. L. Pt. B § 16 (providing, if the applicant resides outside Georgia, that the oath of an attorney can be taken before any officer authorized to administer oaths).

73. *See* Boyd, *Do It in the Sunshine*, *supra* note 61, at 621 ("[E]ntities charged with licensing lawyers not only constitute gatekeepers for a profession, but also hold keys to the judicial branch of government.").

74. *Id.*

75. *See* Patton, *supra* note 49, at 128 ("The data demonstrates that delegation to the NCBE has stripped citizens, in almost every state, of the ability to investigate and hold accountable those charged with attorney licensing in their jurisdictions.").

76. Boyd, *Do It in the Sunshine*, *supra* note 61, at 621.

77. *See Bar Exams*, AM. BAR ASS'N, https://perma.cc/9JSB-7JNF (last visited Dec. 11, 2023) ("For initial licensure, competence is ordinarily established by a showing that the applicant holds an acceptable educational credential (with some exceptions, a JD degree) from a law school that meets educational standards, and by achieving a passing score on the bar examination.").

applicant's character and fitness to practice law.[78] With these empowered roles, the state examining boards are occupational licensing agencies holding the combined powers of rulemaking, investigation, and adjudication.[79] The very nature of the exercise of these combined powers begs for close judicial oversight because the examining boards are susceptible to regulatory capture and because the courts should not use agency delegation to limit public transparency and engagement.[80] As agencies of the state high courts, the examining boards are endowed with "consequential regulatory powers."[81] As discussed in more detail below, these consequential powers include the discretionary authority to outsource aspects of their regulatory functions to private providers.

C. *Outsourcing by Judicial Agencies*

Outsourcing involves "delegation of non-core activities to outside agencies and contractors."[82] In most contexts, the motivation for outsourcing will be economic. Entities outsource when it is cheaper or more efficient to pay an outsider to produce a product or to perform a task, rather than produce or perform it internally.[83] By outsourcing, an entity's talents and resources can be expended in areas where returns on such efforts will be maximized.[84] Outsourcing is not a civil evil, nor is every isolated act of outsourcing a relinquishment of authority or state control. But, where delegation and outsourcing intersect, there is a risk

78. *See* London, *supra* note 70 (manuscript at 18) (discussing problems arising from BBEs powers to reject applicants on the basis of character and fitness).

79. *See id.*

80. *See* Boyd, *Do It in the Sunshine*, *supra* note 61, at 615 ("[T]he very structure of administrative agencies, including occupational licensing agencies, creates a need for adequate oversight.").

81. Rizzardi, *supra* note 70, at 431.

82. *Outsourcing*, L. DICTIONARY, https://perma.cc/3R9D-ZGXA (last visited Sept. 23, 2023).

83. *See* Sidney Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 395 (2003) [hereinafter Shapiro, *Outsourcing Government Regulation*] ("A firm will adopt the institutional arrangement . . . that it believes will minimize its transaction costs.").

84. *See id.* at 407 (illustrating that private actors will resolve matters in a way that maximizes profit based on the resources available).

of abdication of governmental power and/or the potential for a loss of regulatory control.[85]

Governmental outsourcing is a prevalent practice that transfers sovereign "responsibilities to third parties through service contracts and other devices that effectively surrender public power into private hands."[86] Like their executive and legislative counterparts, judicial agencies also rely on outsourcing to carry out important public facing functions.[87] Professors Jody Freeman and Martha Minow refer to governmental outsourcing as "government by contract" and summarize that outsourcing alters only who performs the work, not who pays or is ultimately responsible for it.[88] The aim of democratic governmental regulation is to protect the public from the potential harms of self-serving private interests.[89] When government is allowed to assign its regulatory role to private actors, that public protection dissipates, and irreparable harm may result.[90] An accepted paradox of regulatory outsourcing is that it is both commonplace and inconsistent with democratic governance.[91]

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85. *See* Philip Joyce, *Outsourced Government: Have We Gone Too Far?*, GOVERNING (Oct. 5, 2013), https://perma.cc/AU6D-V8DJ.

86. Kimberly N. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 49 GA. L. REV. 607, 611 (2015) [hereinafter Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*].

87. *See supra* note 49 and accompanying text.

88. Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 1 (Jody Freeman & Marth Minow eds., 2009).

89. *See* Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. UNIV. L. REV. 615, 658 (2016) [hereinafter Brown, *Public Laws*] ("Agencies . . . are representatives of the public interest, a role that 'does not permit [them] to act as an umpire blandly calling balls and strikes for adversaries appearing before [them].' The public is entitled to 'receive active and affirmative protection at the hands of the [agency]' . . . ." (quoting Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 620 (2d Cir. 1965))).

90. *See, e.g.*, Shapiro, *Outsourcing Government Regulation*, *supra* note 83, at 389 ("In the aftermath of the horrific events of September 11, 2001, it was revealed that the Federal Aviation Administration . . . had delegated responsibility for airport security to the nation's airlines, which in turn had hired private firms that failed to provide an adequate level of security.").

91. *See* Brown, *Public Laws*, *supra* note 89, at 658 (explaining that, by outsourcing power to private entities who are incentivized by self-serving goals, agencies jeopardize their ability to represent public interest).

Public accountability and transparency concerns arise any time private actors are involved in a regulatory process.[92] Yet these key characteristics of democratic governance—transparency, accountability, and opportunities for meaningful public participation[93]—are lacking in the current model of outsourced bar examination. Outsourcing by a judicial agency deserves no less scrutiny than outsourcing by an agency of the executive or legislative branches. Somehow, the self-regulating legal profession has embraced the participation of private actors in regulation and standard setting in ways that are unrecognized by the public, unacknowledged by the courts, and not critically analyzed by legal scholars.[94]

Self-regulated systems that serve the public should rightly be subject to public and internal scrutiny. Concerns of perceived or demonstrated bias will arise when a self-governing entity both creates and polices the standards for entry into the profession.[95] Those concerns are not remedied when the self-governed turn self-regulation over to a private body that has its own interest in the regulated industry. State bar examiners have arguably ceded their public authority through private contracts with exam producers and technology providers. The ensuing public-private relationships between the court-appointed examining boards and unregulated private organizations has opened a floodgate of legal and logistical problems, while solving few others.[96] We can view those

92. *See* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816 (2000) (discussing how "the extent of private participation in governance" creates extensive democratic issues, including "the lack of accountability to the electorate").

93. *See* Robert L. Glicksman, *Shuttered Government*, 62 ARIZ. L. REV. 573, 575–77 (2020) (providing an overview of the importance of transparency, accountability, and opportunities for meaningful public participation in democratic governance).

94. *Cf.* Boyd, *Do It in the Sunshine*, *supra* note 61, at 620–21 ("Oversight measures, which have become commonplace for other administrative agencies can sometimes be absent in the context of licensing lawyers.").

95. *See* Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1194, 1215 (2008) (addressing the inherent subjectivity of the moral character requirement of bar admission).

96. *See* HOWARTH, *supra* note 28, at 31 (discussing how examining boards rely on the NCBE, a private entity with "impenetrable protection from judicial scrutiny," to supply bar exams); *e.g.*, Griggs, *Epic Fail*, *supra* note 67, at 21

public-private regulatory relationships as overreaching or as privatizing a governmental function.

II. PRIVATIZING BAR ADMISSION

> *The combination of power and discretion [means that private contractors] may effectively be determining some of the important rules about the application of coercive power to individuals and their access to governmental programs. When government wields this kind of power, we have rules to constrain the government . . . but these rules generally do not apply to private parties [or] to government decisions to contract out.*[97]

The bar exam that, since the early 1900s, has been the principal gateway into the practice of law, is no longer controlled by the state in which it is administered. In all but two jurisdictions, all or a substantial portion of the bar exam content is created and controlled by the National Conference of Bar Examiners ("NCBE").[98] The NCBE is a not-for-profit corporation that develops licensing tests for bar admission and provides character and fitness investigations and other services to state examining boards.[99]

In providing exam content to jurisdictions, the NCBE is much more than a contracted vendor. The NCBE provides additional services to the state examining boards, such as: scoring the exam; equating exam performance across exam administrations; providing grader point sheets; scaling examinee scores from one exam component to another; and conducting character and fitness investigations.[100] In addition

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(citing the pandemic crises as illustrative of the issues in adapting technology for administration of the bar).

97. Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555, 556 (2010).

98. *See Jurisdictions,* NAT'L CONF. BAR EXAM'RS, https://perma.cc/W3UP-HT66 (last visited Sept. 23, 2023) (summarizing which jurisdictions use bar examination content controlled by the NCBE).

99. *Our Mission*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/3WJV-T7ED (last visited Nov. 15, 2023).

100. *See About NCBE,* NAT'L CONF. BAR EXAM'RS, https://perma.cc/P62Y-2M7W (last visited Sept. 14, 2023) ("NCBE . . . provides testing, research, and

to providing turnkey delivery and servicing of the bar exam, the NCBE has pervasively influenced the type and manner of licensing examination used across the country.

Bar licensing exams in the United States may take on one of three optional compositions:

Option 1: a state-law exam created entirely by members of the state examining board. Louisiana, the sole civil law jurisdiction in the United States, is the only state to employ Option 1.[101]

Option 2: a hybrid of state-law exam content and NCBE-controlled multistate content. Nine states use Option 2,[102] and in those states an applicant's performance on the NCBE multistate exam content comprises up to 50 percent of the applicant's overall score.[103]

Option 3: the Uniform Bar Exam ("UBE" or "uniform exam") composed exclusively of NCBE-controlled content.[104] Forty-one jurisdictions, including the District of Columbia, Puerto Rico, and the Virgin Islands have adopted the UBE.[105]

The uniform exam has replaced traditional, state-created bar exams that measured knowledge of state substantive, procedural, and evidentiary rules, and it has quickly grown to be the single most popular format for bar examination in the

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educational services to jurisdictions; provides services to bar applicants on behalf of jurisdictions; and acts as a national clearinghouse for information about the bar examination and bar admissions.").

101. *See About the MBE*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/QW7K-Q4FA (last visited Sept. 14, 2023) (indicating that Louisiana does not administer the MBE); *see also The Bar Exam*, LA. SUP. CT. COMM. BAR ADMISSIONS, https://perma.cc/ZWZ6-VBQY (last visited Sept. 14, 2023) (stating that "[t]he Committee on Bar Admissions administers a written examination" consisting of various Civil Code parts and Louisiana procedural rules). Nevada administered an exam without any multistate content from 2020 to 2022. *See* Order Regarding Modified July 2022 Nevada Bar Examination, No. 23-07733, at 1 (Nev. Apr. 21, 2022), https://perma.cc/8ZQX-DLZ4 (PDF).

102. The jurisdictions are: California, Delaware, Florida, Georgia, Hawaii, Mississippi, South Dakota, Virginia, and Wisconsin. *Cf. UBE Jurisdictions*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/9YBB-NP2Z (last visited Sept. 14, 2023) (listing the jurisdictions that administer the UBE, meaning they do not utilize option 2).

103. Griggs, *Building a Better Bar Exam*, *supra* note 14, at 25.

104. *See About the UBE*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/8PB5-CZVU (last visited Sept. 14, 2023).

105. *See id.*

United States.[106] Under a system of uniform examination, bar applicants in subscribing states take an identical exam.[107] Today, the only difference between the New York Bar Exam and the New Mexico Bar Exam is the fee to the applicant and the place where the exam is administered.[108] The uniform exam and all of its components are the proprietary products of the NCBE and are under exclusive NCBE control.[109] The NCBE determines which subjects will be tested during any given exam administration, dictates the timing and security conditions under which the exam may be administered, and polices what may be accepted as the correct answer to its exam questions.[110] The emergence of a uniform exam has facilitated multijurisdictional practice and offered a host of conveniences for bar applicants and state examining boards.[111] Uniformity in bar examination also has precipitated more opportunity for NCBE influence and has diminished state involvement in the licensure process.[112]

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106. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 5 ("Under a uniform system of examination, bar takers in every adopting jurisdiction take identical exams without variation for state law distinctions or state procedural rules. The UBE has juggernauted from only two adopting jurisdictions in 2011 . . . .").

107. *Id.* at 5.

108. *See UBE Jurisdictions*, *supra* note 102; *see also* N.Y. JUD. LAW § 465 (McKinney 2023) ($250 fee); N.M. R. BAR ADMISSION 15-105(A)(1) ($500 fee).

109. *Cf.* NAT'L CONF. BAR EXAM'RS, UNDERSTANDING THE UNIFORM BAR EXAMINATION 14 (2023), https://perma.cc/NB5D-Y328 (PDF) (describing the NCBE's comprehensive role in administering the UBE).

110. *See How Are Questions Written for NCBE's Exams? Part One: Two Multiple-Choice Question Drafters Share the Process*, 88 BAR EXAM'R, no. 3, 2019, https://perma.cc/2G2W-9DJF ("For each MEE question, the drafting committee also drafts a summary and an analysis. The analysis is provided to the jurisdictions to assist graders in grading the MEE . . . . The summary is a shortened version of the analysis and represents the drafting committee's judgment of what a high-quality answer could be.").

111. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 16 ("[T]he uniform exam has great appeal to would-be bar takers as it promises increased mobility and flexibility for multijurisdictional practice." (citing Myron T. Steele, *Winds of Change: The Challenges Facing State High Courts in Regulating the Practice of Law*, AM. BAR ASS'N (May 1, 2013), https://perma.cc/RX2Z-Q7WK)).

112. *See, e.g.*, Patton, *supra* note 49, at 151 (highlighting how the California Committee of Bar Examiners "no longer has any involvement with administration of the NCBE test," and how both California and Louisiana have "abandoned their traditional government supervision" of the ethics component

The widespread adoption and national use of a uniform bar exam has accelerated a powershift that began in the 1970s when the NCBE introduced the Multistate Bar Exam ("MBE"),[113] the first of four multistate exams.[114] The MBE was a game changer, both in the field of bar examination and in law schools, as neither had relied on multiple-choice testing before the NCBE developed this standardized test purporting to measure competency in six doctrinal subject areas.[115] As one state after another adopted this new exam, the influence of the NCBE expanded. Even before the successor Multistate Essay Exam ("MEE") was introduced,[116] states relied on the NCBE to supply up to half of their bar exam content.[117] That reliance can allow state bar examiners to focus their limited resources on other aspects of the licensing process, but it could also allow their

for licensure); *see also* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 52 ("The UBE states . . . seem to have fully ceded to the NCBE their roles as gatekeepers to the profession.").

113. *See Celebrating 50 Years of the MBE: A Brief History of the Landmark Examination*, 91 BAR EXAM'R, no. 3, 2022, https://perma.cc/68CA-CF8L (stating that the MBE was administered for the first time in February 1972); *see also* HOWARTH, *supra* note 28, at 33 ("The MBE also shifted the role of the NCBE from cheerleader and technical advisor to test designer and supplier. . . . The MBE is the anchor for the NCBE because jurisdictions cannot replicate it for themselves, unlike essays and performance tests.").

114. The NCBE's four "multistate" exams include the Multistate Bar Exam ("MBE"), the Multistate Essay Exam ("MEE"), the Multistate Performance Test ("MPT"), and the Multistate Professional Responsibility Exam ("MPRE"). *See NCBE Exams*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/FF8K-FRMW (last visited Sept. 14, 2023). States may license or purchase three of those exams for use as all or part of a state administered bar exam. *See, e.g.*, Benjamin Afton Cavanaugh, *Testing Privilege: Coaching Bar Takers Towards "Minimum Competency" During the 2020 Pandemic*, 23 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 357, 381 n.135 (2021) (discussing the NCBE's licensing of the MBE and MPT to Texas for use on Texas's bar exam); Scott Johns, *Testing the Testers: The National Conference of Bar Examiner's LSAT Claim and a Roller Coaster Bar Exam Ride*, 35 MISS. COLL. L. REV. 436, 437 n.3 (2017) (explaining Colorado's purchase of the MBE, MEE, and MPT from the NCBE for use in the Colorado Bar Exam).

115. *See* HOWARTH, *supra* note 28, at 32–33 (contrasting MBE multiple-choice questions, which test "general principles" of law, from the pre-MBE bar exams, which were entirely written and focused exclusively on a state's local law).

116. The MEE has been produced since 1988, which was sixteen years after the introduction of the MBE. *See The Multistate Essay Examination (MEE)*, BAR EXAM'R, https://perma.cc/2F8D-ND85 (last visited Sept. 14, 2023).

117. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 25.

exam making skills to atrophy for lack of use. Over time, deferential outsourcing can "weaken the decision-making capacity of government officials along with their sense of engagement and agency."[118] Not writing or discussing new exam questions has created a significant and disturbing distance between those tasked to assess competency to practice law and the tool used as the assessment.

The transition to a uniform system of examination was an intentional act that has yielded unintended consequences for the self-regulated legal profession.[119] The NCBE developed more multistate exam products with an eye to standardizing the bar exam in toto.[120] One pitch that the NCBE used to draw states to its uniform exam was to describe the UBE as a combination of three multistate exams.[121] This pitch was likely a strong lure to many states that were already using at least two of the multistate exams to make the full shift to the UBE. State supreme courts and their delegated examining boards sought to purchase or license bar exam questions sourced by a private party while retaining control and oversight of the licensure process. But, instead, they contracted for a commercially prepared exam that seems to have come with strings attached.[122] And although the courts did not overtly surrender ultimate authority in making bar admission decisions to the NCBE, they have done so implicitly.

It is here that an important distinction must be made between outsourcing government services and outsourcing governmental regulatory powers.[123] Although the NCBE is the

118. Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J.L. & TECH. 103, 127 (2018).

119. *See* Diane F. Bosse, *A Uniform Bar Examination: The Journey from Idea to Tipping Point*, 85 BAR EXAM'R, no.3, 2016, https://perma.cc/L7UK-YLTD (discussing how supporters of the UBE never intended a local jurisdiction's loss of control over bar admissions).

120. *See id.* (enumerating the goals of the UBE including consistency in grading and score calculation, and portability of scores).

121. *See id.* ("A number of jurisdictions were currently using all three tests, providing a ready nucleus of jurisdictions that might be willing to accept the scores achieved on the same tests taken in a sister state.").

122. *See infra* notes 141–142 and accompanying text.

123. *Cf.* Brown, *Public Laws*, *supra* note 89, at 658 ("[Private parties'] incentives are necessarily self-serving and possibly in conflict with the best interests of the broader populace. In outsourcing regulatory *power* to private

most well-known, it is not the lone bar vendor contracting with states in connection with the provision and administration of the bar exam. State examining boards contract with other vendors, like ExamSoft[124] and ILG,[125] that provide technology platforms for the delivery of bar exam content, submission of applicants' responses, and remote proctoring and/or facial recognition of bar applicants.[126] However, outsourcing to these software vendors is for a very narrow and limited purpose and does not involve the same risk of sweeping overreach in attorney admission. The public probably does not care who writes the bar exam questions. But in the context of licensure by bar examination, there is a compelling difference between contracting with a private provider to print and distribute bar exam questions and indirectly empowering the provider to set the standards for entry into the profession. While the former appears to be the intent of the state supreme courts in adopting the uniform exam, the latter threatens the self-regulation of attorney admission.

The NCBE's prominent role in attorney licensure has only recently begun to receive scholarly attention.[127] As a not-for-profit corporation, the NCBE has the legal right and proprietary entitlement to control the multistate exams that it has developed. Notwithstanding the quality and utility of the

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entities, therefore, agencies compromise their ability to fulfill their role as representatives of the public interest." (emphasis added)).

124. ExamSoft's marketing materials boast a "long-running track record for administering state Bar exams with the highest level of platform security and stability available." *Enabling Secure Bar Exam Delivery*, EXAMSOFT, https://perma.cc/BT4M-XHBA (last visited Sept. 24, 2023).

125. ILG provides software that "allows applicants to complete the written portion of the bar exam on a laptop." *ILG Exam360®*, ILG TECHS., https://perma.cc/T8Q4-A2LS (last visited Sept. 24, 2023).

126. *See* EXAMSOFT, EXAM INTEGRITY AND AUTHENTICATION STREAMLINED TO MAKE EXAM DAY MORE SECURE 2 (2023), https://perma.cc/V8P3-BHDV (PDF).

127. *See, e.g.*, Patton, *supra* note 49, at 128; Nicholas W. Allard, *Too Much Power Rests with the National Conference of Bar Examiners*, NAT'L L.J. (Mar. 26, 2015), https://perma.cc/37ZM-T7RT; Ben Bratman, *Why More States Should Not Jump on the Uniform Bar Exam Bandwagon* 1 (Univ. Pittsburgh Legal Stud. Rsch., Working Paper No. 2015-20, 2015), https://perma.cc/4AVH-TCE5 (PDF); Elizabeth Sherowski, *An Inclusive Model for New Lawyer Licensing*, 51 CAP. UNIV. L. REV. 77, 77 (2023); Rory D. Bahadur & Kevin Ruth, *Bad Math, Bar Sauce and the ABA as a Shill for the NCBE*, 66 HOW. L. J. 323, 324 (2023).

exam products, when courts allow the NCBE's control of its multistate and uniform exams to extend beyond the pricing and terms of use, they are vesting the non-state entity with regulatory control.[128] The bar exam has been all but fully privatized by the sweeping usage of NCBE exams in the licensing process that denies states any direct input into the content or scope of exam questions. As one scholar posited, "privatization is here to stay . . . [a]nd it is taking on new forms that are more difficult for the public to identify and question, let alone dismantle."[129] In the scheme of privatized bar examination, the NCBE then becomes a quasi-regulator of bar admission.

The NCBE is, in essence, the non-profit manufacturer of a bar exam product that it licenses to states. Like the supplier of a private label brand, it allows states to affix their names to the exam product without control or input into the quality and content of the product before delivery.[130] After affixing their names to the uniform exam, states set the fees to be paid by bar applicants.[131] With a substantial majority of jurisdictions dependent on NCBE exams, the distinction between a state's bar exam and the NCBE's uniform exam is one in name only. The resultant outsourced control of attorney licensure is at odds with the mandate of self-regulation. A lack of transparency can make the outsourced regulatory role of the NCBE even more problematic.

Although its role in the regulatory landscape is complex, the NCBE is not the villain in this outsourcing story.[132] As a not-for-profit corporation, the NCBE is generally not viewed as

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128. *See supra* note 123 and accompanying text.

129. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, *supra* note 86, at 620.

130. Lifang Wu et al., *Private Label Management: A Literature Review*, 125 J. BUS. RSCH. 368, 368 (2021) ("[P]rivate brands, or store brands, are products which carry a brand name of a retailer's choice and are fully owned, controlled, and sold exclusively by the retailer.").

131. *See e.g.*, SUP. CT. TEX. R. GOVERNING ADMISSION BAR 1(a)(15) ("'Texas Bar Examination' means the Uniform Bar Examination . . . ."); SUP. CT. R. GOV'T BAR FOR OHIO R. 1, § 5(A) (naming the UBE the "Ohio Bar Examination").

132. While I am deeply critical of the power imbalances in attorney regulation, nothing stated or implied in this Article is or is intended to be a criticism of the NCBE, its general staff, or its products.

predatory or maleficent. When private entities act or are established for charitable purposes, they enjoy a presumption of benevolence that operates as a protective blanket, shielding them from the level of scrutiny that would be thrust upon government or profit-motivated actors.[133] When the private entity takes on a governmental role, that presumed benevolence diminishes public accountability.[134] If there is any fault for the breach in control over attorney admission, it is most probably attributable to our own inattention and deference. As laid out in Part I, attorney admission practices receive far less attention than does attorney discipline. As a result, outsourcing practices in bar admission have become the most susceptible to outside encroachment and outright overreach.

A. *Opacity and Overreach*

The public (and often the government) does not place high transparency demands on individuals or institutions who are trusted or viewed as trustworthy. The NCBE is a highly respected organization that has an almost 100-year history of servicing the needs of state bar examiners.[135] The almost familial relationship between the NCBE, the ABA, and the other power brokers in the legal profession is built on a circuitous symbiosis of trust and lack of transparency. The NCBE is trusted,[136] therefore its actions are rarely scrutinized. And transparency is almost never demanded (or even expected) from this *quasi*-regulator.[137]

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133. *See* IND. UNIV. LILLY FAM. SCH. PHILANTHROPY, WHAT AMERICANS THINK ABOUT PHILANTHROPY AND NONPROFITS 20, 24 (2023) (explaining that public confidence remains relatively high in the nonprofit sector despite declines in public trust in the government, yet the public generally "does not view charitable entities as especially transparent").

134. *See* Rizzardi, *supra* note 70, at 442 (explaining that when it comes to not-for-profit bar examiners, "basic notions of checks and balances, or transparency and accountability, simply do not apply").

135. *See About NCBE*, *supra* note 100 (summarizing the NCBE's establishment in 1931 as a not-for-profit).

136. *See* Erica Moeser, *President's Page*, 84 BAR EXAM'R, no. 1, 2015, https://perma.cc/Z6S3-ZENR ("Courts and bar examiners have developed trust in the MBE over the 40-plus years it has been administered. Some legal educators have not.").

137. *See* Nachman N. Gutowski, NextGen Licensure & Accreditation 36 (Nov. 13, 2023) (unpublished manuscript) (on file with author); *see also*

The parameters of the contracts between state examining boards and bar vendors are concealed from the public and are not obtainable by open records requests.[138] Even though all states and the District of Columbia have statutes that provide for public access to government records,[139] records of the judicial branch may not be fully subject to public disclosure through state open records acts.[140] The NCBE seems to be cloaked with many of the same protections and exemptions that the judicial branch enjoys and, at the same time, is not subject to open records requests because it is a private entity.[141] In its quasi-regulator role, the NCBE's lack of transparency and accountability is troubling and difficult to justify. The doctrine of judicial immunity was not contemplated for the protection of a private corporation that contracts with a branch of state government.[142]

Without access to the state-NCBE contracts, it is impossible to determine the scope of authority that has actually been delegated to the NCBE. It would not be unreasonable to assume that the undisclosed contract terms afford the NCBE a considerable amount of discretion to act on behalf (or in place) of the state examining boards. One basis for such an assumption

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Rizzardi, *supra* note 70, at 431 (explaining that bar examiners possess "consequential regulatory powers" and are "[r]ecognized by the states as a regulatory administrative agency").

138. *See* Rizzardi, *supra* note 70, at 429 (highlighting how "[t]he bar examiners in forty-four states operate within a system of rules that make many of their actions confidential," including the ability to deny open record requests).

139. *See* Brauneis & Goodman, *supra* note 118, at 134.

140. *See, e.g.*, KAN. STAT. ANN. § 45-217(k)(2) (2023) (excluding judges from the definition of public agencies subject to Kansas' open records statute); *see also* Rizzardi, *supra* note 70, at 431–39 (discussing the parallels between sweeping confidentiality rules used by state bar examiners and laws governing transparency for the judiciary).

141. *See* Rizzardi, *supra* note 70, at 451 ("[B]ar examiners are agencies within the judicial branch, and some courts have resisted the application of executive branch transparency concepts to the judiciary.").

142. *See* SAMUEL P. STAFFORD, AN OVERVIEW OF JUDICIAL IMMUNITY 2 (2006), https://perma.cc/4N3K-3U8G (PDF) (explaining that legislative enactments and court interpretations "have expanded the doctrine [of judicial immunity] so that it applies to a variety of individuals within the broad ambit of the judicial field"); *see also* Rizzardi, *supra* note 70, at 473 ("[S]elf-serving declarations of confidentiality continue to immunize the bar examiners from inquiry, leaving the public uninformed . . . .").

is the fact that states have overwhelmingly deferred one component of bar licensure, separate from the bar exam, to the NCBE: the Multistate Professional Responsibility Exam ("MPRE").[143] All jurisdictions except Puerto Rico and Wisconsin require a passing score on the MPRE as a precondition of attorney licensure.[144] The weight of NCBE influence in state governance of attorney admission is easily demonstrated by states' nearly unanimous agreement to condition bar admission, in part, on an exam that tests the ABA's Model Rules of Professional Conduct, despite the fact that many state supreme courts have rejected some portions of the Model Rules.[145] Such a nod from the states signals supreme confidence in the MPRE, but it also demonstrates willingness to delegate another component of the attorney licensure process to the NCBE.

Another basis for inferring that a broad latitude of regulatory discretion has been delegated to the NCBE is that the entity has, on multiple occasions, made significant (and seemingly unilateral) changes to the content and format of the bar exam.[146] Moreover, the extent to which state courts and state bar associations have had opportunities for deliberative participation in the change process has not always been visible to the public.[147] One such change was the elimination of state

143. The NCBE creates and administers the MPRE, which is a separate component of the attorney licensing process. *See Multistate Professional Responsibility Examination*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/7LHZ-78T6 (last visited Sept. 16, 2023).

144. *See id.* (explaining how "the MPRE is required for admission to the bars of all but two United States jurisdictions (Wisconsin and Puerto Rico)" but how Connecticut and New Jersey accept completion of a law school professional responsibility course in lieu of the MPRE).

145. *See About the MPRE*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/XSU5-5ZBM (last visited Sept. 16, 2023) (stating that the MPRE's subject matter includes the ABA Model Rules of Professional Conduct); *see also* David L. Hudson, Jr., *States Split on Model Rule Limiting Harassing or Discriminatory Conduct*, 103 A.B.A. J., no. 10, 2017, https://perma.cc/FP7H-ZUAU (explaining that states were split on whether to adopt ABA Model Rule 8.4(g), which prohibits lawyers from engaging in harassment or discrimination).

146. *See generally* NAT'L CONF. BAR EXAM'RS, NCBE TESTING MILESTONES, https://perma.cc/X3U8-YLGB (PDF) (last visited Sept. 20, 2023) (showing the evolution of the MBE, MPRE, and MEE from 1932 to 2018).

147. *See Testing Milestones*, 90 BAR EXAM'R, no. 2, 2021, https://perma.cc/Y8YK-7GGJ (detailing the NCBE's timeline for proposed and

choice in determining which questions and subject matter to include in the licensing exam.[148] For many years, the NCBE provided nine separate essay questions to jurisdictions that adopted the MEE.[149] Each jurisdiction was free to select any six of the nine available questions, giving states the option to avoid questions keyed to rules that might be inconsistent with state law distinctions.[150] In 2014, the NCBE changed the format and the content of its MEE.[151] States that used the reformed MEE were deprived of an important autonomy that had allowed them both to benefit from the efficiency and expertise of using a private provider for exam questions, and the ability to ensure that new lawyers demonstrated knowledge of state law before being allowed to practice.

The most recent development in bar admission is the NextGen Bar Exam. Scheduled to debut in 2026, the NextGen exam "will be narrowed to include only those knowledge areas that cross a wide range of practice areas, from litigation to transactional work, and that newly licensed lawyers most commonly encounter."[152] Released promotional materials promise that the NextGen exam will not contain any essay questions and it will test fewer subjects than the current uniform exam.[153] Unlike its UBE predecessor, the NextGen

implemented changes without clear evidence that those changes were initiated by state examining boards or state supreme courts).

148. *See The Evolution of the Multistate Essay Exam: Why Family Law May Be Tested Less*, J.D. ADVISING, https://perma.cc/H2SW-52ZU (last visited Sept. 16, 2023) (explaining that the NCBE, in February 2014, eliminated the ability to choose questions for states administering its six-question MEE).

149. *Id.*

150. *Id.*

151. *Id.*; *see also* Moeser, *supra* note 136 (describing the research that drives changes to bar exam content and explaining that civil procedure made its way onto the exam "by the same process of broad consultation that has marked all other changes to our tests as they have evolved").

152. Marilyn J. Wellington, *The Next Generation of the Bar Exam: Quarterly Update*, 91 BAR EXAM'R, no. 3, 2022, https://perma.cc/F9JN-G9YH; *see also id.* ("[T]he next generation of the bar exam will add skills that are central to the work of a newly licensed lawyer, including legal research, client management and counseling, negotiation and dispute resolution, and investigation and evaluation.").

153. *See Some Subjects to Be Removed from MEE in 2026*, NAT'L CONF. BAR EXAM'RS (July 17, 2023), https://perma.cc/LA8H-GYXU (announcing that Conflict of Laws, Family Law, Trusts and Estates, and Secured Transactions will no longer be tested on the MEE when the NextGen Bar Exam is

exam will not have discreet components, which will sunset the MBE, MEE, and MPT.[154] Perhaps most notably, the NextGen exam purports to test performance-type skills like legal research, negotiation, and client counseling.[155]

The planned focus on assessing law practice skills and the shift away from essay testing seems to be met with approving nods throughout the legal community.[156] The described changes sound like welcome steps in the direction proposed by Professor Deborah Merritt and the Institute for the Advancement of the Legal System ("IAALS") in a comprehensive study that identified twelve interlocking components of minimum competence and proposed concrete ways to improve the legal licensing process to better protect the public.[157] But the self-described next generation of the bar exam does not incorporate Professor Merritt's findings that speeded multiple-choice questions and closed-book exam formats are not reflective of first year law practice skills and cannot effectively assess competence in client representation.[158] Contrary to the IAALS study findings, the NCBE doubled down on the use of closed-book, speeded, multiple-choice questions. Understandably beholden to standardized testing practices, the

administered). Contrary to prior announcements, however, the NCBE, in response to heavy criticism, adjusted course and announced that it will include family law on the NextGen exam beginning in 2028. *NCBE Announces Update to NextGen Exam Content, Extends Availability of Current Bar Exam*, NAT'L CONF. BAR EXAM'RS (Oct. 25, 2023), https://perma.cc/MP5Z-D59Z.

154. *See NBE Announces NextGen Exam Structure of Current Bar Exam*, NAT'L CONF. BAR EXAM'RS (Aug. 28, 2023), https://perma.cc/PV2H-P5JP (announcing that the MBE, MEE, and MPT will sunset after the July 2027 exam).

155. *See supra* note 152 and accompanying text.

156. *See* Kathryn Rubino, *These States Are Leading the Charge for an Updated Bar Exam*, ABOVE THE L. (Nov. 1, 2023), https://perma.cc/74TK-9A6W.

157. *See* DEBORAH JONES MERRITT & LOGAN CORNETT, INST. ADV. AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 3 (2020), https://perma.cc/HU4C-EF29 (PDF).

158. *See id.* at 4 (stating that "[m]ultiple choice exams should be used sparingly, if at all," and, if jurisdictions use multiple-choice questions, "those questions should be open book").

NCBE announced in 2023 that nearly half of the NextGen exam questions will be in multiple-choice format.[159]

The NextGen exam is the end product of a comprehensive three-year study initiated by the NCBE.[160] The NCBE appointed a task force to survey lawyers and law school faculty about the current bar exam and the practice areas that should be reflected on the exam.[161] A key contrast between the NCBE study and the IAALS study is that the former does not acknowledge the wealth of academic literature and social critique—namely, that the current bar exam does not measure competency to practice law, but instead measures memory,[162] financial resources,[163] and test-taking skills.[164] The NCBE can afford to be far more opaque in its interpretation and use of the data collected because it is a private entity not relying solely on grant funding.[165] It is equally

159. *See* Karen Sloan, *New Bar Exam Gets Lukewarm Reception in Previews*, REUTERS (July 19, 2023), https://perma.cc/8PMX-P7TT (explaining that nearly half of the questions on the NextGen Bar Exam will be standalone multiple-choice questions).

160. *Reports*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/7DX6-QT6M (last visited Sept. 18, 2023).

161. The NCBE Testing Task Force undertook a three-year study from 2018 through 2020. The Testing Task Force's study was completed at the end of 2020, and the Task Force's recommendations were approved by the NCBE Board of Trustees in January 2021. *See Testing Task Force Final Update*, 90 BAR EXAM'R, no. 1, 2021, https://perma.cc/73W8-BU62.

162. *See* Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 377 (2002) ("One problem with the essay questions is that they require analysis based on memorization rather than analysis based on research and case law, which is the kind of analysis practicing lawyers do.").

163. *See* Kayleigh McNiel, *Hidden Hurdles: The True Cost of the Bar Exam*, WASH. J.L. TECH. & ARTS (Apr. 24, 2023), https://perma.cc/4QQW-2SX9 (detailing the significant costs of preparing and taking the bar and reasoning that such costs "continue[ ] to be the biggest barrier to advancing diversity in the legal profession"); *see also* Deborah Jones Merritt et al., *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. (July 20, 2021), https://perma.cc/UNY3-RPYR (examining the connection between financial resources and bar exam success).

164. *See* Curcio, *supra* note 162, at 383 ("Great emphasis is put on examinees' abilities to take multiple-choice exams by using the MBE for up to one-half of the bar exam score . . . .").

165. *See National Conference of Bar Examiners 2022*, PROPUBLICA: NONPROFIT EXPLORER, https://perma.cc/C5QY-TYNQ (last visited Sept. 19, 2023) (providing the NCBE's 2022 Form 990, which shows that only $14,000

important to note that an NCBE study on bar examination—no matter how comprehensive or inclusive—cannot disentangle itself from the substantial revenue stream that the NCBE earns as the principal producer of bar exam products and services in the United States.

Although the NCBE made laudable efforts to seek input from a broad array of stakeholders, the fact remains that the NCBE is the agent in a principal-agent relationship with state supreme courts. On the basis of that agency relationship, we should expect states to charge the NCBE with the task of demonstrating how its proposed exam revisions will result in better competency measures than the predecessor UBE. The regulators, not the exam provider, should initiate the inquiry and have the ultimate say about which method of examination is most suited to assess minimum competency. The important question is not whether states are more persuaded by Professor Merritt's recommendations than the NCBE's recommendations. The important question is whether states, after being presented with both studies, made their own informed and independent regulatory decisions rather than simply deferring to the NCBE's pronouncement.

B. *Courts as Consumers*

We should reasonably expect that the leaders of a self-regulated profession could offer some quantifiable description of what it means to be competent to enter the practice of law and, on that basis, direct its agent(s) to build an assessment tool to measure that competence. What we have instead is a system where an agent has built an exam that bears little resemblance to the practice of law, and its principals have equated test performance with competence.[166] The extent to which state courts have become disengaged with the process by

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of the $12.7 million in revenue less expenses NCBE made could be classified as contributions or grants).

166. *See* Marsha Griggs & Andrea A. Curcio, *Book Review of Shaping the Bar: The Future of Attorney Licensing*, 71 J. LEGAL ED. 543, 547 (2022) ("[*Shaping the Bar*] captures and quotes prominent bar examiners and attorney regulators admitting that they have not examined whether the bar exam is a valid way to measure practice competency.").

which we assess the competence of new lawyers hints at loss of control of an important regulatory function.[167]

The goals of self-regulation cannot be served when our state high courts are reduced to the role of consumers and limit their inquiries to *when* or *whether* they should adopt the latest bar exam product. The key sequences in states' decisions to move to a system of uniform or "national" examination were not driven by the state supreme courts, who are the de jure regulators of entry to the profession.[168] The decision-making sequence began with a joint working group responding to a recommendation from NCBE leadership to investigate the possible advantages of a move toward a national licensure system.[169] Thereafter a "special committee" formed by the NCBE and the Bar Admissions Committee of the ABA Section of Legal Education and Admissions to the Bar conferred to promote (what is now) the UBE and to develop strategies to elicit its national adoption.[170]

More than a decade after the UBE's first administration, thousands of lawyers have taken the exam and benefitted from its prominent feature of score portability.[171] One could argue (and some of my dearest colleagues have argued) that since the ultimate decision to adopt the UBE belongs exclusively to the state supreme courts, the sequential process leading to that adoption is immaterial, especially if the UBE serves to improve attorney admission and the legal profession. More simply, "So what, if the ends justify the means?" But even more simply, and in rebuttal, the sequential process of judicial decision-making is never immaterial. The judiciary should be no less constrained in the delegation of its fundamental duties than Congress.

The standard set by the Supreme Court is that Congress cannot delegate its legislative power to regulate an industry by

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167. *See supra* note 123 and accompanying text.

168. *See* Bosse, *supra* note 119 (explaining that NCBE planted the seeds for a national bar exam in conversations with representatives of the Conference of Chief Justices, the America Bar Association, and the Association of American Law Schools).

169. *See id.*

170. *Id.*

171. *See 2022 Statistics*, BAR EXAM'R, https://perma.cc/XU6Q-79C5 (last visited Sept. 19, 2023) (stating that 9,570 UBE scores were transferred to other jurisdictions in 2022 for bar admission).

distributing the authority to develop codes of conduct for members of the industry without providing standards or guidelines for the implementation of its objectives.[172] In *A.L.A. Schechter Poultry Corp. v. United States*,[173] Congress had enacted a statute that gave the president "blank check" authority to codify rules promulgated by a poultry trade association.[174] In essence, the trade association could write its own manual of restrictive policies concerning hiring, wage rates, sales volume, and membership terms, and the president could then codify the manual (in its entirety) into law, so long as the polices were not anticompetitive.[175] The president also had blue pencil authority to make exceptions and exemptions or to create his own code.[176] The Supreme Court held that the congressional power to regulate an industry cannot be delegated to the president, and, by application, it cannot be delegated to a trade association within the industry.[177] In setting this standard, the Court rejected Congress's rationale that a trade association, which had expertise and familiarity with the problems of the industry and its members, was the appropriate vehicle to dictate laws that could later be codified.[178]

State supreme courts should receive no greater latitude in the delegation of their authority than their legislative counterparts. The legislature cannot write a "blank check" statute that leaves room for the president or a private organization to fill in the blanks.[179] It should follow then that

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172. *See infra* note 177 and accompanying text.

173. 295 U.S. 495 (1935).

174. The relevant provision of the National Industrial Recovery Act, 15 U.S.C. § 703, authorized the president to approve codes of fair competition for a trade or industry upon application by one or more trade or industrial associations or groups; impose conditions for the protection of consumers, competitors, employees, and others in furtherance of the public interest; use discretion to provide exceptions to and exemptions from the provisions of such code necessary to effectuate the policy; and prescribe such a code on his/her own motion or complaint where one has not been approved. *Schechter Poultry*, 295 U.S. at 521–23.

175. *See Schechter Poultry*, 295 U.S. at 538 ("[T]he President may approve or disapprove their proposals as he sees fit.").

176. *Id.* at 523.

177. *See id.* at 537.

178. *See id.*

179. *See supra* notes 174–177 and accompanying text.

the judiciary—charged with setting the standards for attorney admission—cannot be allowed to offer a similar "blank check" to the NCBE or any other organized lobby, thereby empowering the private sector to fill in all the blanks as it deems beneficial to the profession.

The inverted roles in bar admission have placed the test makers in a position to dictate to states, and to law schools indirectly, what is needed to demonstrate competency to practice law.[180] Gone unchecked, that power can leave the public without important information, and it can interfere with legal education and academic freedom.[181] The courts have the ability to reject NCBE's proposed changes, but law schools do not.[182] The welcome but undefined expected rollout of the NextGen exam seems to leave more questions than answers. Important details about the price of the NextGen exam—to bar applicants and to jurisdictions—are unknown. Information about the scoring of the NextGen exam is also unknown. UBE jurisdictions that were promised the ability to set their own cutoff (passing) scores[183] are being told that they will have to set new cut scores on some scale not yet disclosed.[184]

As the debut of the NextGen exam steadfastly approaches, the state supreme courts' prior records of acquiescence to new NCBE exam products make it unlikely that they will exercise their veto power to resist NCBE-driven changes to licensure standards in the future.[185] Anticipating that they will not, law

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180. *See supra* note 49.

181. *See supra* notes 141–142 and accompanying text.

182. *See supra* note 64 and accompanying text.

183. *See* Griggs, *Epic Fail*, *supra* note 67, at 42.

184. *See FAQs About Recommendations*, NEXTGEN, https://perma.cc/AQ77-GJYC (last visited Sept. 16, 2023)

> The changes to the NextGen exam are substantial enough to necessitate adoption of a new score scale. That means jurisdictions will need to set new passing scores. NCBE will support jurisdictions in conducting a standard-setting study to provide a range of scores based on which jurisdictions would make the policy decisions related to setting their passing score requirements.

185. Both New York and California have formed working groups to explore the possibility of creating a state law exam that does not use any NCBE content. *See* Alan D. Scheinkman & Michael Miller, *Why New York Should Withdraw from the Uniform Bar Exam*, BLOOMBERG L. (July 14, 2021), https://perma.cc/98GW-HRTL (advocating for the state to abandon the NCBE and adopt a new exam entirely); Ryan Boysen, *Calif. Explores Changing Its*

schools have already begun the process of implementing or proposing curriculum changes.[186] Concerningly, these changes must be set in motion before the NCBE has released a sufficient number of sample questions,[187] and before schools know whether or when their graduates will take the NextGen exam.[188] Thus, law schools find themselves in the untenable position of blindly implementing curricular changes.[189]

To maintain accreditation as the ABA mandates, law schools must maintain a prescribed bar passage rate for their graduates.[190] If changes to the bar exam will impact the difficulty of bar passage, law schools will be directly affected. Law schools have little alternative other than to adapt their faculty composition and curricular programing to ensure that their graduates are equipped to pass a bar exam. In this sense, the NCBE has garnered some amount of ABA-endorsed regulatory control (by implication) over law schools. This ability to indirectly dictate or influence law school curricula is but one example of NCBE overreach.

Bar Exam, or Nixing It Altogether, LAW360 (Apr. 27, 2021), https://perma.cc/QV5P-UBVG (reporting on the significant changes or complete abandonment of NCBE materials being contemplated by bar examiners in California).

186. *See* Sarah Wood, *NextGen Bar Exam: What to Know*, U.S. NEWS & WORLD REP. (Feb. 15, 2023), https://perma.cc/4PFJ-8KT8 (discussing potential effects of the NextGen bar exam on law school curricula).

187. *See 5 Questions for Ashley M. London, Assistant Professor of Law, Thomas R. Kline School of Law, Duquesne University*, PA. BAR NEWS, July, 10, 2023, at 10, 10, https://perma.cc/8BY2-HYNU (PDF) ("You cannot fully adapt to a newly formatted test if you have not seen the new test questions . . . . [I]n order to adapt to these incredibly significant changes, we need a little more than . . . NCBE [has provided].").

188. *See* James B. Astrachan et al., *The NextGen Bar Exam*, DAILY REC. (Nov. 15, 2022), https://perma.cc/49CF-KL2X (highlighting the various changes to the bar exam under the NCBE's implementation of the NextGen exam and advocating for the Maryland legal community to take an interest in its development so as to assist in better preparing future lawyers for practice).

189. *See* Wood, *supra* note 186.

190. *See* AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023–2024 27 (2023), https://perma.cc/G6ZC-X473 (PDF) ("At least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.").

C. *Profits of Privatization*

Typically, cost and efficiency are the reasons that a governmental agency would consider outsourcing.[191] Privatizing the bar exam is easily justified if the cost of using an outsourced exam is the same or less than the cost to administer a homegrown exam. This cost-benefit analysis is a largely unstudied aspect of judicial delegation in the regulation of bar admission. There are good reasons for this. First, many of the exam products sold to states by the NCBE are innovative and unique: there was no in-state parallel to the MBE or the MPT.[192] Without such a parallel, we cannot readily compare before and after costs prior to NCBE's development and marketing of the product. Second, since all but one of the jurisdictions uses at least one of the NCBE's multistate exams,[193] we cannot meaningfully compare expenditures in states that pay for NCBE exams to the one state that does not.

Third, and most strikingly, unlike most other state and federal agencies, there appears to be no requirement that a state supreme court solicit competitive bids before contracting with the NCBE. A governmental unit is customarily required to engage in a bidding process if it seeks to contract with a private provider.[194] The process of seeking a competitive bid is consistent with judicious use of public funds.[195] Although not always the case, the bidding process provides a mechanism to shepherd tax dollars by selecting the contractor with the lowest

191. *See supra* notes 83–84 and accompanying text.

192. The MPT was developed by NCBE and first made available to states in 1997. Stephanie Francis Ward, *A Better Bar Exam? Law Profs Weigh in on Whether Test Accurately Measures Skills Required for Law Practice*, AM. BAR ASS'N J. (Jan. 8, 2020), https://perma.cc/DL64-HH3Z. Although new to most states, California is the innovator of the bar admission performance test. *Id.* California developed and began using an in-state performance test in 1983. *Id.*

193. *See supra* note 101 and accompanying text.

194. *See* Custos & Reitz, *supra* note 97, at 570 (summarizing how this bidding process provides for "systems of procurement that require competition as much as reasonably possible").

195. *See id.* at 571–72 (explaining how a bidding process is designed to create "competitive pressure [that] will force private entities to trim costs to the bone" when working with governments).

bid.[196] In the case of the bar exam, there is no competitive bidding because the NCBE is an absolute monopoly. The NCBE has no competitors in the business of creating, licensing, selling, and grading bar exams, which means that, in the limited market for bar exams, the NCBE holds a 100 percent share.[197] The few states that currently draft and use their own exam questions are not competitors of the NCBE because homegrown exam questions are created for the sole purpose of testing the law of their own jurisdiction and will have little to no competitive appeal to other states. Thus, without competitive bidding information, it may be difficult for states who have contracted with NCBE to identify cost savings in dollars.[198]

Fourth, state-by-state comparative data would be of little value. The costs of administering the bar exam will vary greatly by state, the number of bar applicants, the physical costs to reserve facilities for exam administration, state budgetary constraints, and the nature and number of accommodations that must be provided to qualified applicants. The Commonwealth of Massachusetts has adopted the uniform exam and relies on NCBE for all of its bar exam content but performs its own

196. A bid does not have to be the lowest for it to be selected—it may be selected because it is the best available. *See id.* Some agencies do not engage in competitive bidding. *Id.* at 572.

197. Commercial bar preparation companies, like Adaptibar and Themis, license questions from the NCBE for use in their courses. *See, e.g.*, *The UWorld Difference*, THEMIS BAR REV., https://perma.cc/X74B-GUW3 (last visited Nov. 17, 2023) (showing Themis's collaboration with UWorld to acquire "1,375+ licensed NCBE questions"); *New NCBE Licensed Questions Added*, ADAPTIBAR (Dec. 15, 2021), https://perma.cc/WM2J-4QZM (announcing availability of "200 NCBE licensed questions"). Any questions not licensed from the NCBE are drafted to simulate NCBE questions. *See, e.g.*, *How Many Multiple-Choice MBE Practice Questions Come With BARBRI? Are They Real MBE Questions?*, BARBRI (Apr. 9, 2022), https://perma.cc/HZD8-XJ26 (explaining that Barbri offers limited number of "real" NCBE questions but primarily relies on "realistic" independently curated practice questions).

198. There are certainly opportunity cost savings for the jurisdictions who rely on NCBE for products and services. Establishing test validity and ensuring test reliability is a costly process, and many states would not want to shoulder those ongoing costs alone. The greater point this Article makes, however, is that those opportunity costs are not readily quantifiable because they have relied on the NCBE servicing for so long.

character and fitness investigations.[199] Massachusetts pays approximately 0.0003% of its allotted $759 million judicial budget to the NCBE for the state's administration of the uniform exam.[200] South Dakota does not administer the uniform exam or rely on the NCBE for character and fitness investigations, but still pays a comparable proportion of its allotted state judicial budget to the NCBE for products and services.[201] Louisiana does not use any NCBE products in its bar exam, but it relies on NCBE for bar-related services, including character and fitness investigations. The state of Louisiana pays NCBE annually for its services, and NCBE charges bar applicants up to $925 each for the character and fitness application.[202] From a purely budgetary perspective, the cost benefits, if any, of utilizing a partially or fully outsourced bar exam are not readily apparent.

Even if the costs of outsourcing exceed the costs of administering a state law exam, the enhanced quality of NCBE's exam products and the score portability of the uniform exam might merit the additional costs. The costs associated with the production of a high-quality standardized exam have likely risen substantially in the last fifty years since the debut of the MBE. The more we understand about competency assessment, the more potential problems we can identify, and the more it will cost to overcome those problems. As this Article shows, there are also noneconomic costs to privatization of the bar exam that cannot be summarily analyzed in terms of money spent or cost savings.

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199. *See* E-mail from Kandace J. Kukas, Exec. Dir., Mass. Bd. Bar. Exam'rs, to author (Aug. 14, 2023) (on file with author) (confirming that Massachusetts relies on the NCBE for all bar exam content).

200. Massachusetts paid NCBE $209,326.00 in 2020, an amount that reflects 12.96% of the budget allocated to the state Board of Bar Examiners. *See Judiciary*, CTHRU—STATEWIDE SPENDING, https://perma.cc/4JFW-M973 (last visited Sept. 23, 2023). This amount does not reflect the costs of renting an exam venue, the compensation to bar exam graders, or members of the Board of Law Examiners. *Id*.

201. South Dakota paid NCBE $8,722, which comprises 15% of the state bar examiners' budget. *See* Email from Aaron Olson, Dir. Budget & Fin. (Sept. 26, 2023) (on file with author) (responding to formal South Dakota public information request).

202. Standard fees charged to bar applicants range from $275 to $925. *Louisiana Fee Schedule*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/4WBJ-73SA (last visited Sept. 23, 2023).

The NCBE hires select law professors, judges, and practicing attorneys to work collectively to draft and vet multistate exam questions.[203] These processes, and others aimed at quality enhancement, make exam production more expensive. The cost corollary of the modern legal era is that as our licensure products become more sophisticated, they also become more expensive to produce. Selective collaboration between states and a private, centralized bar examination entity may be the only cost-effective way to create a product aimed to test the competency of new attorneys. But such selective collaboration can quickly become monopoly control. And, to the extent power is consolidated in the private entity, the states' regulatory control is diminished—this is perhaps the most consequential noneconomic cost of privatizing the bar exam.

The NCBE monopoly is multilayered. It sells or licenses its exams to state examining boards for a fee. It collects separate fees for its role in the character and fitness investigation process from the jurisdictions as well as directly from the applicants. It also collects additional fees each time an applicant seeks to transfer a UBE score from one jurisdiction to another, even though such porting does not entail any additional testing, grading, or scaling services.[204] Its other revenue streams include the licensing of bar exam questions to commercial bar preparation companies and law schools,[205] and selling study aids directly to bar applicants.[206] The source and extent of NCBE's profits cannot be ignored in evaluating its political economic role

203. *Cf. Judiciary 2020*, *supra* note 200 (showing payroll costs in Massachusetts).

204. *See Exam Score Services*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/WG6M-LVL5 (last visited Sept. 23, 2023) (listing transfer services available for a fee).

205. *See supra* note 197.

206. *See Study Aids*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/YGL9-2257 (last visited Sept. 23, 2023). The study aids that NCBE makes directly available to bar applicants are sold at rates substantially below the costs of most commercial bar preparation courses. *Compare id.* (displaying pricing options), *with BARBRI Bar Review*, BARBRI, https://perma.cc/CDX2-GHZC (last visited Nov. 17, 2023) (same), *and Course Pricing*, THEMIS BAR REV., https://perma.cc/GNR5-3UMB (last visited Nov. 17, 2023) (same).

in the licensure process.[207] In the context of protecting or maintaining the self-regulatory aspect of bar admission, the economic justifications for judicial outsourcing should reflect both the needs and resources of the governmental agency as well as the complex and potentially conflicting motivation of the private vendor.

III. THE POLITICAL ECONOMY OF JUDICIAL OUTSOURCING

When a private firm makes eligibility determinations for government services such as welfare benefits or licenses, it is very difficult to safeguard against self-interest or conflicts of interest on the part of the decisionmaker.[208]

Viewing bar admission practices through an economic lens provides a framework from which we can evaluate an agency's decision to involve private parties in regulatory processes. Such a framework is essential because a state agency's decision to outsource a regulatory function affects the rights and entitlements of private citizens.[209] When private entities make eligibility determinations for state-issued licenses, it is essential—yet very difficult—to safeguard against self-interest or conflicts of interest on the part of the decision-maker.[210] Under the regime of privatized bar examination, the state supreme courts seem to be less concerned about safeguards than about efficiency.[211]

The decision to outsource is most commonly motivated by perceived economic efficiency. Professor Sydney Shapiro

207. In 2020, the NCBE's reported revenue and net income were $39,284,236 and $17,288,671 respectively. *See Nation Conference of Bar Examiners 2020*, PROPUBLICA: NONPROFIT EXPLORER, https://perma.cc/H368-L3KP (displaying NCBE's 2019 Form 990 for Fiscal Year ending June 2020).

208. Dru Stevenson, *Privatization of State Administrative Services*, 68 LA. L. REV. 1285, 1290 (2008).

209. *See* Shapiro, *Outsourcing Government Regulation*, *supra* note 83, at 1289 (discussing how, because states make determinations about the issuance of licenses and the eligibility for services, delegation and outsourcing at the state level will more directly impact individual rights than delegation by the federal government).

210. *See supra* note 208 and accompanying text.

211. *See supra* note 208 and accompanying text.

describes the government's decision to rely on private industry in carrying out its regulatory function as a "make-or-buy decision" that triggers a cost-benefit analysis.[212] According to Shapiro, an agency's make-or-buy decision weighs the costs of developing and implementing its own regulatory practices against the benefits of utilizing private actors to execute the same functions.[213] States and state agencies make these same cost evaluations in determining which tasks to outsource and which to self-complete.[214] Regarding the regulatory role of licensing new attorneys, a majority of state examining boards have made the decision to buy instead of make.

The potential benefits of outsourcing must be balanced with the opportunity costs of lessening public protection and the risk of loss of control. The decision to use store-bought licensure exams has resulted in non-economic costs that may equal or outweigh the benefits derived. Some costs, such as a lack of transparency and accountability, trace directly to the delegation decision. Other costs that have arisen during this era of deferential outsourcing are equally troubling. Those costs include the continued lack of diversity in the legal profession,[215] resistance or inability to reform the licensure process,[216] institutionalization of the bar exam,[217] and the risk of unnecessary and unredressed harm to those seeking

212. Shapiro, *Outsourcing Government Regulation*, *supra* note 83, at 390.

213. *See id.* ("When it makes this decision, an agency must determine whether to produce and implement regulatory policy inside the agency or involve private actors in these functions.").

214. *See* Custos & Reitz, *supra* note 97, at 570.

215. *See* Michael B. Frisby et al., *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores*, 70 J. LEGAL EDUC. 125, 153 (2020) (proposing the lowering of cut scores as a way to address the twin legal crises of lack of diversity in the legal profession and lack of access to justice for all). *See generally* Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PROF. 69 (2017) (discussing MBE cut scores, their disparities, and related science and public policy).

216. *See generally* Joan W. Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 F.I.U. L. REV. 383 (2019) (proposing a new framework for conversations about the system of legal licensure).

217. *See* Griggs, *Epic Fail*, *supra* note 67, at 43 ("The professional attachment to the bar exam is a function of deep-rooted institutional legitimacy.").

licensure.[218] It is certainly possible that some of those costs might have arisen even if states had retained direct control of licensing, but we must at least explore the extent to which they are exacerbated by the privatization of the bar exam.

By applying the lenses of multiple political-economic theories to the normative framework of attorney self-regulation, we can better assess the costs and public benefits of outsourcing bar admission. The manner in which the bar exam has been privatized creates a void in available remedies to redress claims of constitutional violations and common law harms.[219] Notwithstanding a problematic limitation on available remedies, the four political-economic models of public-private partnership,[220] path dependency,[221] regulatory capture,[222] and hold-up,[223] can offer enlightened perspective on the interrelationships between judicial agencies and their private partners, as well as the ways those interrelationships endanger the legal profession's ability to regulate itself.

A. *Public-Private Partnerships*

A public-private partnership is an ongoing contractual relationship between a governmental unit and a private provider through which the governmental unit uses private actors instead of government employees to provide infrastructure or specific services to or for the public.[224] For long-term projects or services, public-private partnerships allow the government to capitalize on the expertise and resources of

218. *See* London, *supra* note 70 (manuscript at 2) (arguing that, without reform, the "previously unacknowledged duty gap will continue to demoralize and potentially harm future lawyers and reflect negatively on the profession as a whole"); *see also* Griggs, *Epic Fail*, *supra* note 67, at 43 ("The bar exam has a moral legitimacy that justifies its right to exist based on normative approval and acceptance. . . . [T]he perceived legitimacy of the bar exam is not tied to the exam itself, but to the institutionalization of what bar examination represents: worthiness to practice law.").

219. I plan to address this void in a future article.

220. *See infra* Part III.A.

221. *See infra* Part III.B.

222. *See infra* Part III.C.

223. *See infra* Part III.D.

224. *See* Custos & Reitz, *supra* note 97, at 558.

private industry without making an increased financial investment or bearing the risk of loss.

In public-private partnerships, the private contractor maintains control over the manner in which the assigned tasks are performed.[225] Such a degree of control allows the private contractor to fully execute the project from design to implementation, while allowing the public partner to monitor compliance without investing the labor or resources to design or implement the project.[226] Keeping the design and creation of the bar exam steadfastly in the exclusive control of the NCBE's expertise is one of the beneficial features of the public-private partnership: it helps the judiciary to deliver a higher quality product to the public than the examining boards alone could produce.[227] The NCBE employs psychometricians and testing experts.[228] Unlike state examining boards, the NCBE devotes its full-time talents and efforts to the study and development of licensure exams.[229] Given the NCBE's expertise in test development, excessive state control could be antithetical to the envisioned efficiency that motivated the state to enter the public-private partnership in the first place.

A public-private partnership is a relationship of political and economic interdependence that is different from a general or limited business partnership.[230] The public-private

225. *See id.*

226. *See id.* at 571, 573.

227. *See* DANIEL T. PLUNKETT & ERIN M. MINOR, PUBLIC-PRIVATE PARTNERSHIPS: PRIMER, POINTERS & POTENTIAL PITFALLS 2 (2013), https://perma.cc/V5UR-M43B (last visited Nov. 17, 2023) ("[T]he objective of a public-private partnership is to provide the highest quality service at the optimal cost to the public.").

228. *See Technical Advisory Panel*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/XY35-US5U (last visited Oct. 16, 2023) ("NCBE's Technical Advisory Panel of measurement experts provides technical and psychometric guidance to NCBE's research staff.").

229. *See Our Mission*, *supra* note 100.

230. Public-private partnerships are not the type of business partnerships contemplated by the Revised Uniform Partnership Act. *See* REV. UNIF. P'SHIP ACT § 101(6) (Nat'l Conf. Comm'rs on Unif. State L. 1997) ("'Partnership' means an association of two or more persons to carry on as co-owners a business for profit . . . ."); Custos & Reitz, *supra* note 97, at 559–60 ("Despite its name, [the public-private partnership] rarely takes the legal form of a partnership, in which the respective parties are co-owners of a business, and share profits and losses.").

partnership represents a complex but efficient mode of outsourcing that can produce strong benefits for the public. Exploring the state-NCBE relationship as a public-private relationship can shed more light on the independence and decisional autonomy that the NCBE has maintained despite its theoretically subordinate role in a principal-agent agreement.

Public-private partnerships are distinguishable from traditional government-vendor procurement contracts in four important ways. First, the private party is contracted to perform multiple tasks in fulfillment of a single contractual undertaking with the governmental unit.[231] The provision of bar exam questions complete with scoring and scaling services and optional character and fitness investigations is a turnkey delivery that relieves the state examining boards of investing any public funds to develop bar admission products.

The NCBE's provision of a turnkey bar exam[232] leaves the state examining boards with no responsibilities other than to pass out the exam in a secure setting, grade the subjective component, and deliver the completed exams to the NCBE for scaling and ultimate scoring. One can reasonably assume that there are multiple tasks associated with the turnkey delivery that may not be enumerated in the terms of the agreements between NCBE and the state supreme courts. Some of those tasks may include vetting and pretesting the questions, surveying subject matter experts as to the current law and scope of the questions, using psychometrics to evaluate and refine the exam, making arrangements for confidential printing and delivery of the exam, developing a grading scheme, creating materials to train state graders, and calibrating the multijurisdictional grading of the exam.

The second distinguishing feature is that the term of a public-private partnership is generally longer than that of a standard procurement agreement because it will often involve a project or undertaking that may take multiple years or even

231. *See* Custos & Reitz, *supra* note 97, at 558 (discussing the public-private partnership as a specific form of government contract, as well as encompassing a "wide range of contractual agreements").

232. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 10 (referring to the MBE as the "granddaddy of all bar exams").

decades to complete.[233] State judicial contracts with the NCBE have proven to be long-term undertakings. To date, no state that has adopted any one or more of NCBE's multistate exams has discontinued use of those exams.[234]

Playing a key role in its economic attractiveness, a third distinguishing feature of the public-private partnership is that the private party provides all or most of the funding for the project.[235] Returning to the tasks associated with turnkey delivery by the NCBE, these tasks and the costs thereof are borne entirely by the NCBE. The NCBE does not need to rely on the states for funding or to front any of the costs associated with the design, development, or delivery of its multistate exams or any new or successor versions of its exams.

The fourth distinguishing factor of public-private partnerships is that the private party assumes the risks of loss, uncertainty, or impossibility in the completion of the project.[236] In addition to absorbing the development costs for creating the bar exam, and particularly new versions of the bar exam, the NCBE assumes the initial risk of whether its exams will appeal to the public, the legal profession, and, particularly, the state supreme courts. In economic terms, the NCBE operates as a rational choice actor, as it appears to invest substantial human and other resources in marketing its products and services to its target stakeholders to make long term profitability of that investment more likely.[237] The NCBE's well-executed, full-court-press marketing and information blitz about the forthcoming debut of the NextGen exam is a prime example of the type of investment required for public-private partnerships to be effective.[238] The private entity takes calculated measures to minimize its risks of incurring any losses, and the judicial

233. *See* David W. Gaffey, *Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States,* 39 PUB. CONT. L.J. 351, 353 (2010) (classifying a public-private partnership, in part, as one featuring a "relatively long-term relationship" (internal quotation omitted)).

234. *See supra* note 114.

235. *See* PLUNKETT & MINOR, *supra* note 227, at 2.

236. *See id.* at 3.

237. *See generally* Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493 (1979).

238. *See, e.g.*, *NCBE Announces NextGen Exam Structure, Sunset of Current Bar Exam*, *supra* note 44.

agency contracting for its product and services bears no risk if the product is not successfully utilized. In the unlikely event that a majority of jurisdictions decline to adopt the NextGen exam, the NCBE will have already borne the costs of developing and piloting the exam with no recoupment coming from the state courts.

Despite their many advantages, public-private partnerships can also be problematic. A principal, but not solitary, problem with public-private partnerships is the lack of transparency customarily associated with open government. Laws that protect the public from governmental abuse, like open records acts, are not applicable to private actors or the contracts between private actors and government.[239] The opacity of these agreements allow problems and costs to be concealed from the public and limit the public's ability to challenge the problems.

Another risk of public-private partnerships is that, if left unchecked, public interest can become subsumed by the private entity's desire to maximize profits or maintain influence.[240] Although it makes substantial profits from the bar admission process, the NCBE is conceivably motivated more by a desire for influence than a pursuit of profit. Because the NCBE has no market competitor in the provision of bar exam or bar exam related scoring services, it holds considerable influence in the bar licensure landscape, including states' exploration of nonexam pathways to bar licensure.[241] State examining boards rely on the NCBE because it has expertise and product development resources that a board of part-time examiners does not have.[242] But the same expertise that makes the NCBE an

239. *See* Custos & Reitz, *supra* note 97, at 577

> [W]e have developed basic rules of public law to constrain the government in the name of such public values as transparency, public participation, due process for affected individuals, and public rationality. . . . But these rules generally do not apply to private parties, and some do not even apply to government decisions to contract out.

240. *See* PLUNKETT & MINOR, *supra* note 227, at 6.

241. *Cf. Licensure Pathway Development Committee*, OR. STATE BAR, https://perma.cc/T859-TAL8 (last visited Sept. 19, 2023) (exploring new alternatives to the bar exam while still accepting the UBE).

242. *See* Judith A. Gundersen, *MEE and MPT Test Development: A Walk-Through from First Draft to Administration*, 84 BAR EXAM'R, no. 2, 2015,

ideal private partner also creates an unchecked and problematic power imbalance.

A final criticism of public-private partnerships is that they can be formed too hastily.[243] When long-term partnerships are created before the parties can fully understand their implications, the public bears the cost for years and years.[244] In 2023 and 2024, still years before the planned debut of the NextGen exam, several states have already committed to adopting the exam—before the exam has been fully developed and before states have information on the scoring, scaling, and costs of the exam.[245] The goodwill between state supreme courts and the NCBE has evolved into a nearly complete deference to the entity's opinions, recommendations, and new products. Such extreme deference is potentially dangerous to public accountability. Before any changes to the state licensure process are adopted, the public, the practicing bar, and the judiciary should be fully informed as to the potential implications the changes will have on bar admission.[246]

B. *Path Dependency*

Path dependence refers to a sensitive dependence on initial conditions, design, or product selection that has an irreversible influence on the ultimate allocation of resources.[247] Rational

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https://perma.cc/V9NV-9YHH (summarizing the extensive process that NCBE undertakes in producing its exams).

243. *See* PLUNKETT & MINOR, *supra* note 227, at 6.

244. *See id.* ("Some complicated public-private partnership agreements have been criticized for being rushed through without the public or their elected officials fully understanding the implications." (internal quotation omitted)).

245. *See First Jurisdictions Announce Plans to Adopt NextGen Bar Exam*, NAT'L CONF. BAR EXAM'RS (Nov. 1, 2023), https://perma.cc/FMU4-EKS3 (announcing that Maryland, Missouri, and Oregon will adopt the NextGen exam in 2026, with Wyoming adopting in 2027, and Connecticut adopting at an undetermined date).

246. *See* PLUNKETT & MINOR, *supra* note 227, at 6 (stressing the importance of transparency).

247. *See* S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-in, and History*, 11 J.L. ECON. & ORG. 205, 205 (1995) ("The path dependence literature comes to us accompanied and motivated by a mathematical literature of nonlinear dynamic models, known as chaos or complexity models, for which a key finding is 'sensitive dependence on initial conditions.'").

actors have become path dependent when their decisions or outcomes are "shaped in specific and systematic ways" by some past course, policy, or product that led to the decision or outcome.[248] Path dependence involves a causal relationship between stages in a temporal sequence, with each stage having significant influence on the next.[249]

Path dependence theory has special relevance to judicial decision-making. Our common law system of case precedent demonstrates that courts are expected to resolve issues in a manner that is deeply dependent upon prior resolutions.[250] Judicial decisions also impact policies and decisions made by other branches of government and the institutions they govern.[251] Judicial choices place policy development on one path rather than another, and they inevitably discourage departures to alternative paths.[252] These critical policy choices can have "profound long-term consequences by contributing to the development of one sort of lasting institutional configuration rather than another."[253]

As state examining boards moved away from the practice of writing their own bar exams, they allowed the NCBE to play a bigger role in determining the requirements for bar admission and in investigating an applicant's character and fitness. The enlarged role of the NCBE in bar admission decisions reflects a migration toward outsourcing of a regulatory function and paves a path of dependence from which there may be no easy point of return.

When the early COVID pandemic threatened the safe administration of in-person bar exams across the nation, states were uncertain if the NCBE would provide exam content to

248. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001).

249. *See id.* (explaining that path dependence means earlier events impact the outcomes of later events).

250. *See id.* at 606 ("The doctrine of stare decisis thus creates an explicitly path-dependent process.").

251. *See id.* at 628–29 (noting how the legislative branch may build upon court decisions).

252. *See* Charles R. Epp, *Law's Allure and the Power of Path Dependent Ideas*, 35 L. & SOC. INQUIRY 1041, 1043 (2010).

253. *Id.* at 1044.

allow them to license new attorneys.[254] If the COVID-instigated bar exam debacle of 2020 revealed nothing else, it convincingly demonstrated that states have become dangerously dependent upon the NCBE for the ability to license new attorneys.[255]

An alternative viewpoint is that states have become path dependent upon the bar exam itself—and not specifically on NCBE products or direction.[256] The institutional hold that the bar exam has on the legal profession is almost unshakable. An overwhelming number of lawyers, judges, and nonlawyers equate a passing score (on any bar exam) with competency to practice law.[257] False equivalency notwithstanding, the legal profession and the public are so deeply entrenched in the essentialness of the licensure by examination that it becomes difficult to conceive of any pathway into the practice of law that does not involve a bar exam. In its early introductions, the NCBE presented the NextGen exam as an all or nothing pathway. Because the NextGen exam will not have distinct multistate components, states were told that they may only adopt the full exam and that the NCBE would no longer provide the MBE, MEE, and MPT as individual options for state use.[258] Under a path dependence theory, the NextGen exam is virtually ensured to be adopted by all UBE states if the alternative is no bar exam at all.

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254. *See* Claudia Angelos, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin, & Judith Welch Wegner, *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV.: BLOG (Apr. 7, 2020), https://perma.cc/QZ24-MF55 [hereinafter Angelos et al., *Licensing Lawyers in a Pandemic*] (noting states' concerns with administering the bar exam during the pandemic).

255. *See id.* (explaining that states are struggling to find alternatives to the bar exam in the wake of the pandemic).

256. *See* Griggs, *Epic Fail*, *supra* note 67, at 43 ("For lawyers, the bar exam is an institutional norm that they have internalized. Our behavior and sense of belonging is based on that norm. The professional attachment to the bar exam is a function of deep-routed institutional legitimacy.").

257. *See id.* ("[T]he basis for the perceived legitimacy of the bar exam is not tied to the exam itself, but to the institutionalization of what bar examination represents: worthiness to practice law.").

258. *See NCBE Announces NextGen Exam Structure, Sunset of Current Bar Exam*, *supra* note 44.

C. *Regulatory Capture*

Capture describes the power relationships in an agency. Regulatory capture occurs when a regulator or policymaker is co-opted to serve the commercial, political, or ideological interests of an industry or profession.[259] Capture interferes with the public-protection goals of regulation.[260] In the scheme of judicial regulation of bar admission, members of the profession have strong protectionist interests to limit the entry of new attorneys.[261] State bar associations and bar examiners manifest those interests by advancing and enforcing policies that restrict entry. Delegation to the NCBE may allow more room for those interests to dominate.

Starting in the early months of the COVID pandemic, a push for nonexam pathways to licensure arose. The Collaboratory on Legal Education and Licensing for Practice[262] evaluated and proposed several alternative options that would allow jurisdictions to safely and competently license new attorneys when health concerns and local law prohibited large assemblies of people from convening in person.[263] One of the alternatives proposed was a limited or temporary diploma privilege that would deem graduation from an ABA-approved

259. *See* Will Kenton, *Regulatory Capture Definition with Examples*, INVESTOPEDIA, https://perma.cc/5PYQ-KSJF (last updated Mar. 1, 2021) (defining regulatory capture).

260. *See id.* (explaining how, when regulatory capture occurs, agencies are no longer serving public interests).

261. *See supra* note 41 and accompanying text.

262. The Collaboratory on Legal Education and Licensing for Practice is a group of scholars who have studied and written about the bar exam, licensing, and legal education for many years. Members of the Collaboratory pooled their knowledge to offer suggestions for how jurisdictions might continue licensing new lawyers in the face of the COVID-19 pandemic. *See, e.g.*, Deborah J. Merritt, *This Year is Still Different: An Outdated Bar Exam in Troubled Times*, L. SCH. CAFE (July 19, 2022), https://perma.cc/A9ML-J29F (explaining what the Collaboratory on Legal Education and Licensing for Practice does).

263. *See* Angelos et al., *Licensing Lawyers in a Pandemic*, *supra* note 254 (proposing alternatives to the bar exam); Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, SCHOLARLY COMMONS @ UNLV BOYD L., Mar. 2020, at 2–6 [hereinafter Angelos et al., *The Bar Exam and the COVID-19 Pandemic*] (proposing alternative measures).

law school sufficient for licensure during the global health crisis, when a traditional exam was unavailable.[264]

Of the alternatives proposed by the Collaboratory, diploma privilege seemed to draw the most support and attention throughout the legal profession and among nonlawyers. Diploma privilege, even on a temporary basis, would have allowed states to prevent a halt in the pipeline of new attorneys. Despite concerted pleas from multiple stakeholders, the NCBE shepherded states away from diploma privilege and other nonexam pathways to licensure.[265] Jurisdictional adoption of diploma privilege could reduce the number of prospective attorneys who sat for a bar exam and would subsequently reduce the NCBE's profits. In a published statement, the NCBE claimed: "It is not necessary to take the extreme step of diploma privilege and the risk of diminishing public protection in order to solve the challenges brought on by the pandemic."[266]

The NCBE's response proved to be quite influential to all but a select few state supreme courts.[267] The NCBE's position seemed to prioritize protection of the ritual of the bar exam and the sanctity of its test product over the public's need to ensure the availability of new lawyers to provide access to justice. There is an inherent contradiction in the insistence that a bar exam is the only way to protect the public from incompetence when it comes from a Wisconsin-based organization that is led by lawyers admitted through diploma privilege.[268] Yet, there is no disconnect between the NCBE's public push against diploma

264. *See* Angelos et al., *The Bar Exam and the COVID-19 Pandemic*, *supra* note 263, at 4.

265. *See* Griggs, *Epic Fail*, *supra* note 67, at 11–12. Eventually, the NCBE did offer an online version of its exams, but it deprived many bar applicants of the transferrable score benefit that was part of the advertised bargain of the UBE. *Id.* at 11 n.49.

266. NAT'L CONF. BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 4 (2020), https://perma.cc/9DSX-4E54 (PDF).

267. *See* Griggs, *Epic Fail, supra* note 67, at 21 ("While some states showed a willingness to harness available technology and enact alternatives to protect the public's need for new lawyers, other states—ironically, also citing public protections—staunchly refused to depart from the paper and pencil in-person exam.").

268. *See id.* at 32–33 (explaining that the chief officer of the NCBE has been an attorney admitted to practice by diploma privilege and has never taken a state bar exam).

privilege and the profits it generates from the states' use of its exam products.[269] To many, the NCBE white paper represents an act of overreach by a nonregulatory authority. From an economic lens, the NCBE's behavior looks like a type of capture: its coercive action led states to make decisions that ultimately will serve NCBE interests over the interests of the profession.

The NCBE provides valuable services to state examining boards, but those services should not include directing bar admission policy. Self-regulation principles dictate that the decision to implement or reject a diploma privilege or other viable means of determining competency belongs exclusively to the state supreme courts.[270] Such a decision is not properly made by the public, law schools, state bar associations, or the NCBE. While it is certainly understandable that a decision of such importance might be influenced by the input of key stakeholders, the outcomes of 2020 strongly suggest that the role of the NCBE exceeded the parameters of influence and approached that of puppet master.[271] The motivation behind such alleged overreach need not be sinister or self-serving, but the course of action urged by the NCBE is one that would financially benefit the organization. So much so that the organization's reported profits for fiscal year 2020 exceeded its profits for the preceding five years.[272]

Commonly, regulatory capture is viewed as a form of government failure that happens when an agency operates in favor of private interest over the interest of the public.[273]

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269. *See id.* at 19 ("We must also consider that decisions and recommendations of the NCBE (a private, unregulated entity that makes millions of dollars each year from the sale of bar exams, and bar related services and products) may not necessarily be in the best interest of the state or the bar applicant.").

270. *See supra* notes 29–30 and accompanying text.

271. *See* Michael S. Ariens, The NCBE's Wrong-Headed Response to the COVID-19 Pandemic 8–13 (May 6, 2020) (unpublished manuscript) (on file at SSRN) (discussing the multiple ways the NCBE failed to adequately respond to the COVID-19 pandemic when determining a course of action to take in administering the 2020 bar exam).

272. *See National Conference of Bar Examiners 2020*, *supra* note 207.

273. *See* Lawrence G. Baxter, *Capture in Financial Regulation*: *Can We Channel It Toward the Common Good*, 21 CORNELL J.L. & PUB. POL'Y 175, 176 (2011) (discussing how regulatory capture is "present whenever a particular sector of the industry, subject to the regulatory regime, has acquired persistent

However, to the extent that the public and the legal profession seem to have confidence in the bar exam as an institutional norm, it is conceivable that the elements of capture can be met without any subsequent characterization of failure. The reach and realized profits of the NCBE do not necessarily make the entity unfit to provide services as requested by state examining boards. As one scholar posits, "Just because the result is supported by a powerful and organized group does not necessarily imply that it is wrong."[274]

As a normative matter, capture occurs when a particular sector of an industry subject to regulation has acquired persistent influence that is disproportionate to the balance of interests envisioned when the regulatory system was established.[275] In evaluating the consequences and desirability of a judicial agency's outsourcing policies, it is important to consider the agency's mission or mandate. State bar examining boards were established to implement rules or orders adopted by the state supreme courts.[276] Examining boards are tasked with three responsibilities: (1) to ensure that a licensure candidate has obtained the required education; (2) to investigate and make a determination concerning the character and fitness of a licensure candidate; and (3) to create and administer a bar examination to test a candidate's minimum competence to practice law.[277] Here, the presumed public interest is assurance that all attorneys licensed by the state possess at least the minimum competence to practice law, notwithstanding the deluge of empirical literature that begs for a definition of minimum competence;[278] and that refutes claims that the bar

influence disproportionate to the balances of interests envisaged when the regulatory system was established" (emphasis omitted)).

274. *Id.* at 177.

275. *See id.* at 176.

276. *See* Rizzardi, *supra* note 70, at 431.

277. *See id.* at 432–33.

278. *See* HOWARTH, *supra* note 28, at 35 ("Establishing that bar exams are valid and fair assessments of minimum competence to practice law requires serious research on the legal profession that has been absent until very recently."); *e.g.*, Leanne Fuith, *Building a Better Bar Admissions Process: A Look at What the Minnesota State Board of Law Examiners Is Doing in Its Two-Year Study of the Bar Exam—and What Other Jurisdictions Are Considering*, 79 BENCH & B. MINN. 14, 16 (2022) (discussing twelve interlocking components or building blocks that define minimal competence).

exam in its current or predecessor form can validly or reliably measure minimum competence. Considering the three mandated responsibilities of state examining boards, the Venn diagram overlap between the agency mandate and the functions outsourced to NCBE is either a full circle or an optic illusion thereof. And this reality begs the question: Why would a state supreme court create an examining board if the intent of the court was to have all aspects of the board's mandate fulfilled by a private entity?

In the context of bar admission, it is the third-party regulator who has amassed the dominating influence over the regulated profession and not vice versa. Whether or not we can identify the NCBE's role in bar licensure as one of pure capture, the dominance of its reach and influence is sobering. NCBE's influence in the legal profession is so pervasive that:

> 1. States using NCBE content no longer have the freedom to determine when they will administer their own bar exams;
> 2. States that have adopted the UBE no longer have the freedom to determine the length of their own bar exams;
> 3. States that have adopted the UBE can no longer test state law rules on their own bar exams. States desiring to test or teach state law content must do so outside of the bar exam period and under a separately named program or exam;[279]
> 4. States have no voice as to the selection of exam questions or the subjects or subtopics that will be tested;[280]
> 5. States do not get to determine how their own bar applicants are scored or scaled, and must rely on and accept NCBE scaling without disclosure of the proprietary scaling formula;[281]

279. *See UBE Local Components*, NAT'L CONF. BAR EXAM'RS (2023), https://perma.cc/6D8R-DR94; *see also UBE States and "Local Components": Do I Need to Take an Additional Exam to be Licensed?*, JD ADVISING, https://perma.cc/R55A-ECHM (last visited Nov. 17, 2023) (explaining that UBE states with a "local component" require that applicants complete it either before or after the bar exam).

280. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 31.

281. States have the authority to determine the passing "cut" score for their jurisdiction, but they are relegated to follow the prescribed scoring weights of the exam components set by NCBE. *UBE Scores*, NAT'L CONF. BAR EXAM'RS, https://perma.cc/U8H8-78FB (last visited Sept. 25, 2023).

6. States no longer have the authority to adjudicate appeals for applicants with a failing exam score;[282]
7. Many law schools adjust their curricula in response to the announced changes to the format and content of the NCBE exam(s);[283]
8. There continues to be notable overlap between members of the ABA Council and the NCBE Board of Trustees;[284]
9. The NCBE has more access to the ABA Council for Legal Education than general law faculty or other law school groups, like the Association of Academic Support Educators;[285] and
10. During the early months of the COVID pandemic, state supreme courts had to await NCBE permission to administer the bar exam in their jurisdictions.[286]

The gripping dominance of the NCBE in attorney regulation reeks of capture in outcome,[287] even if not in definition.[288]

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282. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 33 ("Another potentially problematic consequence of UBE adoption is the loss of a state's ability to provide a mechanism for grade appeals or regrading.").

283. *See supra* notes 186–189 and accompanying text.

284. *See* HOWARTH, *supra* note 28, at 42 ("During these years of quick and dramatic changes in ABA accreditation standards, several people served simultaneously on both the ABA Council and on the board of the NCBE—including as chair, as executive committee members, and as other officers."); *see also Hon. Mary Russell Elected to the Board of Trustees of the National Conference of Bar Examiners*, NAT'L CONF. BAR EXAM'RS (Oct. 19, 2023), https://perma.cc/L4LA-RAGZ (discussing how incoming NCBE Board of Trustees member Judge Mary Russell was previously a member of the ABA's Council on Accreditation and Legal Education).

285. *See, e.g.*, AM. BAR ASS'N, NOVEMBER 2023 COUNCIL MEETING OPEN SESSION AGENDA (2023), https://perma.cc/WME6-YWGR (PDF) (illustrating NCBE's standing spot at ABA council meetings).

286. *See Covid-19 and the July 2020 Bar Exam*, 89 BAR EXAM'R, no. 1, 2020, https://perma.cc/3Q9W-DJQH (showing a timeline NCBE decisions and states' reactions).

287. *Cf.* Sidney A. Shapiro, *Blowout: Legal Legacy of the Deepwater Horizon Catastrophe: The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 222 (2012) [hereinafter Shapiro, *Blowout*] (defining regulatory capture, in the federal context, as the act of regulated entities using their superior political influence to capture individual agencies and to persuade Congress and the president to adopt procedures that slow the regulatory process and make it more difficult to regulate).

288. The elements of agency capture are more readily evident in the regulation of attorney discipline. In that structure, the courts have delegated regulatory authority to unified state bar associations. The state bar

D. *Hold-Up*

Hold-up is another potential noneconomic cost of outsourcing that is borne out of an agency's reliance on private parties. Economic hold-up describes a contractual relationship in which the supplier capitalizes on the purchaser's lack of comparably valued alternatives, leaving the purchaser at the mercy of the supplier to fulfill its obligations to third parties.[289] The NCBE has amassed such substantial regulatory influence that state examining boards can no longer easily fulfill the function for which they were established, independent of the NCBE.

Professor Shapiro explains how delegation of substantial discretion to an agency may create the political equivalent of a hold-up problem:

> Once an agency involves a private actor in making policy decisions, it may not be easy for that agency to take back the responsibility for making such decisions. For example, private actors may have the political power to defend their participation in making regulatory decisions. This security may encourage them to exploit their self-interest in ways that are detrimental to the goals of the agency.[290]

A problematic hold-up arises when an agency becomes overly dependent upon a private entity to which authority or responsibility has been delegated and the interests of the private entity do not align with the stated objectives of the agency.[291] A private nonprofit entity will make regulatory

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associations are comprised of practicing attorneys (the regulated body). The attorneys hold influence over the state bar association, and thus, it can be argued, have captured the process of lawyer discipline in a manner that champions the self-interests of the profession over public protection. In contrast, in the context of attorney admissions, it is the private and unregulated NCBE that has asserted influence over the legal profession, and not vice versa.

289. *Cf.* Shapiro, *Outsourcing Government Regulation*, *supra* note 83, at 395 (describing the "hold-up problem" as one of "asset specificity," in which the development of a good or service is particularly specific or idiosyncratic to a transaction).

290. *Id.* at 405.

291. *Cf.* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 42–46 (1999) (finding a "hold-up problem" in the context of Congress's

decisions according to its standards of appropriateness based on its own objectives.[292] Even when the private actor's self-interests are not connected to profits, its motivations will be connected to its own organizational principles, which may be inconsistent with the agency's goals established in its statutory or Constitutional mandate.[293]

Transactions that require relationship-specific investments, such as those in play with regulatory outsourcing and public-private partnerships, give rise to opportunities for hold-up to occur.[294] The potential for self-serving conduct indirectly increases the costs of outsourcing.[295] The end result of a hold-up problem is that the agency is left virtually powerless to move forward without the assistance or cooperation of the private vendor.

In the bar admissions context, to the extent that judicial regulation of bar admission involves licensing through administration of a bar exam, the NCBE's interests would seem perfectly aligned with that of the state examining boards. However, as Professor Shapiro notes, only when the private actor is seeking some industry advantage will its profit-seeking be aligned with the agency's goals.[296]

Even if we agree that profit is not the motivation for NCBE's dominance, influence and control over bar licensure almost certainly are. The blunt truth is that, under the current scheme of privatized bar examination, there will be no new lawyers admitted in forty-two states and the District of Columbia unless the NCBE says so. As previously discussed, the disruption of the early COVID pandemic laid plain the conflicting interests of the NCBE and the principles of

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dependence on the executive to determine and implement the details of broad legislative directives).

292. *See* Shapiro, *Outsourcing Government Regulation*, *supra* note 83, at 405.

293. *See id.*

294. *See id.*

295. *See id.* ("[T]he possibility of opportunistic behavior . . . increases the measurement costs of the government agency.").

296. *See id.* at 428 ("[T]he self-regulatory entity has the opportunity to act in an opportunistic manner regarding both standard setting and enforcement. . . . [A]re there competitive, legal, or political pressures that are likely to ensure that self-regulation will result in the level of regulatory protection that the agency is obligated to provide?").

self-regulation.[297] The early spring of 2020 saw multiple states circle in a holding pattern, waiting to see if the NCBE would provide them with a bar exam to administer.

To an audience of bar applicants, law schools, and state supreme courts, the NCBE demonstrated that its substantial regulatory influence had morphed into regulatory control. One of the potential dangers of outsourcing bar admission is that it "has the potential to undermine many characteristics vital to the reputation and quality of the legal profession."[298] Ultimately, the NCBE made materials available for jurisdictions to administer bar exams in the summer and fall of 2020 and was broadly accommodating of states' needs.[299] But for an extended period, states were held up with no answers and no contingency plans for the fulfillment of their licensing function. That period was on display to the public and it affected public confidence in the bar admission process (specifically) and the legal profession (generally).

It is unclear what lessons were learned and acted upon because of the self-regulatory failings of 2020. If no changes to the state-NCBE relationships are made, the potential for hold-up will remain. The NCBE's supersized role in the licensure landscape has forged a seismic shift in law school accreditation, law school curricula, the academic freedom of law school faculty, and the diversity of the legal profession.[300] Unless curtailed, the quake resulting from this shift will continue. The unanswered question is whether the shifting authority will ultimately serve the public good or its detriment.

CONCLUSION

By outsourcing the mechanisms that control admission to the bar, the legal profession has all but surrendered its gatekeeping function to an industry that profits at the expense of those seeking entry. Any evaluation of judicial delegation and

297. See *supra* Part III.B.

298. Sejal Patel, *Is Legal Outsourcing Up to the Bar? A Reevaluation of Current Legal Outsourcing Regulation*, 35 J. LEGAL PRO. 81, 84 (2010).

299. *See NCBE Announces It Will Make Exam Materials Available for July Bar Exam*, NAT'L CONF. BAR EXAM'RS (May 5, 2020), https://perma.cc/4J2E-X4V6.

300. *See supra* Part II.A–B.

outsourcing must also consider the role of the legal profession in protecting the rule of law and in the furtherance of order and social justice.[301] We cannot rely purely on perceived economic benefits or political detriment to determine whether regulatory outsourcing in attorney licensure is a net benefit for the legal profession.[302] By applying political-economic models to regulation of attorney admission, we can better explain complexities of the interrelationships between private providers and the state supreme courts.[303] Those models can also forecast the risks stemming from those relationships. In considering those risks, we must be mindful of the indirect impact bar admission standards have on legal education and academic freedom.

Prudent delegation allows our busy and overtaxed state supreme courts to focus on the purposes for which they were seated on the bench: to preside and adjudicate. Still, the courts must exercise active oversight of the NCBE and any private contractor they may engage in the function of licensing attorneys.[304] Courts will need to balance the economically efficient decision to outsource the bar exam with the needs of self-regulation and the goal of public accountability. Our courts must also act proactively to mitigate the risks of capture and hold-up in their licensure function. With judicious supervision, outsourcing can be "tailored to protect the interests of all parties involved through enforcement of regulation."[305]

Remediation of the capture or hold-up problems in attorney regulation is not a guaranteed outcome. A crucial first step in the quest for remediation and reclamation of self-regulation in bar admission is to "convince the public of the need for reform."[306] Judicial regulation, in part, serves to protect the public. But the public may lack the legal education and training

301. *See* Patel, *supra* note 298, at 87 ("[T]he quality of the legal system is not only based on financial considerations, but also on considerations of the legal system's role in promoting civic duty and social welfare.").

302. *See id.*

303. *See supra* Part III.

304. This paper argues not against the *products* of the NCBE, but against the *power* of the NCBE and its improper insertion into public governance. *See supra* Part II.

305. Patel, *supra* note 298, at 82.

306. Shapiro, *Blowout*, *supra* note 287, at 249.

to readily know when or how to challenge regulations that are not directed at them. For example, the nonlawyer public will not care about the format or content of the bar exam. Neither will the public be concerned about who produces the exam. The reality is that the bar exam represents far more than an exam that can be produced, sold, administered, and passed.

State supreme courts that are concerned about the dangers associated with the outsourcing of bar admission can and should take decisive action to mitigate future harm to bar applicants and to retain control of their regulatory roles. Suggested course-reversing actions might include:

> 1. States can refuse to exempt vendor agreements from public disclosure. Only information related to the actual bar exam questions (not yet released) or to an applicant's personal information should be exempt from public disclosure. The terms, costs, and other details of state-NCBE contracts should be made public in all jurisdictions.
> 2. States should receive and review bar exam questions well in advance of the bar administration.[307] Members of the examining board should be charged with full review of the questions and sufficient time should be allotted for states to seek and receive clarifying explanations and responses to questions from the BBEs.
> 3. Disputed questions should be removed from the exam at the request of the issuing jurisdiction.
> 4. States should insist on exclusive contract agreements with the NCBE that prohibit the entity from licensing its exam questions to other private vendors (like commercial bar preparation companies). While state supreme courts cannot control a private party's conflicting interests, they can refuse to perpetuate those conflicts.
> 5. States should demand more transparency from the NCBE. State supreme courts should insist on and ensure that bar applicants who are unsuccessful on any bar exam administration have an opportunity to meaningfully review their exam performance. A meaningful review is one that will inform an applicant which questions they answered incorrectly, the point allocation for those questions, and the manner of scoring for each question.

307. Under current practice, the exams are delivered to the state examining boards days before the exam with insufficient opportunity for review or corrections.

> 6. States should offer more transparency to the public regarding their agreements and financial relationship with the NCBE. State court websites should disclose the relationship, if any, with the NCBE. The websites should also disclose the annual amount paid to the NCBE for services. This information should be available to members of the bar and the public without the need for a public information request.
> 7. The broader legal profession, including the ABA, AALS, Council of Chief Justices, and law schools (regardless of affiliation with the ABA or AALS), needs to play a role in limiting NCBE access and presumed authority in decision-making processes. Under the current scheme of attorney licensure, the NCBE has standing access to these bodies which facilitates one-way communication in furtherance of the NCBE's interests.[308] The NCBE should not have greater political access to decision-making bodies than any other vendor. By diminishing the NCBE's power-broker status, we enable the true regulators to take a more authoritative role.

Self-regulation dictates that we demand more from our regulators and ourselves while maintaining the option to effectively outsource to private entities. Third-parties can still have a productive role in attorney admission. But optimal self-regulation requires that states explore how to best leverage third-party expertise and resources in a way that seeks to protect the public from lawyer incompetence without deferentially subordinating our view of minimal competence to that of the third-party. In multiple states, the supreme courts' efforts to commission studies on competency assessment and to involve licensed attorneys in those studies are paving the way for advances in attorney licensure, including nonexam pathways. These advances and the collaborative work that make them possible embody responsible and proactive self-regulation.[309] The bar exam is the first act of attorney

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308. *See* Griggs, *Building a Better Bar Exam*, *supra* note 14, at 17 (discussing conversations between these bodies in the development of the UBE and the continued strong support from the ABA).

309. The supreme courts in Oregon and Utah have demonstrated commitment to such innovative pathways while maintaining public protection. *See Alternative Pathways*, OR. STATE BAR TASK FORCES, https://perma.cc/BQ4M-8J6K (last visited Oct. 14, 2023); *see also Utah Bar Admissions Working Group Proposes Novel Pathway Grounded in IAALS'*

self-regulation. In that regard, it is incumbent upon lawyers, law professors, judges, and juris doctor candidates to preserve and protect our self-regulated profession—even from ourselves.

Research, INST. ADV. AM. LEGAL SYS. (Oct. 26, 2023), https://perma.cc/ES4R-83LS.