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Outsourcing Self-Regulation

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OUTSOURCING SELF-REGULATION

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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 corporate interest. By outsourcing the mechanisms that control admission to the bar, the legal profession has all but surrendered the most crucial component of its gatekeeping function to an 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 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 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 constitutionally vested as an inherent power of the judiciary⁴—specifically the state supreme court or the highest court within the

¹ Restatement (Third) of the Law Governing Lawyers § 1 (2000), Comment d.

² AMERICAN BAR ASSOC’N, Model Rules of Professional Conduct, Preamble 11.

³ Fred C. Zacharias, *The Myth of Self-Regulation*, 93 Minn. L. Rev. 1147, 1153 (2009).

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); and Editorial Board, Minn. L. Rev., *The Inherent Power of the Judiciary to Regulate the Practice of Law – A Proposed Delineation* (1976).

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

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. 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.⁷ 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 lawyer disciplinary process directly serves to protect the public.

Focus on the delegation of the 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; 2) the standardization of the process to license attorneys for multijurisdictional practice; 3) the first remotely delivered online bar exam; and 4) the (limited) judicial adoption of non-exam pathways to licensure. These developments in bar admission as well as the propriety, process, and

⁵ Hereafter, 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 Lisa G. Lehrman, Philip G. Schrag, & Robert Rubinson, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* p. 69 (5th ed. 2020).

⁷ *Id.* at p. 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.).

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. However, those risks have different manifestations, especially 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 lobby at the helm of admission to the bar. 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.

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 regain 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 judicial regulatory functions. 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 the courts' decision 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. 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 non-lawyer 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.*⁸

Lawyer self-regulation is deeply anchored in the history and tradition of the legal profession.⁹ 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 non-lawyer ownership of law firms and that prohibit attorneys from sharing fees with non-lawyers.¹⁰ Despite growing availability of technology and non-lawyer legal services, the ABA remains unmoved in its stance against non-lawyer encroachment of the legal profession. Two recent resolutions demonstrate this commitment. In 2022, the ABA House of Delegates reaffirmed a longstanding Resolution that discouraged states from adopting any rule that would allow non-lawyers to have an ownership interest in law firms.¹¹ The Resolution followed a similar measure approved in 2000, resolving that lawyers sharing law

⁸ AMERICAN BAR ASSOC’N, Model Rule of Professional Conduct, Preamble 12.

⁹ Eli Wald, *Should Judges Regulate Lawyers?*, 42 McGeorge L. Rev. 1, 1 (2010).

¹⁰ AMERICAN BAR ASSOC’N, Model R. of Professional Conduct 5.4 (a) and (b) (“A lawyer or law firm shall not share legal fees with a nonlawyer” except in very limited circumstances. “A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”).

¹¹ Report to the House of Delegates. 402, 1. (ABA Aug. 2022). https://www.americanbar.org/news/reporter_resources/annual-meeting-2022/house-of-delegates-resolutions/402/ (The District of Columbia has permitted shared ownership with non-lawyers for decades. The House Resolution was in response to organized plans by Arizona and Utah to permit such a practice.)

firm ownership or legal fees with nonlawyers is inconsistent with the core values of the legal profession.¹²

By refusing to allow investment firms and tech companies to buy or own law firms and thereby influence a lawyer's independent legal judgment,¹³ the 2022 and the 2000 Resolutions manifest more than just the ABA's unwillingness to depart from ABA Model Rule 5.4 that dictates the professional independence of lawyers.¹⁴ They reflect a foundational attitude of the profession about the importance of autonomous self-regulation. The ABA has no regulatory authority over lawyers, but has considerable influence within the legal profession, and that influence has regulatory repercussions.¹⁵ 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 specifically on bar examinations created by a private provider.¹⁶ 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 non-lawyer 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

¹² L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10f*, 36 Wake Forest L. Rev. 133, 135 (2001).

¹³ Sam Skolnik, *ABA Sides Against Opening Law Firms Up to New Competition*, BLOOMBERG LAW (AUG. 9, 2022, 4:36 PM)(quoting Stephen Younger a partner at Foley Hoag and previous president of the New York State Bar Association). <https://news.bloomberglaw.com/business-and-practice/aba-sides-against-opening-law-firms-up-to-new-competition>

¹⁴ *Supra* note 10 [this text]

¹⁵ 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. 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.¹⁵ Attorneys who are found in violation of the state adopted rules of professional conduct risk disciplinary sanctions ranging from reprimand to suspension to disbarment.

¹⁶ See Joan Howarth, *Shaping the Bar: The Future of Attorney Licensing* pp. 24-25; and Richard L. Abel, *Lawyer Self-Regulation and the Public Interest: A Reflection*, 20 Legal Ethics 115 (2017).

legislative or executive branches of state government¹⁷ and even the federal courts.¹⁸ An 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 can make sense of how they prioritize and dispatch their regulatory authority.¹⁹

In at least half of the U.S. jurisdictions, state supreme court justices are elected to the bench.²⁰ In states where supreme court justices are seated by gubernatorial appointment, many still require election by popular vote to retain the office upon expiration of their term.²¹ Those seeking election to the state supreme court direct their campaigns almost exclusively to attorneys because public interest in, and public understanding of, judicial elections is limited.²² Candidates seeking to claim or retain a position on a state supreme court will naturally prioritize issues that are important to the practicing bar. 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

¹⁷AMERICAN BAR ASSOC'N., *Judicial Oversight of the Legal Profession*, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/?login ("The 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.")

¹⁸ *An Institutional Analysis of Lawyer Regulation*, *supra* note 2 at 1214-1215 (asserting that placing federal district courts in charge of lawyer regulation would "create a patchwork of regulation that would cripple the legal market.").

¹⁹ Michael Ariens, *The NCBE's Wrong-Headed Response to the Covid-19 Pandemic*, SSRN at p. 10 (Apr. 28, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587751.

²⁰ L. C. Berkson, *Judicial Selection in the United States—A Special Report*, 64 *Judicature* 176-193 (Oct. 1990). <https://www.ojp.gov/ncjrs/virtual-library/abstracts/judicial-selection-united-states-special-report>.

²¹ *Id.*

²² Benjamin H. Barton, *Do Judges Systematically Favor the Legal Profession?*, 48 *Ala. L. Rev.* 453, 458 (2008).

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.²³ Even after years in practice, it is not uncommon for attorneys to recount their stressful or traumatic experiences with the bar exam. Attorneys who do not pass the bar on their first attempt or on subsequent attempts commonly combat stigma and career setbacks attributed to failing the bar exam. Those negative consequences are compounded by the financial and mental burdens of repeating the exam. 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 arduity—as a revered and essential gatekeeper. Pre-licensure, the bar exam is seen as a hazing ritual or a rite of passage.²⁴ Post-licensure, the bar exam is treated as a sacred crucible through which all who are fit to practice law must pass.²⁵ 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.

This shift in perspective is particularly concerning because the bar exam has undergone multiple and monumental changes in the last 50 years.²⁶ Changes to the bar exam have been so substantial that even attorneys

²³ See Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 5-7 (2019) (Describing the anxiety induced by the high stakes of the bar exam, the sleep deprivation and fear of failure associated with awaiting results, and the stark differences between the current bar exam and the exam taken by a majority of attorneys as reasons that a majority of attorneys are intentionally or unknowingly dissociated with the content and requirements of the current licensure exam).

²⁴ Jane Gross, *Bar Exam: Ordeal and Rite of Passage*, NEW YORK TIMES (July 30, 1987).

²⁵ Jeremiah V. Ross, *Being a Lawyer*, ROSS LAW PDX BLOG, (“Bar exams are the State's crucible meant to see if you have what it takes to become a lawyer.”). <https://www.rosslawpdx.com/law-blog/2016/9/22/is-it-difficult-to-be-a-lawyer-in-oregon-oregon-state-bar-exam-has-historically-low-pass-rate>

²⁶ *Id.*

licensed just ten years ago would not recognize the bar exam today.²⁷ 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. 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.²⁸ 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.²⁹ 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. 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 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. 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. The power to issue a license

²⁷ *Id.*

²⁸ See e.g. <https://twitter.com/PintsForThePoor/status/1679635633067769856?s=20> (Illustrative of my point, in 2023, Robert Pinel an attorney licensed for more than 30 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 40 other jurisdictions.)

²⁹ Jeremiah V. Ross, *Being a Lawyer*, ROSS LAW PDX BLOG, ("Bar exams are the State's crucible meant to see if you have what it takes to become a lawyer."). <https://www.rosslawpdx.com/law-blog/2016/9/22/is-it-difficult-to-be-a-lawyer-in-oregon-oregon-state-bar-exam-has-historically-low-pass-rate>

to practice law within a state is a non-delegable authority vested exclusively in the state supreme court.³⁰ 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).

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 bar.³¹ These associations seek to advance and improve the legal profession, to provide accountability to attorneys, and to assure public confidence in the legal profession.³² 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 “an administrative agency of the Texas Supreme Court” 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.³³ Some state bar associations specifically disclaim any involvement in attorney licensure. The Connecticut Bar Association publicly declares that it “does not regulate admission to law practice for the state.”³⁴ The Arkansas Bar Association makes a similar declaration.³⁵

In a majority of jurisdictions, there is no regulatory interrelation between the state bar and the board that oversees attorney admission. Only in the few states where the bar admission boards are administratively joined with the state bar associations do we see the dual roles of regulating entry and regulating attorney conduct post-admission.

³⁰ See e.g., TEX. GOV'T. CODE §82.021 (“Only the supreme court may issue licenses to practice law in this state as provided by this chapter. The power may not be delegated.”)

³¹ William Wesley 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, 128 (2021).

³² <https://www.lawyerlegion.com/associations/state-bar> (Twenty states do not have unified bar associations).

³³ www.texasbar.com

³⁴ www.ctbar.org (In Connecticut, bar admission is a function of the Connecticut Bar Examining Committee of the Connecticut Judicial Branch.)

³⁵ www.arkbar.com (“The association does not, however, handle the licensing and regulation of law practice, which is governed by the Supreme Court of Arkansas.”)

California,³⁶ Oregon, Nevada, North Carolina, South Dakota, Utah, Washington,³⁷ and Wyoming have state bar associations that declare regulatory authority in attorney admission.³⁸

In all other jurisdictions, state supreme courts have established separate boards to carry out the function of regulating the admission of new lawyers.³⁹ 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 (hereafter “examining board” or “BBE”). These examining boards coexist with state bar associations, but they serve different roles. Members of state examining boards are not elected. Instead, they are hand-picked by a process rarely disclosed to the public. Even in the small number of states where the examining boards are established by legislative act, the ultimate composition, supervision, and oversight of these boards is charged to the courts.⁴⁰

Appointed members of bar examining boards are typically attorneys licensed within the state, although the boards may be directed by non-attorney administrators.⁴¹ 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.⁴² Some states include judges from a state trial or appellate court. Although ostensibly supervised by the state supreme court, the common practice is

³⁶ The State Bar of California is one of the rare unicorns to take on both regulatory functions. It manages the admission of lawyers into practice, investigates complaints of professional misconduct, and prescribes appropriate discipline for misconduct. www.calbar.ca.gov

³⁷ www.wsba.org (“The 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.”)

³⁸ <https://www.lawyerlegion.com/associations/state-bar>

³⁹ Boyd, *supra* note 7, at 613.

⁴⁰ See, e.g., *Caranchini v. Mo. Bd. of L. Exam’rs*, 447 S.W.3d 768, 775 (Mo. Ct. App. 2014) (Missouri BLE is judicial and not executive).

⁴¹ See TEX. GOV’T. CODE §82.001 (a) and (b) (“The Board of Law Examiners is composed of nine attorneys who have the qualifications required of members of the supreme court. The supreme court shall appoint the members of the board for staggered six-year terms, with the terms of one-third of the members expiring May 31 of each odd-numbered year.”).

⁴² 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).

that one justice from the state supreme court will serve as a liaison to the examining board as the point of contact between the board and the court without a great deal of day-to-day supervision. The state supreme courts promulgate specific rules to govern both the conduct of the bar examining boards and the qualifications, requirements, and procedure for bar applicants.⁴³ In theory, these rules create a degree of transparency and allow those serving on the boards and their 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 highest court of the state for entry into the legal profession.⁴⁴ The court's non-delegable 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.⁴⁵ From this lens, our elite state justices take the symbolic figurehead role of embossing their signatures on the law licenses and administering the attorney oath. Even the attorney oath may be sworn before an inferior court judge or even a notary public in most jurisdictions.⁴⁶

When the court delegates substantial parts of its gatekeeping 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

⁴³ *But see id.*, (asserting that there are insufficient rules to govern the conduct of the Boards of Bar Examiners to protect the public and attorney applicants).

⁴⁴ *Id.* at 130-131 (These boards are appointed to ensure the competence of future attorneys by examining their educational credentials, inquiring extensively into their character and fitness to practice law).

⁴⁵ *See Shaping the Bar supra* note 16, p. 35 (Describing the 1970's as an era that "produced a series of federal court decisions that gave bar examiners impenetrable protection from judicial scrutiny"); and *see In re Application of Griffin*, 128 Ohio St.3d 311 (2011)(demonstrating an instance where a state supreme court became involved in a character and fitness determination, and ultimately sided with the state Board of Commissioners on Character and fitness). <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2011/2011-ohio-20.pdf>.

⁴⁶ *See e.g.*, GA R. Admis. Pt. B §16.

legal profession and the judiciary.⁴⁷ 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. Improper, excessive, or unsupervised delegation contravenes due process as it denies the public of an opportunity to investigate and hold accountable those responsible for attorney licensing.⁴⁸ Confronting this reality makes "fair procedural process[es] and transparent operations" all the more crucial.⁴⁹

The determination of competence to practice law has for decades been equated to earning a passing score on a state administered bar examination. 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 applicant's character and fitness to practice law.⁵⁰ With these empowered roles, the state examining boards are occupational licensing agencies holding the combined powers of rulemaking, investigation, and adjudication.⁵¹ 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.⁵² As agencies of the state high courts, the examining boards are endowed with "consequential regulatory powers."⁵³ These regulatory powers include the discretionary authority to outsource aspects of their regulatory functions to private providers.

⁴⁷ Boyd *supra* note 7, at 621.

⁴⁸ Patton *supra* note 30, at 128.

⁴⁹ *Id.*

⁵⁰ See, e.g., *Records of the Kansas Board of Law Examiners 1907-1970*, KAN. HIST. SOC'Y, <https://www.kshs.org/archives/216108>. The Kansas Board of Law Examiners, a ten-member board consisting of Kansas lawyers and judges, was established in 1903. The BLE members are appointed by the Kansas Supreme Court for four-year terms. "The Board is an arm of the Supreme Court and is subject to the Court's direction and approval. The authority for the creation of this Board is found in the statute which empowers the Court to make rules for the examination of applications for admission to the Bar in the state of Kansas."

⁵¹ Boyd, *supra* note 7, p. 615.

⁵² *Id.*

⁵³ Keith W. Rizzardi, *Excess Confidentiality: Must Bar Examiners Defy Administrative Law and Judicial Transparency?*, 34 GEO. J. LEGAL ETHICS 423, 431 (2021).

C. Outsourcing by Judicial Agencies

Outsourcing is the delegation of non-core activities to outside agencies and contractors.⁵⁴ In most contexts, the motivation for outsourcing is 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. By outsourcing, an entity's talents and resources can be expended in areas where returns on such efforts will be maximized.⁵⁵ 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 of abdication of governmental power and/or the potential for a loss of regulatory control.

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.⁵⁶ Like their executive and legislative counterparts, judicial agencies also rely on outsourcing to carry out important public facing functions. 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.⁵⁷ The aim of democratic governmental regulation is to protect the public from the potential harms of self-serving private interests. But when government is allowed to assign its regulatory role to private actors, that public protection dissipates, and irreparable harm may result.⁵⁸ An accepted paradox of regulatory outsourcing is that it is both commonplace and inconsistent with democratic governance.⁵⁹

⁵⁴ TheLawDictionary.org <https://thelawdictionary.org/?s=outsourcing>

⁵⁵ Sidney Shapiro, *Outsourcing Government Regulation*, 53 DUKE L. J. 389 (2003).

⁵⁶ Kimberly N. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 46 GA L. REV. 607, 611 (2015).

⁵⁷ JODY FREEMAN & MARTHA MINOW, *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (2009).

⁵⁸ See, e.g., Sidney Shapiro, *Outsourcing Government Regulation*, 53 DUKE L. J. 389, 389 (2003) (“In the aftermath of the horrific events of September 11, 2001, it was revealed that the Federal Aviation Administration (FAA) 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.”).

⁵⁹ Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 658 (2016).

Public accountability and transparency concerns arise any time private actors are involved in a regulatory process.⁶⁰ Yet these key characteristics of democratic governance—transparency, accountability, and opportunities for meaningful public participation—are lacking in the current model of outsourced bar examination.⁶¹ 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.

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.⁶² Those concerns are not remedied when the self-governed turn self-regulation over to a private corporation 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.⁶³ 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. We can view those 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.*⁶⁴

⁶⁰ Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816 (2000).

⁶¹ Robert L. Glicksman, *Shattered Government*, 62 ARIZ. L. REV. 573, 575-577 (2020).

⁶² *Shaping the Bar* *supra* note 16, pp. 26-27.

⁶³ Marsha Griggs, *An Epic Fail*, 64 HOWARD L. J. 1 (2020); Ashley London, *supra* note 42.

⁶⁴ Dominique Custos and John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555, 556 (2010).

The bar exam that, since the early 1900's, 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 U.S. jurisdictions, all or a substantial portion of the bar exam content is created and controlled by the National Conference of Bar Examiners ("NCBE").⁶⁵ The NCBE develops licensing tests for bar admission and provides character and fitness investigations and other services to state examining boards.⁶⁶

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.⁶⁷ In addition 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 U.S. may take on one of three optional compositions.⁶⁸

Option 1: a state-law exam created entirely by members of the state examining board. Louisiana, the sole civil law jurisdiction in the U.S., is the only state to employ Option 1.⁶⁹

Option 2: a hybrid of state-law exam content and NCBE-controlled multistate content. Nine states use Option 2 and in those states an applicant's performance on the NCBE multistate exam content comprises 50% or more of the applicant's overall score.⁷⁰

⁶⁵ The NCBE is a not-for-profit corporation with its principal office in Wisconsin. <https://www.ncbex.org/about/media-kit/>

⁶⁶ <https://www.ncbex.org/about> ("NCBE also provides testing, research, and 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.")

⁶⁷ <https://www.ncbex.org/character-and-fitness/>

⁶⁸ Regardless of the option employed, all states except Wisconsin still require bar candidates to take and pass the MPRE as a precondition of licensure.

⁶⁹ Nevada administered an exam without any multistate content in 2020 and 2021. The state resumed use of the MBE in 2023.

⁷⁰ The jurisdictions are: California, Delaware, Florida, Georgia, Hawaii, Mississippi, South Dakota, Virginia, and Wisconsin.

Option 3: the Uniform Bar Exam (“UBE” or “uniform exam”)⁷¹ composed exclusively of NCBE-controlled content. Forty-one U.S. jurisdictions, including the District of Columbia, Puerto Rico, and the Virgin Islands have adopted the UBE.

The uniform exam 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 U.S.⁷² Under a system of uniform examination, bar applicants in all subscribing states take an identical exam. Today, the only difference between the New York Bar Exam and the New Mexico Bar Exam is the cost and place where the exam is administered. The uniform exam and all of its components are the exclusive products of the NCBE and are, at all times, fully under NCBE control. 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. The emergence of a uniform exam facilitated multijurisdictional practice. Uniformity in bar examination also has precipitated more opportunity for NCBE influence and has diminished state involvement in the licensure process.

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”),⁷³ the first of four multistate exams.⁷⁴ The MBE was a game changer, both in the world 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.⁷⁵ 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, states relied on the NCBE to supply up to half of their

<https://www.ncbex.org/exams/ube/list-ube-jurisdictions>

⁷¹ <https://www.ncbex.org/exams/ube/> (last visited Nov. 29, 2022).

⁷² See, e.g., *Building a Better Bar Exam*, *supra* note 23.

⁷³ *Shaping the Bar*, *supra* note 16, pp. 32-33.

⁷⁴ 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”). States may license or purchase three of those exams for use as all or part of a state administered bar exam.

⁷⁵ *Id.*

bar exam content. That reliance allowed state bar examiners to focus their limited resources on other aspects of the licensing process, but it also allowed their 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.”⁷⁶ 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. The NCBE developed more multistate exam products with an eye to standardizing the bar exam in toto.⁷⁷ One pitch that the NCBE used to lure states to its uniform exam was to describe the UBE as a combination of three multistate exams. That pitch rang effective in many states that were already using at least two of the multistate exams. 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 came with strings attached. And although the courts did not overtly surrender ultimate authority in making bar admission decisions to the NCBE, they have done so implicitly.⁷⁸

It is here that an important distinction must be made between outsourcing government services and outsourcing governmental regulatory functions.⁷⁹ Although the NCBE is the 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 ExamSoft⁸⁰ and ILG,⁸¹ that provide

⁷⁶ Robert Brauneis and Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 *Yale J. L. & Tech.* 103, 127 (2018) (asserting that police over-reliance on artificial intelligence algorithms weakens decision making and may cause officers to lose their independent awareness of crime risks and to lose the ability to responsibly deviate from the algorithm’s instruction).

⁷⁷ Diane F. Bosse, *A Uniform Bar Examination: The Journey from Idea to Tipping Point*, *BAR EXAMINER* Vol 85, No. 3 (September 2016).

⁷⁸ Patton *supra* note 30.

⁷⁹ Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 *WASH. U. L. REV.* 615, 658 (2016).

⁸⁰ ExamSoft’s marketing materials boasts a “long-running track record for administering state Bar exams with the highest level of platform security and stability available.” <https://examsoft.com/programs/bar/>

⁸¹ ILG provides software that allows applicants to complete the written

technology platforms for the delivery of bar exam content, submission of applicants' responses, and remote proctoring and/or facial recognition of bar applicants. The outsourcing to these vendors is for a very narrow and limited purpose and does not involve the risk of sweeping overreach in attorney admission. 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 UBE, 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.⁸² As a corporation, the NCBE has the legal right and proprietary entitlement to control the multistate exams that it has developed. But 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. The bar exam has been all but fully privatized by the sweeping usage of NCBE exams in the licensing process, where states have no 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."⁸³ 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

portion of the bar exam on a laptop. <https://www.ilgexam360.com/home.action>

⁸² See e.g., Patton *supra* note 30; Nicholas W. Allard, *Too Much Power Rests with the National Conference of Bar Examiners*, NAT'L. L. J. (March 26, 2015) <https://www.law.com/nationallawjournal/almID/1202721713085/>; Ben Bratman, *Why More States Should Not Jump on the Uniform Bar Exam Bandwagon*, LEGAL STUDIES RESEARCH PAPER SERIES, WORKING PAPER NO. 2015-20, www.idjournal.com; Elizabeth Sherowski, *An Inclusive Model for New Lawyer Licensing*, 51 CAPITAL UNIV. L. REV. (forthcoming 2023); Rory D. Bahadur and Kevin Ruth, *Bad Math Bar Sauce and the ABA as a Shill for the NCBE*, 66 HOWARD L. J. 2 (2023); and Michael S. Ariens, *The NCBE's Wrong-Headed Response to the COVID-19 Pandemic*, SSRN AT 1, 10 (APR. 28, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587751.

⁸³ Kimberly N. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 46 GA L. REV. 607, 620 (2015).

delivery.⁸⁴ After affixing their names to the uniform exam, states set the fees to be paid by bar applicants. With a substantial majority of U.S. jurisdictions relying dependently upon NCBE exams, the distinction between a state's bar exam and the NCBE's uniform exam is one in name only.⁸⁵ The resultant outsourced control of attorney licensure is at odds with the mandate of self-regulation. A lack of transparency makes 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.⁸⁶ As a not-for-profit corporation, the NCBE is generally not viewed as 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. When the private entity takes on a governmental role, that presumed benevolence diminishes public accountability. 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 from all facets of the legal profession. As a result, it has 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.⁸⁷ The almost familial relationship between the NCBE and 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,⁸⁸

⁸⁴ Lifang Wu, et al., *Private Label Management: A Literature Review*, 125 J. Bus. Research 364 (March 2021).

⁸⁵ In UBE jurisdictions, earning a passing score on NCBE's uniform exam is both necessary and sufficient to earn a law license.

⁸⁶ 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.

⁸⁷ The NCBE was established in 1931. <https://www.ncbex.org/about>

⁸⁸ Erica Moeser, *The President's Page*, 84 Bar Examiner 1 (Mar. 2015) A former President for the NCBE said "either one has earned the trust that comes with years of performance or one hasn't. Courts and bar examiners have developed trust in the MBE over the 40-plus years it has been administered.

therefore its actions are rarely scrutinized, and almost never is transparency demanded (or even expected) from this *quasi*-regulator.⁸⁹

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. Even though all states and the District of Columbia have statutes that provide for public access to government records,⁹⁰ records of the judicial branch may not be fully subject to public disclosure through state open records acts.⁹¹ 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. 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.⁹²

Without access to the state-NCBE contracts, it is impossible to determine the scope of authority that has been actually 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 is the fact that states have overwhelmingly deferred one component of

Some legal educators have not.”
<https://thebarexaminer.ncbex.org/article/march-2015/presidents-page-march-2015/>

⁸⁹ Nachman Gutowski, *NextGen Exam & Accreditation* (SSRN).

⁹⁰ Robert Brauneis and Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 *Yale J. L. & Tech.* 103, 134 (2018).

⁹¹ See e.g., Kansas Open Records Act K.S.A. 45-240 (“Judges are not defined as a ‘public agency’ subject to the KORA and court records may or may not be subject to the KORA. The KORA allows the judicial branch to make its own rules and the Supreme Court or district court may have a rule or an order closing a specific court record. Therefore, when seeking records from a court, check the court rules.”). See also Keith W. Rizzardi, *Excess Confidentiality: Must Bar Examiners Defy Administrative Law and Judicial Transparency?*, 34 *GEO. J. LEGAL ETHICS* 423 (2021) (Professor Rizzardi offers a comprehensive review of the confidentiality rules used in each state by state bar examiners contrasting them with other laws governing transparency for administrative agencies and the judiciary).

⁹² U.S. DEPT. OF JUSTICE, Overview of Judicial Immunity (1977) <https://www.ojp.gov/ncjrs/virtual-library/abstracts/overview-judicial-immunity>; Keith W. Rizzardi, *Excess Confidentiality: Must Bar Examiners Defy Administrative Law and Judicial Transparency?*, 34 *GEO. J. LEGAL ETHICS* 423 (2021).

bar licensure, that is separate from the bar exam, to the NCBE. The NCBE creates and administers the Multistate Professional Responsibility Exam (“MPRE”), which is a separate component of the attorney licensing process. All jurisdictions in the U.S. except Puerto Rico and Wisconsin require a passing score on the MPRE as a precondition of attorney licensure.⁹³ 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.⁹⁴ 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.

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.⁹⁵ 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. One such change was the elimination of state choice in determining which questions and which subject matter to include in the licensing exam. For many years, the NCBE provided nine separate essay questions to jurisdictions that adopted the MEE for use. 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.⁹⁶ In 2014, the NCBE changed the format and the content of its MEE.⁹⁷ States that used the reformed MEE were

⁹³ <https://www.ncbex.org/exams/mpre/>

⁹⁴ David L. Hudson, Jr., *States split on new ABA Model Rule limiting harassing or discriminatory conduct*, ABA Journal (Oct. 1, 2017), https://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct

⁹⁵ Nat’l. Conf. of Bar Examiners, *Testing Milestones*, 90 BAR EXAMINER No. 2 and 3 (Summer/Fall 2021) (The NCBE timeline for proposed and implemented changes is published without clear evidence that those changes were initiated by state examining boards or state supreme courts.); *see also* <https://nextgenbarexam.ncbex.org/wp-content/uploads/NCBE-Testing-Program-Timeline.pdf>

⁹⁶ J.D. Advising, *The Evolution of the Multistate Essay Exam*, <https://jidadvising.com/evolution-of-the-multistate-essay-exam/#:~:text=From%202007%20through%202013%2C%20the.about%20which%20subjects%20they%20test> (last visited Dec. 1, 2022).

⁹⁷ Moeser *supra* note 90 (describing the research behind any changes to the bar exam content. New subjects/formats find their way onto the bar exam “by

deprived of an important autonomy that had allowed them to both benefit from the efficiency and expertise of using a private provider for exam questions, and to maintain the ability to ensure that new lawyers demonstrated knowledge of state law before being allowed to practice.⁹⁸

The most recent development in bar admission is the NextGen Bar Exam (“NextGen exam”). Scheduled to debut in 2026, the NextGen exam promises to “utilize fundamental legal concepts and principles in a manner that offers a better balance of necessary skills for both transactional and litigation practice.”⁹⁹ The NextGen exam will not contain any essay questions and it will test fewer subjects than the current uniform exam.¹⁰⁰ Unlike its UBE predecessor, the NextGen exam will not have discreet components, which will sunset the MBE, MEE, and MPT.¹⁰¹ Perhaps most notably, the NextGen exam purports to test performance-type skills like legal research, negotiation, and client counseling.¹⁰²

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. 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.¹⁰³ 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.¹⁰⁴ Contrary to the IAALS study findings, the

the same process of broad consultation that has marked all other changes to our tests as they have evolved.”); NAT.L CONF. OF B. EXAMINERS, NCBE Testing Milestones <https://nextgenbarexam.ncbex.org/wp-content/uploads/NCBE-Testing-Program-Timeline.pdf>;

⁹⁸ J.D. Advising *supra* note 95.

⁹⁹ *Id.*

¹⁰⁰ <https://www.ncbex.org/news-resources/some-subjects-be-removed-mee-2026>

¹⁰¹ The NCBE announced that it will sunset the MBE, MEE, and MPT effective July 2027. <https://nextgenbarexam.ncbex.org/nextgen-exam-structure-announcement/>

¹⁰² *Id.*

¹⁰³ Deborah Jones Merritt and Logan Cornett, *Building A Better Bar: The Twelve Building Blocks of Minimum Competence* (2021).

¹⁰⁴ *Id.* (“Multiple choice exams should be used sparingly, if at all” and if jurisdiction use multiple choice questions, “those questions should be open book.”)

NCBE doubled down on the use of closed-book, speeded, multiple-choice questions. Understandably beholden to standardized testing practices, the NCBE announced in 2023 that 50% of the NextGen exam questions will be in multiple choice format.¹⁰⁵

The NextGen exam is the end product of a comprehensive three-year study initiated by the NCBE.¹⁰⁶ The NCBE appointed a task force to survey lawyers and law school faculty about the current bar exam and practice areas that should be reflected on the exam.¹⁰⁷ A key contrast between the NCBE study and the IAALS study is that the former does not acknowledge a wealth of academic literature and social critique that the current bar exam does not measure competency to practice law, but instead measures memory,¹⁰⁸ financial resources,¹⁰⁹ and test-taking skills.¹¹⁰ 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. It is equally 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

¹⁰⁵ Karen Sloan, *New bar exam gets lukewarm reception in previews*, Reuters.com (Jul. 19, 2023); <https://www.reuters.com/legal/legalindustry/new-bar-exam-gets-lukewarm-reception-previews-2023-07-19/>

¹⁰⁶ The NCBE describes its Task Force study as “a three-year, comprehensive, empirical study to ensure that the bar examination continues to assess the minimum competencies required of newly licensed lawyers in an evolving legal profession, and to determine how those competencies should be assessed.” <https://nextgenbarexam.ncbex.org/reports/>

¹⁰⁷ The NCBE Testing Task Force undertook a three-year study from 2018 – 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. <https://thebarexaminer.ncbex.org/article/spring-2021/testing-task-force-final-update/>

¹⁰⁸ Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 Neb. L. Rev. 363, 377 (“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.”).

¹⁰⁹ Kayleigh McNeil, *Hidden Hurdles: The True Cost of the Bar Exam*, Washington J. of L. Technology & Arts (Apr. 24, 2023) <https://wjta.com/2023/04/24/hidden-hurdles-the-true-cost-of-the-bar-exam;>

Deborah Jones Merritt, Carol L. Chomsky, Claudia Angelos, and Joan W. Howarth, *Racial Disparities in Bar Exam Results—Causes and Remedies*, Bloomberg Law (Jul. 20, 2021) <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies>.

¹¹⁰ Curcio, *A Better Bar supra* note 104, p. 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 . . .”).

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 persuaded by Professor Merritt's recommendations or 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 to 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 exam that bears little resemblance to the practice of law, and its principals have equated test-taking ability with competence.¹¹¹ The extent to which state courts have become disengaged with the process by which we assess the competence of new lawyers hints at loss of control of an important regulatory function.

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.¹¹² The decision-making sequence began with a joint working group¹¹³ responding to a

¹¹¹ Marsha Griggs and Andrea A. Curcio, *Book Review: Shaping the Bar*, 71 J. Legal Ed. 547 (forthcoming Spring 2022).

¹¹² Bosse *supra* note 77.

¹¹³ *Id.* (Some members of the Council of Chief Justices are reported to have been included in the joint working group.)

recommendation from NCBE leadership to investigate the possible advantages of a move toward a national licensure system. 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.¹¹⁴

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.¹¹⁵ 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 U.S. Supreme Court is that Congress cannot delegate its legislative power to regulate an industry by distributing the authority to develop codes of conduct for members of the industry without providing standards or guidelines for the implementation of its objectives.

In *Schechter Poultry Corp. v. U.S.*, Congress enacted a statute¹¹⁶ that gave the President “blank check” authority to codify rules promulgated by a poultry trade association. 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 codify the manual (in its entirety) into law, so long as the polices were not anti-competitive.¹¹⁷ The President also had blue pencil authority to

¹¹⁴ *Id.*

¹¹⁵ In 2022, 9570 UBE scores were transferred to other jurisdictions for bar admission. <https://thebarexaminer.ncbex.org/2022-statistics/the-uniform-bar-examination-ube/>

¹¹⁶ National Industrial Recovery Act (“NIRA”), Section 3, 15 USC §1703 (The Act 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. The Act also provided that the President may impose conditions for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy. Where such a code has not been approved, the President may prescribe one on his own motion or on complaint.)

¹¹⁷ *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

make exceptions and exemptions or to create his own Code.¹¹⁸ Following *Schechter*, the congressional power to regulate an industry could not be delegated to the President and, by application, it cannot be delegated to a trade association within the industry.¹¹⁹ In setting this standard, the court rejected Congress' rationale that a trade association was appropriate to dictate laws to be codified based on its expertise and familiarity with the problems of the industry and its members.¹²⁰

State supreme courts should receive no greater latitude in the delegation of its 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. It should follow then that 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 and allow it 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. Gone unchecked, that power can leave the public without important information, and it can interfere with legal education and academic freedom. The courts have the ability to reject NCBE's proposed changes, but law schools do not. 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 unknown, but the UBE jurisdictions that were promised the ability to set their own cut (passing) scores,¹²¹ are being told that they will have to set new cut scores on some scale not yet disclosed.¹²²

¹¹⁸ NIRA *supra* note 115.

¹¹⁹ *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 537 (1935) (holding unconstitutional the delegation of legislative power to trade or industry associations to enact laws that govern their industry and explaining that the trade association's familiarity with the problems of the industry and its members does not provide justification for any such delegation.)

¹²⁰ *Id.*

¹²¹ *Building A Better Bar Exam*, *supra* note 23, p. 42 ("States were promised the ability . . . to set their own cut scores.")

¹²² *Id.* ("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

As the debut of the NextGen exam steadfastly approaches, the courts' prior record of acquiescence to NCBE new exam products makes it unlikely that they will exercise their veto power to resist NCBE-driven changes to licensure standards in the future.¹²³ Anticipating that they will not, law schools have already begun the process of implementing or proposing curriculum changes. Concerningly, these changes must be set in motion before the NCBE has released a sufficient number of sample questions,¹²⁴ and before schools know whether or when their graduates will take the NextGen exam.¹²⁵ Thus, law schools find themselves in the untenable position of blindly implementing curricular changes. To maintain accreditation as the ABA mandates, law schools must maintain a prescribed bar passage rate for their graduates.¹²⁶ When changes to the bar exam could impact the difficulty of bar passage, law schools are directly affected. In this vein, a private provider has some ABA-endorsed regulatory control over law schools. The curricular impact of NCBE's decisions is but one example of its overreach.

C. Cost Considerations

Typically, cost and efficiency are the reasons that a governmental agency would consider outsourcing. 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 home-grown exam. This cost-benefit analysis is a largely unstudied aspect of judicial delegation in the regulation of bar

requirements.”)

¹²³ 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 Hon. Alan D. Scheinkman and Michael Miller, *Why New York Should Withdraw from the Uniform Bar Exam*, BLOOMBERG LAW (Jul. 14, 2021) <https://news.bloomberglaw.com/us-law-week/why-new-york-should-withdraw-from-the-uniform-bar-exam>; and Ryan Boysen, *Calif. Explores Changing Its Bar Exam or Nixing It Altogether*, LAW360 PLUS MODERN LAWYER (Apr 27, 2021, 3:54 PM EDT) <https://www.law360.com/pulse/articles/1379334/calif-explores-changing-its-bar-exam-or-nixing-it-altogether> (last visited Dec. 1, 2022).

¹²⁴ Pennsylvania Bar Association, *5 Questions for Ashley M. London, Assistant Professor of Law, Thomas R. Kline School of Law, Duquesne University*, 33 PENN. BAR NEWS 13 (July 10, 2023).

¹²⁵ Editorial Advisory Board, *The NextGen Bar Exam*, THE MARYLAND DAILY RECORD (Nov. 15, 2022) <https://thedailyrecord.com/2022/11/15/editorial-advisory-board-the-nextgen-bar-exam/>

¹²⁶ ABA Standards and Rules of Procedure for Approval of Law Schools 2022-2023: ABA Standard 316 (“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.”)

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.¹²⁷ 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 U.S. jurisdictions uses at least one of the NCBE's multistate exams, 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 is 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. The process of seeking a competitive bid is consistent with judicious use of public funds. Although not always the case, the bidding process provides a mechanism to shepherd tax dollars by selecting the contractor with the lowest bid.¹²⁸ 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. In the limited market for bar exams, the NCBE holds a near 100% share.¹²⁹ The few states that draft and use their own exam questions are not competitors of the NCBE because home-grown exam questions are created for the sole purpose of testing the law of their own jurisdiction and will have 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.¹³⁰

¹²⁷ The MPT was developed by NCBE and first made available to states in 1997. Although new to most states, California is the innovator of the bar admission performance test. California developed and began using an in-state performance test in 198_.

¹²⁸ A bid does not have to be the lowest for it to be selected. A bid may be selected because it is the best available. Some agencies do not engage in competitive bidding. *See* Custos & Reitz, *supra* note 63, p. 571-572.

¹²⁹ Noting that commercial bar preparation companies, like Barbri, Adaptibar, Themis, and Helix, also license questions from the NCBE for use. Any questions not licensed from the NCBE are drafted to simulate NCBE questions.

¹³⁰ There are certainly opportunity cost savings to 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 is that those opportunity costs are not readily quantified because they have relied on the NCBE servicing for so long.

Fourth, state-by-state comparative data would be of little value. The costs of administering the bar exam will vary greatly by state, by the number of bar applicants, by the physical costs to reserve facilities for the exam administration, by state budgetary constraints, and by 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 character and fitness investigations.¹³¹ Massachusetts pays approximately .0003% of its allotted \$759 million judicial budget to the NCBE for the state's administration of the uniform exam.¹³² 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.¹³³ Louisiana does not use any NCBE products in its bar exam, but 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.¹³⁴ 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 50 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. There are also non-economic costs to privatization of the bar exam that cannot be summarily analyzed in terms of money spent or cost savings.

¹³¹ Email from Kandace J. Kukas, Executive Director, Massachusetts Board of Bar Examiners (Aug. 14, 2023) on file with author.

¹³² 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. 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. [https://cthruspending.mass.gov#!/year/2020/explore/0-/department/BOARD+OF+BAR+EXAMINERS+\(BBE\)/0-barChart/cabinet_secretariat/JUDICIARY/0-/vendor](https://cthruspending.mass.gov#!/year/2020/explore/0-/department/BOARD+OF+BAR+EXAMINERS+(BBE)/0-barChart/cabinet_secretariat/JUDICIARY/0-/vendor)

¹³³ South Dakota paid NCBE \$8722, which comprises 15% of the state bar examiners' budget. South Dakota Public Information Request Response (on file with author).

¹³⁴ Standard fees charged to bar applicants range from \$275 to \$925. <https://www.ncbex.org/character-fitness/LA/fee-schedule>

The NCBE hires select law professors, judges, and practicing attorneys to work collectively to draft and vet multistate exam questions. 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 may be the only cost-effective way to create a product aimed to test the competency of new attorneys, but collaboration can quickly become monopoly control. Diminished regulatory control is possibly the most consequential non-economic cost of privatizing the bar exam.

The NCBE monopoly is multi-layered. 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. Its other revenue streams include the licensing of bar exam questions to commercial bar preparation companies and law schools and selling study aids directly to bar applicants.¹³⁵ The source and extent of NCBE's profits cannot be ignored in evaluating its political economic role in the licensure process.¹³⁶ 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.¹³⁷

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.*¹³⁸

¹³⁵ 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. <https://www.ncbex.org/study-aids>

¹³⁶ In 2020, the NCBE's reported revenue and net income were \$39,284,236 and \$17,288,671 respectively. NCBE IRS Form 990 2019-2020 on file with author, also publicly available.

¹³⁷ Shapiro *supra* note 59.

¹³⁸ Dru Stevenson, *Privatization of State Administrative Services*, 68 LA. L. REV. 1285, 1289 (2008).

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.¹³⁹ 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 decisionmaker.¹⁴⁰ Under the regime of privatized bar examination, the state supreme courts seem to be less concerned about safeguards than about efficiency.

The decision to outsource is most commonly motivated by perceived economic efficiency. Professor Sydney Shapiro 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.¹⁴¹ 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.¹⁴² States and state agencies make these same cost evaluations in determining which tasks to outsource and which to self-complete. As regards 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,¹⁴³

¹³⁹ Stevenson *supra* note 142 at p. 1289 (States make determinations about the issuance of licenses and the eligibility for services, thus delegation and outsourcing at the state level will more directly impact individual rights than delegation by the federal government.)

¹⁴⁰ *Id.*

¹⁴¹ Sidney Shapiro, *Outsourcing Government Regulation*, 53 DUKE L. J. 389, 390 (2003).

¹⁴² *Id.*

¹⁴³ Michael B. Frisby, Sam C. Erman, Victor D. Quintanilla, *Safeguard or Barrier, An Empirical Examination of Bar Exam Cut Scores*, ____ J. LEGAL EDUC. ____ (forthcoming 2022); and Joan W. Howarth, *The Case for a Uniform*

resistance or inability to reform the licensure process,¹⁴⁴ institutionalization of the bar exam,¹⁴⁵ and the risk of unnecessary and unredressed harm to those seeking licensure.¹⁴⁶ 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.¹⁴⁷ Notwithstanding a problematic limitation on available remedies, the four political-economic models of public-private partnership, path dependency, regulatory capture, and hold-up can offer enlightened perspective on the interrelationships between judicial agencies and their private partners and 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.¹⁴⁸ For long-term projects or services, public-private partnerships allow the government to capitalize on the expertise and resources of private industry while not making the 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.¹⁴⁹ 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

Cut Score, 42 J. Legal Prof. 69 (2017).

¹⁴⁴ Joan Howarth and Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 F.I. U. L. REV. 383 (2019).

¹⁴⁵ *An Epic Fail* *supra* note 63.

¹⁴⁶ London *supra* note 42; *An Epic Fail* *supra* note 63.

¹⁴⁷ I will address this void in a future article.

¹⁴⁸ Custos & Reitz, *supra* note 63.

¹⁴⁹ *Id.* at 2.

implement the project. 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.¹⁵⁰ The NCBE employs psychometricians and testing experts. Unlike state examining boards, the NCBE devotes its full-time talents and efforts to the study and development of licensure exams. 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.¹⁵¹ The public-private 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.¹⁵² 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, 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.¹⁵³ There are multiple tasks associated with the turnkey delivery that may not be enumerated in the terms of the agreement between NCBE and the state supreme courts.

¹⁵⁰ Daniel T. Plunkett and Erin M. Minor, *Public-Private Partnerships: Primer, Pointers & Potential Pitfalls*, Briefing Papers 13-7 (June 2013).

¹⁵¹ Public-private partnerships are not the type of business partnerships contemplated by the Revised Uniform Partnership Act. *See* REV. UNIFORM PARTNERSHIP ACT § (defining a partnership as an association of two or more persons to carry on a business for a profit.); *see also* Custos & Reitz *supra* note 63, pp. 559-560.

¹⁵² Custos & Reitz *supra* note 63.

¹⁵³ *Building a Better Bar Exam*, *supra* note 23, pp. 25-27.

Some of those tasks may reasonably include vetting and pre-testing 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 decades to complete.¹⁵⁴ 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. Highly significant to its economic attractiveness, a third distinguishing feature is that the private party provides all or most of the funding for the project. The multiple 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.¹⁵⁵ 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 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.¹⁵⁶ 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. The private entity takes calculated measures to minimize its risks of incurring any losses, and the judicial agency contracting for its product and services bears no risk if the product is not successfully utilized. In

¹⁵⁴ David W. Gaffey, *Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States*, 39 PUB. CONT. L. J. 351, 353 (2010).

¹⁵⁵ Plunkett & Minor, *supra* note 136 at 3-4.

¹⁵⁶ See Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 American Econ. Rev. 493-513 (1979), <http://www.jstor.org/stable/1808698>.

the unlikely event that a majority of U.S. jurisdictions declined 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.¹⁵⁷ 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.¹⁵⁸ 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 non-exam pathways to bar licensure.¹⁵⁹ 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. But the same expertise that makes the NCBE an 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.¹⁶⁰ When long-term partnerships are created before the parties can fully understand their implications, the public bears the cost for years and years. In 2023, three years before the planned debut of the NextGen exam, some states are considering adoption of the exam—before the exam has been fully developed and before states have information on the scoring and scaling of the exam.¹⁶¹ The goodwill between state supreme courts and the NCBE has evolved into a deference for the entity's opinions, recommendations, and new products that is potentially dangerous to public accountability. Before any changes to the state

¹⁵⁷ Custos & Reitz *supra* note 63.

¹⁵⁸ *Id.*

¹⁵⁹ Oregon Commission.

¹⁶⁰ Plunkett & Minor *supra* note 136, p. 6.

¹⁶¹ Missouri announced its plans to adopt the UBE on January 28, 2023. (email on file with author).

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.¹⁶²

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.¹⁶³ Rational 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.¹⁶⁴ Path dependence involves a causal relationship between stages in a temporal sequence, with each stage having significant influence on the next.

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.¹⁶⁵ Judicial decisions also impact policies and decisions made by other branches of government and the institutions they govern. Judicial choices place policy development on one path rather than another and they inevitably discourage departures to alternative paths.¹⁶⁶ 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.¹⁶⁷

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

¹⁶² Plunkett & Minor *supra* note 136, p. 6.

¹⁶³ *Id.* at 205-206 (“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.’”).

¹⁶⁴ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 101, 104 (2003).

¹⁶⁵ Hathaway *supra* note 116, at 106 (“The doctrine of stare decisis thus creates an explicitly path-dependent process.”).

¹⁶⁶ Charles R. Epp, *Law’s Allure and the Power of Path Dependent Ideas*, 35 L. & Social Inquiry 1041 (2010).

¹⁶⁷ *Id.* at 1044.

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 U.S., states were uncertain if the NCBE would provide exam content to allow them to license new attorneys. If the COVID-instigated bar exam debacle of 2020 revealed nothing else, it convincingly demonstrated that states have become too dangerously dependent upon the NCBE for the ability to license new attorneys.¹⁶⁸

An alternative viewpoint is that states have become path dependent upon the bar exam itself—and not specifically on NCBE products or direction.¹⁶⁹ The institutional hold that the bar exam has on the legal profession is almost unshakable. An overwhelming number of lawyers, judges, and non-lawyers equate a passing score (on any bar exam) with competency to practice law. 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 path 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 MPPT as individual options for state use. 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.

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.¹⁷⁰ Capture interferes with the public-protection goals of regulation. In the scheme of judicial regulation of admission to the practice of law, members of the profession have strong protectionist interests to limit the entry of new attorneys. State bar associations and bar examiners manifest those interests by advancing and enforcing

¹⁶⁸ *Id.*

¹⁶⁹ See *An Epic Fail* supra note 63, p. 43 (describing the bar exam as an institution in and of itself. “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.”).

¹⁷⁰ https://en.wikipedia.org/wiki/Regulatory_capture

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 non-exam pathways to licensure arose. The Collaboratory on Legal Education and Licensing for Practice¹⁷¹ evaluated and proposed several alternative options that would allow jurisdictions to safely and competently license new attorneys.¹⁷² One of the alternatives proposed was a limited or temporary diploma privilege that would deem graduation from an ABA-approved law school sufficient for licensure during the global health crisis, when a traditional exam was unavailable.¹⁷³ By the early summer of 2020, recent law graduates, practicing attorneys, and law school faculty and administrators had sent letters and petitions to state supreme courts and examining boards pleading for the enactment of a one-time diploma privilege for 2020 law school graduates who were unable to safely take a bar exam when so little was medically known about the spread and contamination risk of COVID and while no vaccine was broadly available.

Of the alternatives proposed by the Collaboratory, diploma privilege seemed to draw the most support and attention throughout the legal profession and among non-lawyers. 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 non-exam pathways to licensure.¹⁷⁴ Jurisdictional adoption of

¹⁷¹ 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. <https://lawyerlicensingresources.org/about-us>.

¹⁷² 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://blog.harvardlawreview.org/licensing-lawyers-in-a-pandemic-proving-competence/>; and Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol M. Chomsky, Andrea Anne Curcio, Marsha Griggs, Joan W. Howarth, Eileen R. Kaufman, Deborah Jones Merritt, Patricia Salkin & Judith W. Wegner, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, SCHOLARLY WORKS 3–7 (Mar. 22, 2020), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2309&context=facpub>.

¹⁷³ *Id.*

¹⁷⁴ See *An Epic Fail*, *supra* note 63, p.12 (Eventually, the NCBE did offer an

diploma privilege could reduce the number of prospective attorneys who sat for a bar exam and subsequently would 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.¹⁷⁵

The NCBE response proved to be quite influential to all but a select few state supreme courts.¹⁷⁶ 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.¹⁷⁷ Yet, there is no disconnect between the NCBE's public push against diploma privilege and the profits it generates from the states' use of its exam products. 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 its own 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. 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 encroached that of puppet master. The motivation behind such alleged overreach need not be sinister or self-

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.).

¹⁷⁵ BAR ADMISSIONS DURING THE COVID-19 PANDEMIC:

EVALUATING OPTIONS FOR THE CLASS OF 2020 4 (Nat'l Conf. of Bar Exam'rs ed. 2020).

¹⁷⁶ *An Epic Fail supra* note 63

¹⁷⁷ *An Epic Fail supra* note 63, pp. 32-33 (explaining that since 1994, the chief officer of the NCBE has been an attorney admitted to practice by diploma privilege who has never taken a state bar exam).

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.¹⁷⁸

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. 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."¹⁷⁹

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.¹⁸⁰ 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.¹⁸¹ 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.¹⁸² 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,¹⁸³ and that refutes claims that the bar exam in its current or predecessor form can validly or reliably measure minimum competence.¹⁸⁴ Considering the three mandated responsibilities of state examining

¹⁷⁸ See footnote 136.

¹⁷⁹ Lawrence G. Baxter, *Capture in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 177 (2011).

¹⁸⁰ *Id.*

¹⁸¹ Rizzardi *supra* note 58, at 431.

¹⁸² Rizzardi *supra* note 58, at 432.

¹⁸³ Howarth *supra* note 104.

¹⁸⁴ LeAnne Fuith, *Building a Better Bar Exam Admission Process*, 79 Bench and Bar of Minnesota 14 (Aug. 2022).

boards, the Venn Diagram of the overlap between the agency mandate and the functions outsourced to NCBE is either a full circle or an optic illusion thereof. It is therefore difficult to imagine why a state supreme court would 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;¹⁸⁵
4. States have no voice as to the selection of exam questions or the subjects or subtopics that will be tested;
5. States do not get to determine how their own bar applicants are scored or scaled must rely on and accept NCBE scaling, without disclosure of the proprietary scaling formula;¹⁸⁶
6. States no longer have the authority to adjudicate appeals for applicants with a failing exam score;
7. Many law schools adjust their curricula in response to the announced changes to the format and content of the NCBE exam(s);¹⁸⁷

¹⁸⁵ <https://www.ncbex.org/exams/ube/score-portability/local-components/> (although the NCBE permits states to add a supplemental state law component to their exams, the NCBE prohibits states from administering any supplemental content during the 2-day bar exam. Such content must be given at a time outside of the bar exam administration.)

¹⁸⁶ 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.

¹⁸⁷ *Building a Better Bar Exam supra* note 23.

8. The NCBE has more access to the ABA Council for Legal Education than law faculty or other law school groups, like the Association of Academic Support Educators and the Clinical Legal Education Association;
9. For decades, there has been overlap between members of the ABA Council and the NCBE Board; and
10. During the early months of the COVID pandemic, state examining boards had to await NCBE permission to administer the bar exam.

That gripping dominance of the NCBE in attorney regulation reeks of capture in outcome,¹⁸⁸ even if not in definition.¹⁸⁹

D. Hold-Up

Hold-up is another potential non-economic 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. 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.

¹⁸⁸ Sidney A. Shapiro, *Blowout: Legal Legacy of the Deepwater Horizon Catastrophe: The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 Roger Williams Univ. L. Rev. 221, 222 (2012) (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.).

¹⁸⁹ The elements of agency capture are more clearly evident in the regulation of attorney discipline. In that structure, the courts have delegated regulatory authority to unified state bar associations. The state bar associations are comprised of practicing attorneys (the regulated body). The attorneys hold influence over the state bar association, and thus can be argued to have captured the process of lawyer discipline in a manner that champions the self-interests of the profession over public protection. In contrast, it is the private and unregulated NCBE that has asserted influence over the legal profession and not vice versa.

Professor Shapiro explains how delegation of substantial discretion to an agency may create the political equivalent of a hold-up problem.¹⁹⁰ 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.¹⁹¹

[P]rivate 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.

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.¹⁹² A private non-profit entity will make regulatory decisions according to its standards of appropriateness based on its own objectives.¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ The potential for self-serving conduct indirectly increases the costs of outsourcing.¹⁹⁶ 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. 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.¹⁹⁷

¹⁹⁰Shapiro *supra* note 59 at 398 (citing Oliver E Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J. L. Econ. & Org. 306, 308-326 (1999)).

¹⁹¹ *Blowout supra* note 162.

¹⁹² David Epstein & Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* 46 (1999).

¹⁹³ Shapiro *supra* note 59 at 405.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Shapiro *supra* note 59.

¹⁹⁷ Shapiro *supra* note 59.

Even if we agree that profit is not the motivation for NCBE's dominance, influence and control over bar licensure appear to be motivators. The blunt truth is that under the current scheme of privatized bar examination, there will be no new lawyers admitted in forty-two U.S. 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 self-regulation.¹⁹⁸ The early spring of 2020 saw multiple states circling in a holding pattern, awaiting 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.¹⁹⁹ Ultimately, the NCBE made materials available for jurisdictions to administer bar exams in the summer and fall of 2020 and was broadly accommodating to states' needs.²⁰⁰ 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 as a result 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 regulatory 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. 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.

¹⁹⁸ *Infra*.

¹⁹⁹ Sejal Patel, *Is Legal Outsourcing Up to the Bar? A Reevaluation of Current Legal Outsourcing Regulation*, 35 J. Legal Prof. 81, 84 (2010).

²⁰⁰ <https://www.ncbex.org/news-resources/ncbe-announces-it-will-make-exam-materials-available-july-bar-exam>

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 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.²⁰¹ 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.²⁰² 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. 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 for the function of licensing attorneys.²⁰³ 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.”²⁰⁴

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.”²⁰⁵ Judicial regulation, in part, serves to protect the public. But the public may lack the legal education and training to readily know when or how to challenge regulations that are not directed at them. For example, the non-lawyer

²⁰¹ Patel, *supra* note 186.

²⁰² *Id.*

²⁰³ This paper argues not against the *products* of the NCBE, but against the *power* of the NCBE and its improper insertion into public governance.

²⁰⁴ Patel, *supra* note 186.

²⁰⁵ Shapiro *supra* note 59 p. 249.

public will not care about the format or content of the bar exam. Neither is the public concerned about who produces the exam. But 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 on advance of the bar administration.²⁰⁶ 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. Disputed questions should be removed from the exam at the request of the issuing jurisdiction.
3. States should insist on exclusive contract agreements with the NCBE that prohibit the entity from licensing its exam questions to private vendors. While state supreme courts cannot control a private party's conflicting interests, it can refuse to perpetuate those conflicts.
4. States should demand more transparency from the NCBE. State supreme courts should insist 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 their questions.
5. Fifth, states should offer more transparency to the public in

²⁰⁶ Under current practice the exams are delivered to the state examining boards days before the exam with insufficient opportunity for review or corrections.

regard to their agreements 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 readily available to members of the bar and the public.

6. The broader legal profession, including the ABA, AALS, and Council of Chief Justices, and collective law schools needs to play a role in limiting NCBE access and presumed authority. 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. 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 serves the objective of protecting the public from lawyer incompetence without differentially subordinating our view of minimal competence to theirs. A state supreme court's efforts to commission studies on competency assessment and to involve licensed attorneys in paving the way for advances in attorney licensure, including non-exam pathways, embodies responsible and proactive self-regulation.²⁰⁷ The bar exam is the first act of attorney 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.

* * *

This is a pre-publication draft. Please send any comments or suggestions to marsha.griggs@slu.edu.

²⁰⁷ The supreme courts in Oregon and Utah have demonstrated commitment to such innovative pathways while maintaining public protection. *See, e.g., Oregon Advances Alternative Routes to Becoming a Licensed Lawyer*, OR. PUB. BROAD., <https://taskforces.osbar.org/alternative-pathways/> (last visited Nov. 30, 2022).