

2021

THE POLITICS OF BAR ADMISSION: LESSONS FROM THE PANDEMIC

Leslie C. Levin
University of Connecticut School of Law

Follow this and additional works at: https://opencommons.uconn.edu/law_papers

 Part of the [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Levin, Leslie C., "THE POLITICS OF BAR ADMISSION: LESSONS FROM THE PANDEMIC" (2021). *Faculty Articles and Papers*. 599.
https://opencommons.uconn.edu/law_papers/599

THE POLITICS OF BAR ADMISSION: LESSONS FROM THE PANDEMIC

*Leslie C. Levin**

I. INTRODUCTION

The COVID-19 pandemic upended lives and the economy. No one was immune from its effects as borders closed, commerce slowed, and people sheltered in place. One of the many groups that felt its effects was graduating law students. Almost as soon as COVID-19 sent them home in March 2020 to complete law school online, law students began to raise questions about states' plans for the July bar examination.¹ Prospective graduates feared losing their jobs or their ability to find one if they could not become quickly licensed. Many had incurred significant debt to complete law school and were depending upon those jobs to pay their bills. They wanted answers and reassurance. What they found was uncertainty and mixed messages as bar examiners and state supreme courts struggled to respond to the rapidly evolving public health crisis and determine what to do about the bar exam.

To be sure, the bar exam was not the only—or most pressing—issue that the state supreme courts were addressing as many courts halted their operations or moved online.² Yet the efforts to address the

* Hugh Macgill Professor of Law, University of Connecticut School of Law. I thank the bar examiners, law school deans, faculty, and bar applicants who shared their insights with me for this Article. I am also grateful to Lynn Mather and Deborah Jones Merritt for their very helpful comments on an earlier draft of this Article.

1. See Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* 1, 7 (Ohio State Univ. Pub. L. Working Paper & Ctr. for Interdisc. L. & Pol'y Stud. at Moritz Coll. of L., Legal Studies Working Paper Series No. 537, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060.

2. In New York, much litigation halted after the chief administrative judge issued an order prohibiting most state court filings. See Administrative Order of the Chief Administrative Judge of the Courts, No. AO/78/20 (N.Y. Mar. 22, 2020), <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>. Courts conducted essential court business remotely. Press Release, Lawrence K. Marks, C.A.J., New York State Unified Ct. Sys., Virtual Court Operations to Commence in NYC Mid-Week (Mar. 22, 2020), https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_07.pdf. Courts were also grappling with many other urgent issues including how to address access to courthouses, court employees' safety, and criminal defendants' speedy trial rights.

question of what to do about the July 2020 bar examination provide new insights into the politics of bar admission. Even under the best of circumstances, lawyer regulation is often not a priority for state supreme courts, which frequently wait for bar associations, court-appointed committees, or court-supervised agencies to make proposals.³ The bar exam debates of 2020, however, were far from typical. New actors—most notably bar applicants—organized to advocate for states to grant them a law license based on their graduation from law school (a “diploma privilege”) and satisfaction of the character and fitness requirement.⁴ Law school deans and law school faculty also acted in some instances to support this request. Some state legislators also entered the fray on the side of the bar applicants. The National Conference of Bar Examiners (“NCBE”), which administers the Uniform Bar Exam (“UBE”) in many states, and state bar examiners (predictably) opposed the idea of forgoing the bar exam. So did some state bar associations.

The question of how to proceed was not a simple one for state bar examiners. The spread of the disease was unpredictable. Recommended safety precautions and stay-at-home orders changed during this period. Plans announced in April when infection rates were low in some jurisdictions sometimes proved untenable two months later due to the spread of COVID-19. Efforts to find large enough facilities in which to administer the exam so that there could be six-foot social distancing and adequate ventilation were daunting. Even the logistics of bathroom use was a challenge.⁵ Yet online tests posed security, administrative, and other concerns. Moreover, the bar exam itself had long been under attack for various reasons. Bar examiners feared that a one-time diploma privilege would open the door to eventually doing away with the exam.

The uncertainty and changing landscape were also very challenging for bar applicants, who were not all similarly situated. Some applicants with jobs wanted to take a July bar exam so they could start work. The prospect of taking the test in the fall while they were working was daunting. Some still seeking jobs also wanted to take the exam as quickly as they could so they could find employment and pay their bills. Those who were immunocompromised or lived with others who were

3. See Leslie C. Levin, *The Politics of Lawyer Regulation: The Case of Malpractice Insurance*, 33 GEO. J. LEGAL ETHICS 969, 980 (2020).

4. See Emma Kennedy, *After Bar Exam Canceled, Louisiana Law Grads Will Appeal for ‘Diploma Privilege;’ Here’s What That Means*, ADVOC. (July 17, 2020, 11:13 PM), https://www.theadvocate.com/baton_rouge/news/article_4cce5692-c84c-11ea-9ccd-ff7ae641b941.html.

5. See, e.g., Jonathan Ringel, *‘Diploma Privilege,’ Temporary Licenses Spice Up Bar Exam Prep This Summer*, DAILY REP. (July 16, 2020), <https://www.law.com/dailyreportonline/2020/07/14/diploma-privilege-temporary-licenses-spice-up-bar-exam-prep-this-summer>.

especially vulnerable to the disease—and even some with no such issues—were terrified of being exposed to COVID-19 during an in-person exam. When remote exams became available, applicants raised new concerns, as some had no Wi-Fi at home, spotty connectivity, or no quiet place to take the exam. And every time jurisdictions altered test dates it required applicants to significantly change life plans.

Then the situation worsened. In mid-May 2020, the national media was reporting on the police killing of Breonna Taylor, a Black woman, who was shot in her Louisville home during a botched search.⁶ The media also reported that Georgia prosecutors had failed to bring murder charges against two White men for deliberately killing Ahmaud Arbery, a Black man, while he was jogging.⁷ In late May, video captured George Floyd, an unarmed Black man, being killed by a Minneapolis police officer who applied a knee to Floyd's neck during an arrest as Floyd pleaded, "I can't breathe."⁸ This sparked nationwide protests against police misconduct and racial inequality that continued for weeks, and in some places, for months.⁹ The police in many cities responded with tear gas and violence.¹⁰ The shootings, their aftermath, and the feelings they triggered—especially in people of color—were deeply traumatizing.¹¹

6. See, e.g., Darcy Costello & Tessa Duvall, 'Get Your Damn Story Straight': What We Know About Louisville Woman Breonna Taylor's Death, USA TODAY (Oct. 12, 2020, 9:51 AM), <https://www.usatoday.com/story/news/nation/2020/05/14/breonna-taylor-what-know-louisville-emi-killed-police/5189743002>. Taylor was killed in March but her family continued to keep media attention on the matter. *Id.*

7. The shooting occurred in February, but the failure to bring charges did not garner national attention until late April. See Richard Fausset, *Two Weapons, a Chase, a Killing and No Charges*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2020/04/26/us/ahmed-arbery-shooting-georgia.html>.

8. A bystander filmed these images, which were then widely disseminated. Audra D. S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html>.

9. See, e.g., *Portland Protests Resume, 11 Arrested in Unlawful Assembly*, KOIN (Sept. 19, 2020, 2:18 PM), <https://www.koin.com/news/protests/smoke-clears-and-protests-resume-in-portland>; *Chicago's Summer of Looting and Unrest, and How the City Is Still Reeling*, CHI. TRIB. (Oct. 6, 2020), <https://www.chicagotribune.com/news/breaking/ct-cb-george-floyd-fallout-impact-chicago-20201006-lkndggmch5emjiefplywhcaeou-story.html>.

10. See K.K. Rebecca Lai et al., *Here Are the 100 U.S. Cities Where Protestors Were Tear-Gassed*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/interactive/2020/06/16/us/george-floyd-protests-police-tear-gas.html>. President Trump exacerbated tensions when he sent federal agents and the National Guard into some cities to perform law enforcement functions. Zolan Kanno-Youngs & Katie Benner, *Trump Deploys the Full Might of Federal Law Enforcement to Crush Protests*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/02/us/politics/trump-law-enforcement-protests.html>.

11. See, e.g., Alia E. Dastagir, *George Floyd Video Adds to Trauma: 'When Is the Last Time You Saw a White Person Killed Online?'*, USA TODAY (May 29, 2020, 6:40 AM), <https://www.usatoday.com/story/news/nation/2020/05/28/george-floyd-ahmaud-arbery-covid-emotional-toll-hits-black-families/5270216002>; Crystal Milner, *'It Just Weighs on Your Psyche': Black Americans on Mental Health, Trauma, and Resilience*, STAT (July 6, 2020), <https://www.statnews.com/2020/07/06/it-just-weighs-on-your-psyche-black-americans-on-mental-health-trauma-and-resilience>.

The protests were both galvanizing and distracting.¹² This was equally true for bar applicants who were attempting to study for the July 2020 bar exam.

Starting in spring 2020, bar applicants, aided by some law school deans and faculty, very publicly challenged regulators' plans for administering the July bar exam.¹³ In some jurisdictions, these advocates drew on the attention that was focused on the Black Lives Matter movement to echo the inequities and disparate impacts of these events for bar applicants of color.¹⁴ They also made arguments based on the financial hardship, health concerns, family obligations, and other challenges that many bar applicants faced because of the pandemic. In a few jurisdictions, they questioned the value of the bar exam itself.

Thanks to the public nature of much of the advocacy, the situation presents an unusual opportunity to more closely examine the politics of bar admission. In most states, the ultimate decision about how to proceed with the bar exam rests with the state supreme courts. Yet the behavior of state supreme courts as regulators is largely understudied.¹⁵ When looking at how state supreme courts have regulated the legal profession, the work has largely been limited to descriptions of the formal procedures, bar or committee recommendations, the outcomes, and any accompanying public judicial statements.¹⁶ There are few case studies and little analysis of why differences among the states occur. The controversy over the administration of the July 2020 bar exam presents a rare opportunity to more closely observe and compare regulatory responses that occurred throughout the United States within a few short months.

This Article looks at the states' handling of the 2020 bar exam and what those responses tell us about the politics of bar admission. This is a complex story. Each state has its own political culture and was somewhat differently situated. The states experienced different rates of infection at different times. New York contemplated 10,000 test takers while Delaware anticipated 200.¹⁷ Some states could be nimbler, because

12. They resulted in broad support for calls for police reform and racial justice throughout the country. *See, e.g.*, Laura King et al., *Voices Raised in Pain, Hope, Anger: Since George Floyd's Death, a National Reckoning Is Unfolding in American Cities.*, L.A. TIMES, June 7, 2020, at 1, 2.

13. *See, e.g.*, *infra* notes 135-37, 158-59 and accompanying text.

14. *See, e.g.*, Petition for Emergency Rule Waiver at 4-9, 13, No. ADM10-8008 (Minn. June 22, 2020), <https://images.law.com/contrib/content/uploads/documents/292/Minnesota-Petition-filed-6-22-20.pdf>.

15. Most studies of state supreme courts as regulators have looked at court reform generally. *See, e.g.*, Paul B. Wice, *Court Reform and Judicial Leadership: A Theoretical Discussion*, 17 JUST. SYS. J. 309, 310-11 (1995).

16. *See, e.g.*, Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 92-95 (1994).

17. *See infra* notes 247, 254 and accompanying text.

they already wrote portions of their own exams and were comfortable doing so, while others were not. Some states had only a few law schools with high bar passage rates while others did not. The supreme courts' institutional relationships with other actors also differed. And while the protests over racial inequality occurred in every state, their size and the police response differed among the jurisdictions. So did the activism by bar applicants and law schools relating to administration of the bar exam.

The decisions about the July 2020 bar exam must also be viewed in the larger historical context of state bar admission requirements. These requirements—which include legal education, the character and fitness inquiry, and the bar exam—came about as part of the organized bar's efforts to raise the competence and status of the profession and to protect lawyers' economic interests. These requirements were created as barriers to entry to the profession, and they continue to disproportionately exclude applicants of color today.¹⁸ For almost a century, the courts have almost uniformly endorsed these admission requirements.¹⁹ Yet there is pressure on them to reconsider. Not only is the legal profession's lack of diversity a growing concern, but many individuals cannot afford a lawyer. A few courts have begun innovating to address the access to justice crisis by allowing licensed non-lawyers to provide some legal advice.²⁰ Identifying the factors that prompt some jurisdictions to innovate when others steadfastly refuse adds to our understanding not only of the politics of bar admission, but of the conditions that produce policy change in lawyer regulation.

This Article proceeds in four parts. Part II briefly looks at the history and purpose of the bar exam, its structure, and controversies concerning the validity and fairness of the current exam. It reveals that the value of the exam has long been deeply contested.²¹ Part III situates the actors involved in the decisions about the administration of the 2020 bar examination, including the NCBE, the state supreme courts, state bar examiners, and the organized bar. It also describes the role of other vocal actors: law deans, faculty, and bar applicants.²² In Part IV, the Article examines how the jurisdictions responded to the question of what to do about the July 2020 bar exam. Thirteen offered the July exam as the only exam option while others offered alternatives including a fall exam date, remote testing, and diploma privilege.²³ The Article identifies a few

18. See *infra* notes 39-41, 70-72 and accompanying text.

19. See RICHARD L. ABEL, *AMERICAN LAWYERS* 69-71 (1989).

20. Levin, *supra* note 3, at 970.

21. See *infra* Part II.

22. See *infra* Part III.

23. See *infra* Part IV.A.

common elements that seemingly affected decisions in some jurisdictions. It then uses case studies to look more closely at the responses in eight states.²⁴ It examines four states that took approaches ranging from no changes to the planned July in-person exam (North Carolina), to two in-person exam options (Minnesota), to a remote bar examination (New York), to cancellation of the exam (Delaware). It also describes the circumstances in the four states that granted diploma privilege to bar applicants (Louisiana, Oregon, Utah, and Washington).²⁵ Part V reflects on what these case studies tell us about the politics of bar admission. It identifies some political and institutional factors that seemingly affected the courts' decisions.²⁶ The courts' openness to innovation seemingly also affected their decisions.²⁷ The roles played by the NCBE, bar examiners, and the other actors are further explored.²⁸ The Conclusion of this Article identifies some questions for further research. It also considers what the events teach us both about the politics of bar admission and the conditions that can lead to policy change in lawyer regulation.

II. THE BAR EXAM: BACKGROUND AND CURRENT CONTROVERSIES

A. A Very Brief History

During most of the nineteenth century, bar admission requirements were relatively undemanding.²⁹ Apprenticeships were common and bar examination requirements—to the extent they existed—were not rigorous.³⁰ Some applicants could also gain bar admission by attending law school and by 1890, sixteen states conferred a diploma privilege to graduates of certain law schools.³¹ Law schools supported the diploma privilege because it attracted students at a time when a law degree was not required to practice.³² Elite bar associations came to oppose the

24. See *infra* Part IV.B–C.

25. While the term “diploma privilege” is used to describe the basis for admission, it was actually “diploma privilege plus” in some jurisdictions that added some additional supervision or educational requirements. See *infra* text accompanying notes 281–85, 366.

26. See *infra* Part V.

27. See *infra* Part V.A.3.

28. See *infra* Part V.B–E.

29. See ABEL, *supra* note 19, at 71–72; JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 280 (1950); see also Francis L. Wellman, *Admission to the Bar*, 15 AM. L. REV. 295, 296 (1881) (“[F]ew yet realize to how low a point the requisitions for becoming a lawyer in the United States have sunk.”).

30. See ABEL, *supra* note 19, at 5; HURST, *supra* note 29, at 256, 281; George Neff Stevens, *Diploma Privilege, Bar Examination or Open Admission*, BAR EXAM’R, 1977, at 15, 17; Wellman, *supra* note 29, at 299.

31. ABEL, *supra* note 19, at 62.

32. *Id.*; Stevens, *supra* note 30, at 18–19.

diploma privilege because it surrendered control over bar admission to the schools and “increased the flood of new entrants.”³³

The American Bar Association (“ABA”) worked from its founding in 1878 to raise admission standards.³⁴ As part of that effort, it encouraged states to adopt centrally administered written examinations.³⁵ In 1931, the ABA Section of Legal Education sponsored the creation of the NCBE,³⁶ which was formed with the aim of “raising . . . the standards both as to knowledge of the law and fitness of character of those who are to become future members of the bar”³⁷ By that time, most jurisdictions had a statewide board of bar examiners and used a written bar exam.³⁸

The organized bar’s efforts to raise admission standards took place within the broader context of the professional project, that is, the legal profession’s efforts to attain market monopoly, social status, and autonomy.³⁹ It also coincided with an influx of immigrant lawyers.⁴⁰ Nativist attitudes and ethnic prejudices during the 1920s and economic pressures during the Great Depression fueled renewed calls for barriers to entry to the legal profession.⁴¹ By raising admission standards through formal legal education requirements, bar examinations, and the character inquiry, the bar sought to signal that lawyers possessed the technical expertise and moral fiber to be viewed as a profession and to be entrusted with legal work.⁴² It also sought to use these requirements to control the number of lawyers.⁴³

33. ABEL, *supra* note 19, at 62. Nevertheless, by 1976, thirty-eight jurisdictions had for some period granted a diploma privilege to some bar applicants. Stevens, *supra* note 30, at 19-20.

34. ABEL, *supra* note 19, at 45-46.

35. *Id.* at 63.

36. Michel Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1033 n.153 (1994).

37. James C. Collins, *Foreword*, 1 BAR EXAM’R 1, 1 (1931).

38. Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, U. WIS. L. SCH. F. GARGOYLE, Summer 1990, at 3, 4; Stevens, *supra* note 30, at 21.

39. See ABEL, *supra* note 19, at 25; TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 67-68 (1987); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 49-50 (1977); Robert W. Gordon, *The Legal Profession*, in LOOKING BACK AT LAW’S CENTURY 287, 294-97 (Austin Sarat et al. eds., 2002).

40. See JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 95-96, 99-100 (1976).

41. See ABEL, *supra* note 19, at 72; Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 499-500 (1985).

42. See HURST, *supra* note 29, at 272, 287; Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. BAR FOUND. RSCH. J. 159, 175-77 (1980).

43. See ABEL, *supra* note 19, at 64-65; William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, 555-58 (2004).

B. *The Current Bar Examination—Content and Critiques*

Today virtually every jurisdiction requires bar applicants to pass a written multi-subject bar examination.⁴⁴ Forty jurisdictions have adopted the UBE, which is drafted, coordinated, and partially graded by the NCBE.⁴⁵ First administered in 2011,⁴⁶ the UBE is a two-day exam consisting of the Multistate Bar Examination (“MBE”),⁴⁷ the Multistate Essay Examination (“MEE”),⁴⁸ and two Multistate Performance Tests (“MPT”).⁴⁹ Its purpose is to test the “knowledge and skills” that lawyers should be able to demonstrate prior to bar licensure.⁵⁰ Each jurisdiction sets its own passing (“cut”) score.⁵¹ A UBE score obtained in one jurisdiction can be transferred to another state that accepts UBE scores, enabling applicants to gain admission in the second jurisdiction without the need to pass another full bar examination.⁵² Even the non-UBE states (except Louisiana, with its civil law system) use the MBE, along with their own exam questions.⁵³ Consequently, virtually all state bar examinations are administered on the dates set by the NCBE, in February and July.⁵⁴

44. NAT’L CONF. BAR EXAM’RS & A.B.A. SECTION LEGAL EDUC. & ADMISSIONS TO BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 18-20, 24-25, 28 (Judith A. Gundersen & Claire J. Guback eds., 2020), https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf [hereinafter COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS]. Only Wisconsin affords a diploma privilege to graduates of its two in-state law schools who complete certain courses and satisfy the character and fitness inquiry. *Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS., <https://www.wicourts.gov/services/attorney/bar.htm> (last visited Oct. 13, 2021). Some University of New Hampshire Law School graduates are also allowed to bypass the traditional bar exam if they successfully complete the Daniel Webster Scholar Honors Program. *Daniel Webster Scholar Honors Program*, UNIV. N.H. FRANKLIN PIERCE SCH. L., <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> (last visited Oct. 13, 2021).

45. *Uniform Bar Examination*, NCBE, <http://www.ncbex.org/exams/ube> (last visited Oct. 13, 2021); *Understanding the Uniform Bar Examination*, NCBE, <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F209> (last visited Oct. 13, 2021). Some Uniform Bar Exam (“UBE”) states also include jurisdiction-specific test questions in their bar exams, require completion of a course, or both. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 44, at 20.

46. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 44, at 18-19.

47. The MBE is a six-hour, 200-question multiple choice test of seven subjects. *Preparing for the MBE*, NCBE, <http://www.ncbex.org/exams/mbe/preparing> (last visited Oct. 13, 2021).

48. The MEE consists of six thirty-minute essay questions covering twelve topics. *Preparing for the MEE*, NCBE, <http://www.ncbex.org/exams/mee/preparing> (last visited Oct. 13, 2021).

49. The MPT uses a case file with factual documents like written summaries of client interviews and provides test takers with ninety minutes to perform an assigned task, such as completion of a memo to a supervising attorney. *Preparing for the MPT*, NCBE, <http://www.ncbex.org/exams/mpt/preparing> (last visited Oct. 13, 2021).

50. *Uniform Bar Examination*, *supra* note 45.

51. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 44, at 19.

52. See *id.* at 18.

53. See *id.* at 28. Some non-UBE jurisdictions also use other parts of the UBE. *Id.*

54. See *Uniform Bar Examination*, *supra* note 45.

Critics have long challenged the content and value of state bar exams.⁵⁵ They question whether even the UBE, which is the most psychometrically sound,⁵⁶ is a valid test of basic competence.⁵⁷ They note it is a closed-book test that requires an enormous amount of memorization.⁵⁸ It tests the applicant's ability to identify issues and analyze and apply the law, but does not test other competencies needed in law practice such as the ability to perform legal research or do factual investigation.⁵⁹ Critics also note the heavily-weighted, 200-question MBE is sometimes based on obscure or highly complex rules of law, and its multiple choice format is unrelated to how lawyers solve legal problems.⁶⁰ Moreover, the exam does not test for the competence problems that are actually seen in practice.⁶¹

The UBE has also been criticized for the manner in which it is scored. The MBE is worth fifty percent of the examinee's total scaled score,⁶² which may disproportionately hurt applicants who do not do well on multiple choice tests.⁶³ Critics also note that jurisdictions set

55. See, e.g., Max A. Pock, *The Case Against the Objective Multistate Bar Examination*, 25 J. LEGAL EDUC. 66, 67, 69-70 (1973); I. Maurice Wormser, *The Results of a Comparative Study of the Examination Questions Framed by State Boards of Bar Examiners*, 24 YALE L.J. 34, 34 (1914). For some of the more recent critiques, see Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 566-67, 582-83, 603-04 (2015).

56. Unlike states that use lawyers to draft bar exam questions, the National Conference of Bar Examiners ("NCBE") has an experienced psychometric staff. See *NCBE Media Kit*, NCBE, <https://www.ncbex.org/media-kit> (last visited Oct. 13, 2021). It employs multiple methods to ensure the reliability of its scores from test to test. See Joanne E. Kane & Andrew A. Mroch, *Testing Basics: What You Cannot Afford Not to Know*, BAR EXAM'R, Sept. 2017, at 32, 34-36.

57. "Validity" refers to "the extent to which a test measures what it purports to measure . . ." Kane & Mroch, *supra* note 56, at 33.

58. Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, ASS'N AM. L. SCHS., <https://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives> (last visited Oct. 13, 2021) ("[T]he exam forces applicants to memorize hundreds of black-letter rules that they will never use in practice."); see also Bratman, *supra* note 55, at 573.

59. See Bratman, *supra* note 55, at 573-74; Merritt, *supra* note 58; Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 77-78 (2007).

60. Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 375-76 (2002). Merritt, *supra* note 58; Trujillo, *supra* note 59, at 80; see also NAT'L CONF. BAR EXAM'RS, YOUR VOICE: STAKEHOLDER THOUGHTS ABOUT THE BAR EXAM 3 (2019), <https://testingtaskforce.org/wp-content/uploads/2020/03/FINAL-Listening-Session-Executive-Summary-with-Appendices-2.pdf> ("[T]he target level for items on the MBE was viewed by many as going beyond the point of entry-level competency by testing nuanced issues and 'exceptions to exceptions to rules.'").

61. Trujillo, *supra* note 59, at 80-81.

62. *UBE Scores*, NCBE, <https://www.ncbex.org/exams/ube/scores/#:~:text=The%20MBE%20is%20weighted%2050,passing%20scores%20for%20the%20UBE> (last visited Oct. 13, 2021).

63. Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 27-28 (2019); see also Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PRO. 69, 72 (2017); William Wesley Patton, *A Blueprint for a Fairer ABA Standard for Judging Law Graduates' Competence: How a Standard Based on Students' Scores in Relation to the National Mean MBE Score Properly Balances Consumer Safety with Increased Diversity in the Bar*, 24 WASH. & LEE J. CIV. RTS. &

their cut scores at different points for no apparent reason,⁶⁴ with UBE cut scores ranging from 260 to 280.⁶⁵ Setting a cut score is said to be “a peculiar mixture of psychometrics, tradition, and politics,”⁶⁶ which has at times been connected to controlling the number of lawyers.⁶⁷ No one actually knows at what point minimum “competence” is shown.⁶⁸

The bar exam raises further concerns because underrepresented minority test-takers have greater difficulty passing it than other applicants.⁶⁹ This problem is exacerbated in jurisdictions with very high UBE cut scores, which disproportionately affect minority applicants.⁷⁰ Scholars have suggested a variety of possible explanations for why these applicants do less well on the bar exam than their White counterparts.⁷¹ What is clear, however, is that the bar exam is “serving to severely and disproportionately limit the number of underrepresented minorities” who will obtain a license to practice law.⁷²

SOC. JUST. 3, 18 (2017). For examples of other problems with the grading and scoring, see Suzanne Darrow-Kleinhaus, *A Reply to the National Conference of Bar Examiners: More Talk, No Answers, So Keep on Shopping*, 44 OHIO N.U. L. REV. 173, 175-84 (2018).

64. Indeed, the Executive Director of the State Bar of California has stated that there was “no good answer” for why California’s cut score was set where it was. David L. Faigman, *The California Bar Exam Flunks Too Many Law School Graduates*, L.A. TIMES, Mar. 21, 2017, at 1; see also Howarth, *supra* note 63, at 76 (“Many bar examiners have no idea the basis on which their state’s MBE cut score was established.”).

65. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 44, at 18-19.

66. Joan W. Howarth & Judith Welch Wegner, *Ringin’ Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 413 (2019). In Ohio, for example, the cut score was raised simply because it was lower than the cut score in most other states. See Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 939 (2001).

67. See ABEL, *supra* note 19, at 64-66, 227-28; Kidder, *supra* note 43, at 551, 556, 561; see also Merritt et al., *supra* note 66, at 930 (“Recent rises in bar passing scores followed both a legal recession during the early 1990s and the admission of a record number of new attorneys . . .”).

68. See Curcio, *supra* note 60, at 370-71; Howarth, *supra* note 63, at 77-78; Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 961-62 (2020). Nevertheless, “[n]o one pretends that these disparities are justified because practicing law as a new lawyer is more difficult in California than in New York.” Howarth, *supra* note 63, at 69.

69. See Milo Colton, “*What Is Wrong with the Texas Bar Exam? A Minority Report*”, 28 T. MARSHALL L. REV. 53, 60 (2002); Howarth, *supra* note 68, at 952-58; Kidder, *supra* note 43, at 570-71, 576-78; ROGER BOLUS, RECENT PERFORMANCE CHANGES ON THE CALIFORNIA BAR EXAMINATION (CBE): INSIGHTS FROM CBE ELECTRONIC DATABASES 15-16 (2017), http://www.calbarjournal.com/Portals/0/documents/communications/2017_PR-01-17_R.pdf. The disparity in bar admission is exacerbated by the fact that more Blacks who fail the bar opt not to retake the bar exam than Whites. Curcio, *supra* note 60, at 389-90.

70. See Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer*, 24 STAN. L. & POL’Y REV. 379, 416-17 (2013); Merritt et al., *supra* note 66, at 965.

71. See, e.g., Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31, 58 (2018) (describing possible implicit test biases in the bar exam); Kidder, *supra* note 43, at 577 (noting that students of color confront a more hostile learning environment than White law students).

72. Johnson, *supra* note 70, at 383.

In 2018, the NCBE appointed a Testing Task Force to undertake a study “to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice”⁷³ After conducting a survey to determine the job activities of newly licensed lawyers, the Task Force announced plans in January 2021 to design a new test.⁷⁴ Some law professors are also working to identify ways to improve the bar exam or to implement other methods to ensure lawyer competency at the time of bar admission.⁷⁵ Thus, even before the pandemic arrived, the bar exam was facing serious scrutiny. COVID-19 and the protests against racial inequality made it even more susceptible to challenge.

III. SETTING THE STAGE: COVID-19, THE BAR EXAM, AND THE POLITICAL ACTORS

In order to understand the decisions concerning the July 2020 bar exam, it is necessary to introduce the relevant actors, starting with the NCBE. The NCBE’s actions directly influenced the courts and bar examiners, as they wrestled with decisions about administering their bar exams. The remainder of this Part then briefly describes the role that other actors played to help situate them in the debates about the administration of the July 2020 bar exam.

A. *The NCBE and Its Response*

In March 2020, all the states (except Louisiana) relied on the NCBE for all or portions of their bar exams. Many UBE jurisdictions had ceded complete responsibility to the NCBE for drafting their bar exams and were not in a position to begin drafting reliable test questions for a differently scheduled or administered July bar exam.⁷⁶ The states were therefore largely constrained by the NCBE’s willingness to offer later test dates or different methods of administration.⁷⁷ At the same time the

73. *About Testing Task Force*, TESTING TASK FORCE, <https://testingtaskforce.org/about> (last visited Oct. 13, 2021).

74. NAT’L CONF. BAR EXAM’RS TESTING TASK FORCE, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 2 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf>. Implementation of the exam will likely take four or five years. *Id.* at 5.

75. *See, e.g.*, Angelos et al., *supra* note 1, at 1 n.1; DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 7 (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf.

76. More than twenty-five jurisdictions relied entirely on the UBE and included no jurisdiction-specific questions on their exam. *See* COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 44, at 18-19.

77. *See, e.g.*, TASK FORCE ON N.Y. BAR EXAMINATION, SECOND REPORT OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION: THE CORONAVIRUS AND BAR EXAMINATION ADMINISTRATION 3 (2020), <https://nysba.org/app/uploads/2020/03/Second-Report-of-the-Task->

NCBE, which markets itself as “serving the bar admissions community,” had incentives to develop alternatives to the July exam.⁷⁸ It wanted the states to continue to rely on its tests and services⁷⁹ and was uncertain whether a July test administration would even be possible.⁸⁰

The NCBE announced on April 3, 2020, that it would offer two additional in-person administrations of the UBE—on September 9-10 and September 30-October 1—that would provide portable UBE scores.⁸¹ By this time, some applicants, law school deans, and faculty were calling for a remotely administered exam or an emergency diploma privilege.⁸² On April 9, 2020, the NCBE issued a “white paper” that stated that it was exploring the possibility of remote-proctored testing, but argued against admitting applicants through a diploma privilege.⁸³ It later announced on June 1, 2020, that it would provide a limited set of questions (MBE, MEE, and MPT) for a remote exam on October 5-6, but that the exam results would not qualify as portable UBE scores.⁸⁴ NCBE President Judith Gunderson stressed that the “NCBE continues to strongly advocate that a full-length, standard, in-person administration of the bar exam/UBE is best for a number of reasons, including psychometric issues, exam security, and the testing environment of candidates, who may not have access to comparable testing conditions or equipment.”⁸⁵ The NCBE left it to the jurisdictions to administer and score the remote exam, using online vendors.⁸⁶

Force-on-the-New-York-Bar-Examination-April-2020.pdf (noting that because New York had adopted the UBE, “the administration of the Bar Examination is entirely dependent upon” the NCBE).

78. *About NCBE*, NCBE, <https://www.ncbex.org/about> (last visited Oct. 13, 2021).

79. The NCBE also conducts character and fitness investigations for twenty-eight jurisdictions, and drafts and administers the MPRE. *See* NAT’L CONF. BAR EXAM’RS, 2020 YEAR IN REVIEW 11, 14-15 (2021), <https://www.ncbex.org/pdfviewer/?file=%2Fdmtdocument%2F292> [hereinafter 2020 YEAR IN REVIEW]. In addition, the states’ use of the NCBE’s exams creates demands for the NCBE’s testing aids. *See id.* at 9.

80. *Past NCBE COVID-19 Updates*, NCBE, <https://www.ncbex.org/ncbe-covid-19-updates/past-updates> (last visited Oct. 13, 2021).

81. *Id.*; NAT’L CONF. BAR EXAM’RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 2 (2020), https://thebarexaminer.ncbex.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf.

82. *See, e.g.*, Karen Sloan, *Amid More Bar Exam Delays, Push for Diploma Privilege Grows*, LAW.COM (Mar. 30, 2020), <https://www.law.com/2020/03/30/amid-more-bar-exam-delays-push-for-diploma-privilege-grows>; Angelos et al., *supra* note 1, at 4.

83. *See* NAT’L CONF. BAR EXAM’RS, *supra* note 81, at 2-4. The “white paper” appeared to be largely in response to a March 2020 paper by legal academics suggesting alternatives to the bar exam. *See infra* note 106 and accompanying text.

84. *Past NCBE COVID-19 Updates*, *supra* note 80.

85. *Id.*

86. *Id.*

B. The Main Regulators and Other Actors

1. The State Courts

Many state supreme courts claim the inherent or constitutional authority to regulate the practice of law,⁸⁷ and a few claim the exclusive right to regulate lawyer conduct.⁸⁸ Most state legislatures tend to defer to the courts on these issues. Yet lawyer regulation is just one of the state supreme courts' many responsibilities, which include overseeing the activities of the lower courts, preparing budgets, supervising centralized personnel, lobbying the legislature for funding, and participating in reform efforts.⁸⁹ The courts often lack the time and resources to do their own fact-gathering on issues relating to lawyer regulation.⁹⁰ They frequently allow the organized bar to take the lead on proposing new rules.⁹¹ This is not as true when it comes to bar admission standards. There is another entity with expertise—state bar examiners—that makes recommendations to state courts and may be empowered to adopt rules and make policy.

2. State Bar Examiners

State bar examiners are usually tasked with administration of the state bar examination and oversight of the character and fitness inquiry.⁹² Their mission is to protect the public from incompetent or unethical

87. *Clark v. Austin*, 101 S.W.2d 977, 980 (Mo. 1937) (noting that the court “has inherent power to define and regulate the practice of law”); *Unauthorized Prac. of L. Comm. v. Am. Home Assurance Co.*, 261 S.W.3d 24, 33 (Tex. 2008) (noting that the court’s inherent power to regulate the practice of law derives from the state constitution); *see also* Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 69, 88-91 (2009).

88. *See In re Day*, 54 N.E. 646, 653 (Ill. 1899); *Clark*, 101 S.W.2d at 983-84; *In re Brown*, 708 N.W.2d 251, 256 (Neb. 2006); *In re Splane*, 16 A. 481, 483 (Pa. 1889); Rigertas, *supra* note 87, at 70, 90-91; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 6-7 (1989).

89. *See* Steven W. Hays & James W. Douglas, *Judicial Administration: Modernizing the Third Branch*, in *HANDBOOK OF PUBLIC ADMINISTRATION* 983, 1017 (Jack Rabin et al. eds., 3rd ed. 2007); Steven W. Hays, *The Traditional Managers: Judges and Court Clerks*, in *HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT* 221, 224 (Steven W. Hays & Cole Blease Graham, Jr. eds., 1993); Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 N.Y.U. L. REV. 1535, 1543-46 (2006).

90. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1207 (2003).

91. *See* Levin, *supra* note 3, at 980.

92. *See, e.g., Connecticut Bar Examining Committee*, STATE CONN. JUD. BRANCH, <https://www.jud.ct.gov/cbec> (last visited Oct. 13, 2021); *About the Board*, TEX. BD. L. EXAM’RS, <https://ble.texas.gov/about> (last visited Oct. 13, 2021). In some states, they draft and grade the bar exam. Even in UBE states, they grade part of the exam. *See* Judith A. Gundersen, *It’s All Relative—MEE and MPT Grading, That Is*, BAR EXAM’R, June 2016, at 37, 37-38.

lawyers.⁹³ In some states, bar examiners operate within mandatory state bar organizations.⁹⁴ More often, the bar examiners' offices are agencies of the state courts.⁹⁵ Employees of the state bar examiners' office are responsible for the day-to-day administrative work, and a committee of lawyers who are usually appointed by the state court or the mandatory state bar also assist with the work and the development of rules and policies pertaining to bar admission.⁹⁶ The volunteer committees often devote substantial time to this work.⁹⁷ The state supreme courts rely heavily on the state bar examiners, who typically determine the content of the bar examination (in states that do not rely exclusively on the UBE), how it will be administered, and how the character and fitness inquiry will be conducted.⁹⁸ In the case of the July 2020 bar exam, it was often the bar examiners that decided, at least in the first instance, how the state would proceed with the July bar examination.

3. Bar Associations

Like the ABA, state bar associations work to maintain the status and prerogatives of the profession.⁹⁹ All typically play a significant role in proposing rules governing the legal profession.¹⁰⁰ There are mandatory bars in thirty-two jurisdictions and the remainder have voluntary state bar associations.¹⁰¹ Mandatory bars, to which all lawyers admitted in the jurisdiction are required to belong, typically handle some regulatory functions such as admission, discipline, or other licensing requirements, and maintain that public protection is one of their goals.¹⁰²

93. See, e.g., PA. BD. L. EXAM'RS, <https://www.pabarexam.org> (Aug. 18, 2021).

94. See, e.g., OR. SUP. CT. R. ADMISSION ATTORNEYS 2.05; *Contact Admissions*, STATE BAR NEV., <https://www.nvbar.org/for-lawyers/admissions/contact-admissions> (last visited Oct. 13, 2021).

95. See, e.g., FLA. BD. BAR EXAM'RS, <https://www.floridabarexam.org> (last visited Oct. 13, 2021); see also COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 44, at 55-58.

96. See, e.g., NEV. SUP. CT. R. 49; WASH. ADMISSION & PRAC. R. 2; *Board Members of Pennsylvania*, PA. BD. L. EXAM'RS, https://www.pabarexam.org/board_information/members.htm (Aug. 18, 2021). The committees sometimes also include judges and non-lawyers. See, e.g., *Committee of Bar Examiners*, STATE BAR CAL., <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Committee-of-Bar-Examiners> (last visited Oct. 13, 2021); FLA. SUP. CT. R. ADMISSIONS BAR 1-21.

97. See *Florida Bar Admissions Process*, FLA. BD. BAR EXAM'RS, https://www.floridabarexam.org/_85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe17d48930b13621e2c85257c0700752662 (last visited Oct. 13, 2021) (stating that volunteers devote 350 to 400 hours annually).

98. See, e.g., CONN. PRAC. BOOK § 2-3; NEV. SUP. CT. R. 49, 50.

99. See Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 2-3 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf.

100. See Levin, *supra* note 3, at 977.

101. See Levin, *supra* note 99, at 5, 8-9. The percentage of admitted lawyers who belong to voluntary state bars ranges from less than fifty percent in New York and Illinois to over eighty-five percent in Delaware. *Id.* at 8-9.

102. See *id.* at 2, 5-6.

In most other respects, they perform the same functions as voluntary state bar associations.¹⁰³ Some mandatory bars supported the bar examiners in the bar exam debates.¹⁰⁴ The ABA—which often leads on issues concerning lawyer regulation—played only a limited role in the controversies over the administration of the July 2020 bar exam.¹⁰⁵

4. Law School Deans and Faculty

Like the courts, law schools also struggled with how to respond to questions surrounding the July 2020 bar exam during a time when law schools were triaging a multitude of issues as they moved to online instruction and remote administration. On March 22, 2020, eleven legal academics released a working paper that advocated for swift decisions about the bar exam and suggested the diploma privilege as one option.¹⁰⁶ In late March, law school deans began communicating via the Association of American Law Schools Law Deans listserv about bar exam-related issues.¹⁰⁷ Especially during the first several weeks, the deans struggled with how best to respond to help their own students, who were not all similarly situated. Some deans advocated for no delay, while others advocated for provisional licenses, under the supervision of another lawyer, until applicants could safely take the exams.¹⁰⁸ Deans at some elite schools were initially reluctant to join calls in their states to change plans for the in-person July bar exam¹⁰⁹ because they feared their

103. *Id.* at 2.

104. *See, e.g., infra* note 302 and accompanying text. Possibly due to concerns about antagonizing members who could leave the organization, most voluntary state bars did not take a position. *But see infra* note 216 and accompanying text.

105. In early April 2020, the American Bar Association (“ABA”) Board of Governors approved a resolution urging states to adopt rules authorizing limited practice with lawyer supervision for recent law school graduates if the July exams were canceled. Stephanie Francis Ward, *ABA Board of Governors Backs Limited Practice for Recent Law School Grads as They Await Bar Exam*, A.B.A. J. (Apr. 7, 2020, 7:00 PM), <https://www.abajournal.com/news/article/aba-board-of-governors-approves-new-model-rule-on-supervised-limited-practice-for-recent-law-school-graduates-bar-exam-delayed>. After the July exam, the ABA House of Delegates passed a resolution at its August Annual Meeting urging jurisdictions to find alternative ways to license new lawyers until the pandemic subsided, such as supervised practice, a remote bar exam, or diploma privilege. Karen Sloan, *Ditch In-Person Bar Exams During Pandemic, ABA Says*, LAW.COM (Aug. 4, 2020, 3:09 PM), <https://www.law.com/2020/08/04/ditch-in-person-bar-exams-during-pandemic-aba-says>.

106. *See* Angelos et al., *supra* note 1, at 2, 5.

107. *See* E-mail from Timothy Fisher, Former Dean, Univ. of Connecticut L. Sch., to author (Aug. 31, 2020, 1:41 PM) (on file with author).

108. *See, e.g., infra* notes 147-48 and accompanying text; Erwin Chemerinsky & Jennifer Mnookin, *Making the Case for Provisional Bar Licenses in the Coronavirus Pandemic*, NAT’L L.J. (Apr. 8, 2020, 7:11 PM), <https://www.law.com/nationallawjournal/2020/04/08/making-the-case-for-provisional-bar-licenses-in-the-coronavirus-pandemic>.

109. *See, e.g.,* Donna Saadati-Soto (@SaadatiSoto), TWITTER (July 6, 2020, 12:14 PM), <https://twitter.com/SaadatiSoto/status/1280173331644219393> (noting that Harvard’s dean was the only Massachusetts dean who had not yet endorsed diploma privilege).

graduates would be closed out of taking the New York bar exam—which had limited seats due to social distancing constraints—and that other exam alternatives in their states would not produce a portable UBE score that would enable their graduates to practice in New York.¹¹⁰ Eventually, however, deans and some faculty in most states advocated for changes in the July in-person 2020 exam and in many jurisdictions, asked the courts to grant diploma privilege.¹¹¹

5. Bar Applicants

Bar applicants do not typically advocate for changes in bar admission rules. They are taught in law school to avoid conduct that could create problems during the character and fitness process.¹¹² Nevertheless, starting in March 2020, some bar applicants began to raise concerns about the safety of an in-person July bar exam and about the feasibility and fairness of the exam arrangements that were subsequently proposed.¹¹³ They quickly organized via texts and social media, sometimes through their law school student body associations, and through contacts at other schools.¹¹⁴ In late March 2020, four law students at the University of California-Irvine, Harvard, and Seattle University founded a national initiative called “United for Diploma Privilege.”¹¹⁵ The group started to provide resources and information to help applicants organize state chapters for the purpose of advocating for

110. See, e.g., Karen Sloan, *Law Deans at Top Schools Outside NY Balk at Bar Exam Access Plan*, LAW.COM (May 3, 2020, 5:00 PM), <https://www.law.com/2020/05/03/law-deans-at-top-schools-outside-ny-balk-at-bar-exam-access-plan> (discussing opposition to New York’s plan to limit the number of July test-takers and to give priority seating to graduates of in-state law schools).

111. See, e.g., Letter from the Texas L. Sch. Deans to Texas Sup. Ct. & Bd. of L. Exam’rs 1-5 (June 29, 2009), <https://law.utexas.edu/wp-content/uploads/sites/5/Deans-Letter-June-29.pdf>; Cheryl Miller, *Law School Deans Lobby California Court for Diploma Privilege in Virus Era*, RECORDER (July 2, 2020, 6:47 PM), <https://www.law.com/therecorder/2020/07/02/law-school-deans-lobby-california-court-for-diploma-privilege-in-virus-era>; Letter from the Massachusetts L. Sch. Deans to Ralph D. Gants, C.J., Massachusetts Sup. Jud. Ct. (July 8, 2020), <https://hls.harvard.edu/dept/dos/letter-to-the-massachusetts-supreme-judicial-court>.

112. Law schools frequently discuss the character and fitness process at the beginning of law school. See, e.g., *2021 1L Orientation*, UNIV. PITT. SCH. L., <https://www.law.pitt.edu/student-resources/incoming-student-orientation> (last visited Oct. 13, 2021).

113. The primary software vendor, Examsoft, had experienced major problems in 2014 when administering a bar exam. See Karen Sloan, *Will October’s Online Bar Exams Implode? Takers Request ‘Stress Tests’ to Find Out*, LAW.COM (Sept. 4, 2020, 2:05 PM), <https://www.law.com/2020/09/04/will-octobers-online-bar-exams-implode-takers-request-stress-tests-to-find-out>. Furthermore, the non-UBE states that attempted to administer remote exams in July 2020 encountered software problems that resulted in test delays. See *id.*

114. See, e.g., *infra* notes 292, 356 and accompanying text.

115. See Croucher, Escontrias, Hudnell & Saadati-Soto on *Diploma Privilege*, IPSE DIXIT (July 2, 2020), <https://shows.acast.com/ipse-dixit/episodes/croucher-escontrias-hudnell-saadati-soto-on-diploma-privilege>; Rachel Stone, *Pushing for Diploma Privilege Unites Law Grads Nationwide*, LAW360 (July 8, 2020, 7:09 PM), <https://www.law360.com/articles/1289972/push-for-diploma-privilege-unites-law-grads-nationwide>.

an emergency diploma privilege.¹¹⁶ In June, Bar Exam Tracker (@BarExamTracker) began anonymously tweeting updates about bar exam-related developments throughout the United States.¹¹⁷ In most jurisdictions, some bar applicants organized to ask regulators to adopt a diploma privilege.

IV. STATES' HANDLING OF THE ADMINISTRATION OF THE JULY 2020 BAR EXAM

A. State Overview

The states' responses to the question of what to do about the July 2020 bar exam varied considerably. Ultimately thirteen jurisdictions were inflexible, deciding to go forward with the scheduled in-person July 2020 bar exam, with no other exam options.¹¹⁸ Six jurisdictions delayed their in-person exam until September or October, while seven others offered applicants two in-person exam options.¹¹⁹ Six non-UBE states offered their own remote bar exams.¹²⁰ Eighteen other jurisdictions offered the NCBE's remote October exam as the only option or in addition to an in-person exam alternative.¹²¹ Four states granted some qualifying applicants an emergency diploma privilege.¹²² Delaware simply canceled its bar exam.¹²³ The variation in the jurisdictions' decisions is illustrated below.

116. For example, it provided information about how to compile personal impact statements from applicants that could be sent to state regulators. *See infra* note 357 and accompanying text.

117. *See* Karen Sloan, *Bar Examinees Feel Left in the Dark. This Twitter Account Is Shining a Light on the Test*, LAW.COM (July 21, 2020, 3:04 PM), <https://www.law.com/2020/07/21/bar-examinees-feel-left-in-the-dark-this-twitter-account-is-shining-a-light-on-the-test>. @BarExamTracker had over 7,000 followers by September 2020.

118. *July 2020 Bar Exam: Jurisdiction Information*, NCBE, <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information> (Oct. 7, 2020, 2:59 PM). Five of these states (Arkansas, Colorado, Missouri, Montana, and South Dakota) expanded their supervised practice rules so that some graduates could engage in limited practice before passing the bar, but only those applicants who already had employment—or who had close social connections to lawyers—were likely to find a lawyer-supervisor who would take on this responsibility. *See id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *See id.* In September 2020, the District of Columbia granted a bar examination waiver for Juris Doctor applicants who practiced for three years under the supervision of a lawyer. *See* D.C. CTS. ADMISSION BAR R. 46-A. Due to the lengthy supervised practice requirement, this approach is not treated as a true diploma privilege.

123. *See infra* note 264 and accompanying text.

Jurisdictions' Decisions About Administration of the July 2020 Bar Exam¹²⁴

Decisions about bar exam administration	Jurisdictions	Diploma privilege afforded to some applicants
In-person July exam with no other exam alternative	AR, CO, IA, MO, MS, MT, NC, ND, OK, SC, SD, WI, WV	WI ¹²⁵
In-person Sept./Oct. exam with no other exam alternative ¹²⁶	AK, HI, ME, NM, RI, UT	UT
Two in-person exam options	AL, KS, MN, NE, VA, WA, WY	WA
Non-NCBE remote exam	CA, FL, IN, LA, MI, NV	LA
Remote Oct. NCBE exam ¹²⁷	AZ, CT, DC, GA, ID, IL, KY, MA, MD, NH, NJ, NY, OH, OR, PA, TN, TX, VT	OR
Cancel bar exam until July 2021	DE	

There are many reasons why states make different policy choices.¹²⁸ Political attitudes about COVID-19 seemingly help to explain the decisions by most of the thirteen states that held the bar exam as scheduled in July 2020 with no exam alternatives. Actual COVID-19 infection rates appear less important to those states' decisions, as several were experiencing what was then considered a substantial number of

124. For the information on which this chart is based, see *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 118.

125. Wisconsin's pre-existing diploma privilege was available to graduates of in-state law schools. *See supra* note 44.

126. As previously noted, the NCBE offered in-person exams in July and on September 9-10 and September 30-October 1. *See supra* note 81 and accompanying text.

127. Arizona, Texas, Idaho, and Oregon also offered an earlier in-person exam option. Georgia, Kentucky, Pennsylvania, and Texas were not then UBE states, but elected to offer the NCBE's remote exam. *See July 2020 Bar Exam: Jurisdiction Information*, *supra* note 118.

128. *See* Virginia Gray, *The Socioeconomic and Political Context of States*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 1, 3, 5-6, 9, 13-15, 18-23 (Virginia Gray et al. eds., 11th ed. 2018).

cases.¹²⁹ During this period, President Trump and many other Republican leaders were downplaying the seriousness of the pandemic and urging states to stay open for business.¹³⁰ In fact, nine of the thirteen states that only offered the July in-person exam had Republican governors and legislatures.¹³¹ In some of those states (Arkansas, Iowa, Missouri, and South Dakota), the governors had expressly declared that they were keeping their states “open for business” during the pandemic.¹³² Three of the other states that only offered the in-person July exam—North Carolina, Montana, and Wisconsin—had Democratic governors and Republican legislatures.¹³³ While governors and

129. On July 1, 2020, Montana, North Dakota, and South Dakota had had relatively few deaths or current hospitalizations due to COVID-19. See *The Data*, COVID TRACKING PROJECT, <https://covidtracking.com/data> (last visited Oct. 13, 2021); see also Casey Junkins *South Dakota COVID Death Rate Much Lower than that of ‘Blue’ States*, CAP. J. (June 15, 2020), https://www.capjournal.com/news/coronavirus/south-dakota-covid-death-rate-much-lower-than-that-of-blue-states/article_c0899aae-af62-11ea-b1de-4b4b996eac26.html. Yet in July, six of the jurisdictions that only offered a July exam option (Iowa, Mississippi, North Carolina, Oklahoma, South Carolina, and Wisconsin) were in the red zone for new cases or test positivity (or both). See Betsy Klein, *Task Force Report Says 18 States in Coronavirus ‘Red Zone’ Should Roll Back Reopening*, CNN (July 17, 2020, 10:30 AM), <https://www.cnn.com/2020/07/17/politics/white-house-states-hot-spots-task-force/index.html>; Matt Piper & Ricardo Torres, *Wisconsin Coronavirus Cases Surpass 30,000 as 5.7% of Latest Tests Are Positive*, MILWAUKEE J. SENTINEL (July 3, 2020, 3:56 PM), <https://www.jsonline.com/story/news/local/2020/07/03/wisconsin-coronavirus-cases-pass-30-000-5-7-positive-new-tests-covid-19/5373325002>.

130. See, e.g., Aamer Madhani & Mike Stobbe, *White House Steps Up Effort to Downplay Coronavirus Concerns*, AP NEWS (June 16, 2020), <https://apnews.com/article/946f95384c1d78e1225c23923f4e7bbd>; J.M. Rieger, *54 Times Trump Downplayed the Coronavirus*, WASH. POST (May 6, 2020, 12:59 PM), https://www.washingtonpost.com/video/politics/the-fix/54-times-trump-downplayed-the-coronavirus/2020/03/05/790f5afb-4dda-48bf-abe1-b7d152d5138c_video.html.

131. See *State Partisan Composition*, NAT’L CONF. STATE LEGISLATURES (Sept. 14, 2021), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx>.

132. Three of the five governors who wrote an op-ed piece in the *Washington Post* declaring their states were “open for business,” were from Arkansas, Iowa, and Missouri. See Mark Gordon et al., *Five Republican Governors: Our States Stayed Open in the Covid-19 Pandemic. Here’s Why Our Approach Worked.*, WASH. POST (May 5, 2020), <https://www.washingtonpost.com/opinions/2020/05/05/republican-governors-our-states-stayed-open-covid-19-pandemic-heres-why-our-approach-worked>. Likewise, Governor Kristi Noem announced in early June that “South Dakota is open for business.” Governor Kristi Noem (@govkristinoem), TWITTER (June 8, 2020, 2:13 PM), <https://twitter.com/govkristinoem/status/1270056274634387465>. Six of the states that only offered an in-person July exam option (Alabama, Montana, Mississippi, North Dakota, Oklahoma, and West Virginia) were among the ten most “open for business states” in the country. Amanda Postma, *Here Are the Most “Open for Business” States*, ZIPPAA (May 14, 2020), <https://www.zippia.com/advice/most-open-for-business-states>.

133. See *State Partisan Composition*, *supra* note 131. It may be indicative of political attitudes in Montana that it was ranked the most “open for business” state in the country. See Postma, *supra* note 132. Stay-at-home orders were highly politicized in Wisconsin, and its Republican majority state supreme court repeatedly rebuffed efforts to accommodate public health concerns during the early months of the pandemic. See Jonathan Easley & Justine Coleman, *Wisconsin Supreme Court Blocks Governor’s Effort to Delay Election*, HILL (Apr. 6, 2020, 8:54 PM), <https://thehill.com/homenews/campaign/491445-wisconsin-supreme-court-blocks-governors-effort-to-delay-election>; Shawn Johnson, *Wisconsin Supreme Court Strikes Down ‘Safer at Home’ Order*, WIS. PUB. RADIO (May 13, 2020, 9:00 PM),

legislatures did not decide the timing of the bar exams in their states, their party affiliations likely reflect some of the dominant political views about the appropriate response to COVID-19 in those states.

Colorado—with its Democratic governor and legislature and rising COVID-19 infection rates¹³⁴—was an outlier among the thirteen states that only offered applicants the in-person July bar exam option. In early July 2020, after three other jurisdictions granted diploma privilege to some applicants, the Colorado Students for Diploma Privilege started a petition to the Colorado Supreme Court calling for alternatives to the exam, including diploma privilege.¹³⁵ The petition, which was signed by over 1,500 people, made several arguments, including that the situation presented an opportunity for the court “to reexamine the efficacy of the bar exam.”¹³⁶ The applicants enlisted law professors, legislators, and the media in their efforts to get the court to provide alternatives to the in-person exam.¹³⁷ According to one observer, some members of the Colorado Supreme Court viewed the advocacy concerning the July 2020 bar exam as an effort to abolish the exam altogether.¹³⁸ Some justices felt the late timing and very public nature of the advocacy to be “disrespecting the Court.”¹³⁹ The court never responded directly to the applicant-advocates, but on July 9, 2020, it adopted an emergency rule

down-safer-home-order-0. The reasons for North Carolina’s decision are discussed *infra* Part IV.B.1.

134. See *State Partisan Composition*, *supra* note 131; see also KUSA Staff, *Colorado Coronavirus Latest Numbers, July 1*, 9NEWS (July 1, 2020, 9:57 PM), <https://www.9news.com/article/news/health/coronavirus/colorado-coronavirus-latest-numbers-july-1/73-6551e0ec-6621-4c18-b3ca-83a1e8061727>. By late June, Colorado was seeing more COVID-19 than nearby states and was reinstating some business closures. See Orion Rummler, *Colorado Shuttters In-House Service for Bars and Nightclubs*, AXIOS (June 30, 2020), <https://www.axios.com/coronavirus-colorado-bars-nightclubs-ba767f5f-9690-4a2b-aa26-ea02611d4cb4.html>.

135. Colorado Law Students for Diploma Privilege, *Colorado Supreme Court: Provide an Alternative to the Colorado July Bar Exam*, CHANGE.ORG, <https://www.change.org/p/colorado-supreme-court-provide-an-alternative-to-the-colorado-july-bar-exam> (last visited Oct. 13, 2021); see also Mitchell Byars, *With Diploma Privilege Unlikely, CU Boulder Law Grads Concerned About Safety of Bar Exam Amid Pandemic*, DAILY CAMERA (July 13, 2020, 11:36 AM), <https://www.dailycamera.com/2020/07/10/with-diploma-privilege-unlikely-cu-boulder-law-grads-concerned-about-safety-of-bar-exam-amid-pandemic>; Elizabeth Hernandez, *Worried About COVID-19, Colorado Law School Graduates Seek Alternative to In-Person Bar Exam*, DENVER POST (July 7, 2020, 11:54 AM), <https://www.denverpost.com/2020/07/07/colorado-bar-exam-july-coronavirus-covid-cu-du>.

136. Colorado Law Students for Diploma Privilege, *supra* note 135.

137. See Colorado Law Students for Diploma Privilege, *Phase 2 – Colorado Bar Exam Alternatives*, CHANGE.ORG (July 3, 2020), <https://www.change.org/p/colorado-supreme-court-provide-an-alternative-to-the-colorado-july-bar-exam/u/27191426>. The deans of the state’s two law schools had previously communicated privately to bar authorities and the Colorado Supreme Court about their support for alternatives to the in-person exam. See Hernandez, *supra* note 135; Telephone Interview with Colo. L. Fac. Member (Dec. 10, 2020).

138. Telephone Interview with Colo. L. Fac. Member, *supra* note 137.

139. *Id.*

providing for supervised practice for applicants who did not wish to take the in-person July exam.¹⁴⁰

As the preceding discussion suggests, each state has its own story with respect to the handling of the July 2020 bar exam, although some patterns can be detected. For example, the states that offered remote exams in July or August 2020 had the flexibility to adapt quickly because they were non-UBE states and already wrote parts of their bar exams.¹⁴¹ None of the UBE jurisdictions attempted to create their own exams and instead chose among the NCBE's options. All of the states with large numbers of applicants (over 1,000) ultimately offered a remote exam, due in part to the challenge of arranging to socially distance so many test takers. This included Texas, which might have been expected to insist on the July in-person exam due to the "open for business" position taken by the Republican governor.¹⁴² But concerns about locating venues in which to socially distance over 1,000 applicants contributed to the decision to cancel the July exam.¹⁴³

In order to understand these events—and to better understand the politics of bar admission—the discussion below more closely examines the events, arguments, and decisions surrounding the July 2020 bar exam in eight jurisdictions. The first Subpart looks at four jurisdictions that required applicants to take the bar exam, although they each provided for different arrangements. The second Subpart looks more closely at the four jurisdictions where the diploma privilege—or more accurately, diploma privilege-plus—was granted to applicants. While this account undoubtedly fails to capture all of the factors at play, it provides a window into the process and helps to explain some of the different outcomes.

140. See COLO. SUP. CT. EMERGENCY R. 205.8.

141. See *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 118.

142. Texas was ranked as one of the ten most "open for business" states in May 2020. See Postma, *supra* note 132. Even in June 2020, it had not closed businesses or mandated masks. See Jessica Glenza, *Texas to Remain 'Wide Open for Business' Despite Dramatic Covid-19 Rise*, GUARDIAN (June 22, 2020), <https://www.theguardian.com/world/2020/jun/22/texas-open-for-business-despite-covid-19-surge> (reporting that Governor Greg Abbott had said that Texas would remain "wide open for business" despite rise in COVID-19 infections).

143. See Nineteenth Emergency Order Regarding the COVID-19 State of Disaster at 2, No. 20-9083 (Tex. July 3, 2020) (noting "the recent surge in COVID-19 cases in Texas and the related uncertainty regarding the availability of examination sites"). Instead, the Texas Supreme Court offered bar applicants a later in-person exam and a remote exam. *Id.*

B. Selected States that Required Bar Exams for All Applicants

1. North Carolina—In-Person July Bar Exam Only

North Carolina was a UBE state that decided to “hang tough” and proceed with the in-person July 2020 bar exam as the only option for applicants. North Carolina differs from other jurisdictions because it vests so much power to determine bar admission issues in its state bar examiners. While the North Carolina Supreme Court claims the inherent power to “deal with its attorneys,”¹⁴⁴ the constitutional power to establish the qualifications for bar admission “rests in the Legislature.”¹⁴⁵ The North Carolina legislature has vested the authority to examine applicants and make bar admission rules in the North Carolina Board of Law Examiners (“NCBLE”), subject to approval of the rules by the Council of the mandatory North Carolina State Bar.¹⁴⁶

In April 2020, North Carolina law school deans asked the NCBLE to hold the in-person July 2020 exam because they believed that was what students wanted.¹⁴⁷ They also raised the possibility that applicants at risk of contracting COVID-19 should be given a limited license until the February exam, but that was unavailing.¹⁴⁸ The NCBLE announced on May 5, 2020, that it intended to go forward with the July bar exam,¹⁴⁹ and later that month, after consulting with the Governor’s Counsel, concluded that it could proceed with the exam, notwithstanding the rising number of COVID-19 cases.¹⁵⁰ On May 29, 2020, the NCBLE notified bar applicants that all test-takers would be required to sign a liability waiver,¹⁵¹ and it subsequently posted information indicating that

144. Gardner v. N.C. State Bar, 341 S.E.2d 517, 519 (N.C. 1986).

145. *In re Willis*, 215 S.E.2d 771, 779 (N.C. 1975) (citing *In re Applicants for License*, 55 S.E. 635, 636 (N.C. 1906)). At the same time, N.C. GEN. STAT. § 84-36 states that “[n]othing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.” N.C. GEN. STAT. § 84-36 (2020).

146. N.C. GEN. STAT. § 84-24 (2020). The State Bar’s sixty-one-member Council is mostly composed of lawyers, but includes three nonlawyer members. *Leadership*, N.C. STATE BAR, <https://www.ncbar.gov/about-us/leadership> (last visited Oct. 13, 2021). The Council appoints State Bar members to the eleven-member NCBLE. N.C. GEN. STAT. § 84-24.

147. E-mail from J. Rich Leonard, Dean, Campbell L. Sch., to Lisa Buczek, North Carolina Bar Applicant (July 4, 2020, 10:56 PM) (on file with author).

148. *Id.*

149. *All Announcements*, BD. L. EXAM’RS STATE N.C. (May 5, 2020), <https://www.ncble.org/allnews.action>.

150. E-mail from Lee Vlahos, Exec. Dir., North Carolina Bd. of L. Exam’rs, to the North Carolina L. Sch. Deans (May 22, 2020, 6:03 EDT) (on file with author).

151. Taylor M. Dant, *The North Carolina Bar Exam Is Not Protecting the Public or Examinees*, JURIST (July 12, 2020, 7:03 PM), <https://www.jurist.org/commentary/2020/07/taylor-dant-nc-bar-exam>. The waiver stated, “[b]y proceeding to take the examination, each applicant acknowledges and voluntarily assumes all risk of exposure to or infection with COVID-19 by attending the July 2020 North Carolina bar examination, and the possibility that such exposure or infection may result in personal injury, illness, permanent disability, and death.” BD. L. EXAM’RS

test-takers would not be required to continuously wear masks during the exam.¹⁵²

By this time, law graduates from the University of North Carolina (“UNC”) and Campbell Law School had come together—through an introduction by a law faculty member—to advocate for alternatives to the in-person bar exam. They attended a Zoom meeting with United for Diploma Privilege organizers to learn more about effective advocacy and were advised of the importance of obtaining the support of their deans.¹⁵³ Applicants from North Carolina law schools reached out to their deans, soliciting their support for changes in the scheduled in-person bar exam,¹⁵⁴ but most deans did not support their efforts.¹⁵⁵ Campbell’s dean was particularly unsympathetic to the idea of changing the in-person exam.¹⁵⁶ Indeed, when he saw a post by one of Campbell’s graduates, a cancer survivor, expressing concerns about taking the

STATE N.C., NOTICE TO APPLICANTS REGARDING COVID-19 REQUIREMENTS, PROTECTIVE MEASURES, AND ASSUMPTION OF RISK FOR JULY 2020 NORTH CAROLINA BAR EXAMINATION 2 (2020), https://www.ncble.org/covid_19_requirements.

152. Dant, *supra* note 151. One bar applicant noted that it was these announcements that prompted applicants’ advocacy. Telephone Interview with N.C. Bar Applicant 1 (Dec. 9, 2020). After the Governor issued more widespread mask mandates in late June, the North Carolina Board of Law Examiners (“NCBLE”) announced that continuous mask use during the exam would be required. See N.C. Governor Exec. Order No. 147 (June 24, 2020); *Notice: Masks to Be Required Continuously Throughout July 2020 NC Bar Exam*, N.C. BD. L. EXAM’RS, <https://www.ncble.org/news.action?id=402> (last visited Oct. 13, 2021).

153. Telephone Interview with N.C. Bar Applicant 2 (Dec. 10, 2020).

154. *Id.* Elon’s dean was not contacted because most Elon graduates took the February bar exam. *Id.*

155. The exception was the law dean of North Carolina Central University, a historically Black law school, who publicly stated that the exam should not be held in-person and noted that applicants of color may face more challenges than their counterparts. See Alyssa Lukpat, *NC Bar Exam to Be Held In-Person Despite Coronavirus Health Concerns*, NEWS & OBSERVER (June 23, 2020), <https://www.newsobserver.com/news/local/article243717302.html>. Duke’s law school dean was reportedly also sympathetic, but did not publicly advocate for changes in North Carolina’s exam—possibly because very few Duke graduates took the North Carolina exam. See *Bar Passage Outcomes*, A.B.A. SECTION LEGAL EDUC. & ADMISSIONS TO BAR, <http://www.abarequireddisclosures.org/BarPassageOutcomes.aspx> (last visited Oct. 13, 2021) (indicating that only twelve Duke graduates took the North Carolina bar in 2019). She signed an “open letter” with thirty-four other law deans calling for the diploma privilege a few days after North Carolina’s bar exam was administered. See Kimberly Mutcherson, *An Open Letter on the 2020 Bar Exam from Law Deans*, MEDIUM (July 30, 2020), <https://medium.com/@ProfessorMutch/an-open-letter-on-the-2020-bar-exam-from-law-deans-fbc73e5a1fc4>.

156. In his response to a letter from thirteen recent graduates seeking his support, he noted that “[w]e just cannot lock down our society” until there is a vaccine and urged them to “not sabotage this for [their] classmates and friends who need to test in July.” E-mail from J. Rich Leonard to Lisa Buczek, *supra* note 147. He later referred to the advocacy as a “guerilla war.” J. Rich Leonard, *COVID-19 First-Person Perspective: Dean Rich Leonard, Campbell*, N.C. BAR ASS’N (Nov. 13, 2020), <https://www.ncbar.org/nc-lawyer/2020-11/covid-19-perspective-dean-leonard-campbell>.

in-person exam, he responded on Facebook, “The exam is four weeks away. It is time to hunker down and study.”¹⁵⁷

On June 30, 2020, some North Carolina Central University graduates posted a petition on Change.org asking the North Carolina State Bar to institute emergency diploma privilege for the July 2020 applicants.¹⁵⁸ A week later, about 225 bar applicants and graduates from five North Carolina law schools and a few out-of-state schools signed on to separate letters to the NCBLE, the Governor, and the North Carolina Supreme Court, expressing deep concerns about the July exam.¹⁵⁹ The letters were accompanied by personal impact statements from applicants and asked, *inter alia*, for North Carolina to delay the exam, offer an online version, or grant diploma privilege.¹⁶⁰ It noted the number of COVID-19 cases in North Carolina, the Governor’s directives limiting mass gatherings to under ten people indoors, and the recent cancellation of the Republican National Convention in Charlotte.¹⁶¹ The letters also noted the disparate impact of COVID-19 on persons of color, but did not reference the recent street protests.¹⁶² On that same date, law professors, North Carolina lawyers (including a retired supreme court justice), and medical professionals also sent a letter to the Governor, the North Carolina Supreme Court, and the NCBLE, echoing many of the applicants’ arguments and asking for consideration of alternatives to the July in-person exam.¹⁶³

Kimberly Herrick, Chair of the NCBLE, responded on July 7, 2020, stating that a written examination “was in the best interests of the

157. Sarah Edwards, *Other States Are Making the Bar Exam Safer in the Pandemic. Why Won't North Carolina?*, INDYWEEK (July 8, 2020, 6:30 AM), <https://indyweek.com/news/northcarolina/north-carolina-bar-exam-COVID-19>.

158. See Sonia Yancey, *North Carolina Bar, Institute Emergency Diploma Privileges for July 2020 Applicants*, CHANGE.ORG (June 30, 2020), <https://www.change.org/p/north-carolina-bar-institute-emergency-diploma-privileges-for-july-2020-applicants>. At that point, North Carolina Central University graduates were not yet working in a coordinated fashion with the other group, but some graduates from the other law schools also signed the Change.org petition.

159. See, e.g., Letter from Bar Examinees to the Members of the North Carolina Bd. of L. Exam’rs (July 6, 2020), <https://www.jurist.org/commentary/wp-content/uploads/sites/3/2020/07/NCBLE-Letter.pdf>.

160. *Id.*; Dant, *supra* note 151. In many jurisdictions, these personal impact statements described fears for their health and the health of their families. See, e.g., Letter from Bar Examinees to the Members of the North Carolina Bd. of L. Exam’rs, *supra* note 159. Some recounted how the pandemic was affecting them economically or how the recent killings and protests over racial inequality were affecting them emotionally. Others described trying to study at home with children and other family members present in conditions where they lacked privacy. See *id.*

161. See Letter from Bar Examinees to the Members of the North Carolina Bd. of L. Exam’rs, *supra* note 159.

162. *Id.* In addition, a group of applicants sent a letter to the North Carolina Supreme Court on July 10 arguing that the bar examination was violating the delegation of authority to the NCBLE by the legislature and violating the Governor’s executive order. Dant, *supra* note 151.

163. See Letter from North Carolina Laws. & L. Professors to Roy Cooper, Governor, State of North Carolina (July 6, 2020) (on file with author). The letter was signed by some law professors from each of the North Carolina law schools and elsewhere. *Id.*

applicants and the general public” and “is required by NCGS § 84-24.”¹⁶⁴ She further suggested (incorrectly) that a remote option was only “offered to jurisdictions in which in-person UBE administration is unavailable.”¹⁶⁵ Counsel for the NCBLE, John Fountain, also responded in an effort to “address the concerns . . . express[ed] in all three letters.”¹⁶⁶ He noted that the bar applicants “urge[d] adoption of a diploma privilege this year or perhaps for all years” and stated that a “short-term diploma privilege decision has the potential to expose the public . . . to hundreds of lawyers” who do not demonstrate professional competency.¹⁶⁷ Fountain asked that any future inquiries to the NCBLE be directed to him.¹⁶⁸

Chief Justice Cheri Beasley did not formally respond, but stated in a news interview that she did not have authority over the NCBLE unless “something comes to court.”¹⁶⁹ The Governor also did not directly respond.¹⁷⁰ Nevertheless, the advocates continued their efforts in July on a variety of fronts. Although the legislature was out of session, the advocates organized a campaign to call and email legislators to get the legislature to act.¹⁷¹ They also asked the Governor to step in to require alternatives to the test.¹⁷² When one advocate called the Governor’s office, she reported, “I was aggressively told to stop calling the governor’s office over the NC Bar Exam because he does not have jurisdiction over the NCBLE. I need to take ‘my problem’ up with the

164. Letter from Kimberly A. Herrick, Chair, North Carolina Bd. of L. Exam’rs, to North Carolina Bar Examinees (July 7, 2020), https://www.ncble.org/a_note_from_the_chair.

165. *Id.* In fact, from the time the NCBE announced the availability of a remote exam on June 1, it never indicated that jurisdictions were unable to offer both in-person and remote exams.

166. See Letter from John N. Fountain, Couns., North Carolina Bd. of L. Exam’rs, to Adam Rodrigues (July 8, 2020) (on file with author).

167. *Id.* His calculation assumed that the pass rate in North Carolina was between fifty and sixty percent. *Id.* In fact, North Carolina had moved to the UBE in 2019 and had a pass rate of over seventy-two percent. See David Donovan, *Bar Exam Pass Rates Surge After Shift to UBE*, N.C. LAWS. WKLY. (Oct. 17, 2019), <https://nclawyersweekly.com/2019/10/17/bar-exam-pass-rates-surge-after-shift-to-ube>.

168. Letter from John N. Fountain to Adam Rodrigues, *supra* note 166.

169. Tim Boyum (@TimBoyumTV), TWITTER (July 16, 2020, 10:42 AM), <https://twitter.com/timboyumtv/status/1283774095373537280>; Letter from Kieran J. Shanahan to Roy Cooper, Governor, State of North Carolina (July 16, 2020) (on file with author).

170. Dant, *supra* note 151. Governor Cooper had effectively shut down efforts to hold the Republican National Convention in North Carolina the previous week and was enduring intense criticism during this period. See Spectrum News Staff & Associated Press, *North Carolina GOP Won’t Hold In-Person Annual Convention*, SPECTRUM NEWS1 (June 30, 2020, 10:51 PM), <https://spectrumlocalnews.com/nc/charlotte/news/2020/07/01/north-carolina-gop-won-t-hold-in-person-annual-convention>.

171. Some legislators were sympathetic to the bar applicants’ position and wrote letters to the NCBLE. Telephone Interview with N.C. Bar Applicant 2, *supra* note 153.

172. Colin Campbell, *Hundreds Will Gather to Take NC Bar Exam Next Week. Is it Safe?*, NEWS & OBSERVER (July 21, 2020), <https://www.newsobserver.com/news/coronavirus/article244353552.html>.

NCBLE.”¹⁷³ The advocates reasoned, however, that the Governor did have authority to declare that the plans for the exam violated his directive about public gatherings.¹⁷⁴ Less than a week before the exam, one applicant tweeted, “In this interview, Kim Herrick states that she would cancel or modify the bar exam if [the Governor’s] office told them to do so. Yesterday Gov. Cooper stated that it was up to the NCBLE. SOMEONE NEEDS TO HELP US.”¹⁷⁵ Bar applicants asked the North Carolina State Bar to intervene, but the State Bar President refused to call the question.¹⁷⁶

A week before the July exam, Herrick noted that the NCBLE did have the option to postpone the exam until September, but “the majority of applicants and law school leadership we have corresponded with indicated that a later bar exam would result in substantial financial hardship to many.”¹⁷⁷ On July 23, 2020, the NCBLE reduced the passing score for the July 2020 and February 2021 bar exam¹⁷⁸ but the bar exam was held as planned. Over 140 applicants withdrew their applications rather than take the July 2020 exam.¹⁷⁹

The bar applicants’ experience dealing with the NCBLE and other decision-makers left many frustrated and deeply disillusioned. They were dismayed to learn that the NCBLE had sought a liability waiver from them but had not even contacted North Carolina’s Department of Health and Human Services until less than a month before the in-person exam.¹⁸⁰ A few applicants received dismissive correspondence from the NCBLE’s lawyer.¹⁸¹ The law school deans’ responses were also very disappointing. One applicant tweeted, “The North Carolina bar exam is days away. [My] dean hasn’t said a single word about the bar exam. Not

173. Bprybol (@BPrybol), TWITTER (July 14, 2020, 1:00 PM), <https://twitter.com/BPrybol/status/1283083897941757952>.

174. See Allison Dunsford (@AllisonDunsford), TWITTER (July 24, 2020, 3:31 PM), <https://twitter.com/AllisonDunsford/status/1286745845963071490>.

175. Bprybol (@BPrybol), TWITTER (July 22, 2020, 4:46 PM), <https://twitter.com/BPrybol/status/1286039909120319489>.

176. Telephone Interview with N.C. Bar Applicant 2, *supra* note 153.

177. Campbell, *supra* note 172.

178. *Passing Score Reduced for July 2020 and February 2021 North Carolina Bar Examinations*, NCBLE, https://www.ncble.org/passing_score_reduced_july_2020_and_february_2021 (last visited Oct. 13, 2021).

179. Bprybol (@BPrybol), TWITTER (Aug. 21, 2020, 10:51 AM), <https://twitter.com/BPrybol/status/1296822311962791939>.

180. See Letter from Kieran J. Shanahan to Roy Cooper, *supra* note 169; Bar Exam Tracker (@BarExamTracker), TWITTER (July 16, 2020, 9:26 PM), <https://twitter.com/BarExamTracker/status/1283936202308149252>.

181. See Dant, *supra* note 151. One applicant was advised to “focus on the upcoming examination as are the other candidates” and that “[t]his is not the occasion for a policy debate.” Bprybol (@BPrybol), TWITTER (July 3, 2020, 10:00 AM), <https://twitter.com/bprybol/status/1279052399538319364?s=21>; see Letter from John N. Fountain to Adam Rodrigues, *supra* note 166.

even a ‘good luck and try not to die!’ Can’t wait to start blocking emails when the donation solicitation starts.”¹⁸²

2. Minnesota—Two In-Person Exams

Minnesota regulators made more accommodations for bar applicants, but they, too, declined to grant them a diploma privilege. In late March 2020, students from Minnesota’s three law schools organized and sent a letter to the Minnesota Supreme Court’s Board of Law Examiners (“MBLE”) asking it to grant an emergency diploma privilege to May 2020 graduates due to the “crisis brought on by the COVID-19 pandemic.”¹⁸³ Minnesota’s law school deans took a more measured approach when they wrote to the MBLE on April 2, 2020, offering to assist the MBLE with the administration of the exam, stating that postponement was not a viable alternative, and suggesting, among other alternatives, the possibility of granting an emergency diploma privilege.¹⁸⁴ Later in April, due to the uncertainty surrounding the administration of the July exam, the MBLE petitioned the Minnesota Supreme Court to amend the Student Practice Rules to permit recent graduates some ability to practice while waiting to take the bar exam.¹⁸⁵ On May 15, the MBLE decided that it would administer the in-person July bar exam and an in-person bar exam in September 2020.¹⁸⁶ It indicated it had spoken with “many interested parties,” including the court, the Minnesota law school deans, the Minnesota Department of Health, the NCBE, members of the Minnesota State Bar Association (“MSBA”), and students, among others.¹⁸⁷

Later that month, George Floyd was killed in Minneapolis, igniting large protests in the Twin Cities area and throughout the state that continued into the summer.¹⁸⁸ Minnesota was reporting a substantial

182. Mollie McGuire (@molliejmcguire), TWITTER (July 25, 2020, 6:51 PM), <https://twitter.com/molliejmcguire/status/1287158465333547013>.

183. Letter from Minnesota Bar Applicants to the Minnesota Bd. of L. Exam’rs (Mar. 27, 2020) (on file with author).

184. Letter from the Minnesota L. Sch. Deans to the Minnesota Bd. of L. Exam’rs (Apr. 2, 2020) (on file with author).

185. Letter from the Sup. Ct. of Minnesota Bd. of L. Exam’rs (May 20, 2020), <https://www.ble.mn.gov/wp-content/uploads/2020/05/Open-Letter-May-20-2020.pdf>. The court subsequently entered an order expanding its supervised practice rules for recent graduates. Order Adopting Supervised Practice Rules at 1-2, No. ADM09-8002 (Minn. June 5, 2020).

186. Letter from the Sup. Ct. of Minnesota Bd. of L. Exam’rs, *supra* note 185, at 1.

187. *Id.* It is unclear whether the Minnesota Board of Law Examiners (“MBLE”) actually spoke with students or whether it was referring to the March 2020 letter.

188. See Petition for Emergency Rule Waiver, *supra* note 14, at 6-7; Aaron Morrison & Tim Sullivan, *Watch: Tim Walz Speaks at 2 A.M. as Thousands Ignore Minneapolis Curfew in George Floyd Protests*, PIONEER PRESS (May 30, 2020, 3:42 AM), <https://www.twincities.com/2020/05/30/thousands-ignore-minneapolis-curfew-as-u-s-protests-spread/>; Associated Press, *Protesters Demonstrate for a Second Night in St. Cloud; Police Use Tear*

number of new COVID-19 cases during this time.¹⁸⁹ Some applicants decided to petition the Minnesota Supreme Court for emergency diploma privilege¹⁹⁰ and advised the MBLÉ of their plan. The MBLÉ gave two applicants a very brief opportunity to address the MBLÉ by video conference on June 19, 2020, but did not change its position.¹⁹¹

Three bar applicants filed the petition with the Minnesota Supreme Court on June 22, 2020, asking it to grant an emergency diploma privilege to Minnesota bar applicants.¹⁹² The petition noted the financial and other effects of the pandemic on bar applicants as they attempted to study for the exam, the hyper-local impact of the civil unrest sparked by George Floyd's death, their safety concerns about the planned bar exam, the benefits of having bar applicants licensed so they could assist underserved communities, and the disparate impact of the present conditions on applicants of color.¹⁹³ They deliberately did not challenge the value of the bar exam in the petition.¹⁹⁴ The court provided for a public comment period¹⁹⁵ and received more than 125 comments, with all but five supporting the diploma privilege.¹⁹⁶ The Minnesota law school deans, joined by the dean of Iowa Law School, submitted a very brief letter supporting temporary diploma privilege.¹⁹⁷ Some in- and out-of-state law professors also filed supportive comments, with some explicitly describing problems with the UBE.¹⁹⁸

Gas, PIONEER PRESS (June 16, 2020, 7:00 PM), <https://www.twincities.com/2020/06/16/protesters-demonstrate-for-a-second-night-in-st-cloud>.

189. Petition for Emergency Rule Waiver, *supra* note 14, at 11.

190. *Id.* at 19-20.

191. E-mail from Rebecca Hare, Minnesota bar applicant, to the Minnesota Bd. of L. Exam'rs (June 19, 2020, 10:42 AM CDT) (on file with author).

192. Petition for Emergency Rule Waiver, *supra* note 14, at 20-21. Fifteen applicants provided impact statements that were appended to the petition, and fifty-seven additional applicants appended their names to the petition as supporters of the petition. *Id.* at Ex. A, C.

193. *See id.* at Ex. A.

194. Telephone Interview with Minn. Bar Applicant (Sept. 17, 2020).

195. Order Establishing Public Comment Period on Petition for Proposed Temporary Waiver of Bar Examination Requirement for Admission to the Minnesota Bar at 1-2, No. ADM10-8008 (Minn. June 24, 2020).

196. A single comment sometimes came from more than one individual. One of the comments in opposition came from the MBLÉ. *See* Minn. Bd. of L. Exam'rs, Comment Letter on Proposed Temporary Waiver of Bar Examination Requirement for Admission to the Minnesota Bar 2 (July 6, 2020), <https://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&delID=1104528&csNameID=69135&csInstanceID=75906&csIID=75906>.

197. Garry W. Jenkins et al., Comment Letter on Proposed Temporary Waiver of Bar Examination Requirement for Admission to the Minnesota Bar (June 26, 2020), <https://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&delID=1103394&csNameID=69135&csInstanceID=75906&csIID=75906>. The two-paragraph letter appeared perfunctory in comparison to the letters written by deans advocating for bar applicants in other states. It may not be coincidental that the MBLÉ's President, Douglas R. Peterson, was also the University of Minnesota's General Counsel. *See Office of the General Counsel*, UNIV. MINN., <https://ogc.umn.edu/staff/douglas-r-peterson> (last visited Oct. 13, 2021).

198. *See, e.g.,* Eileen Kaufman & Judith Welch Wegner, Comment Letter on Proposed Temporary Waiver of Bar Examination Requirement for Admission to the Minnesota Bar (June 29, 2020),

During the comment period, applicants sought to engage with the MSBA, a voluntary state bar, and were eventually able to meet with the MSBA Council to seek its support.¹⁹⁹ The Council decided to submit a comment in support of a temporary diploma privilege.²⁰⁰ In contrast, the MBLE submitted a fourteen-page comment opposing the diploma privilege.²⁰¹ The MBLE noted its responsibility to ensure that bar candidates were competent, cited concerns about public protection, and explained why it believed it could safely administer an in-person exam.²⁰² It also reminded the court that “[t]he debate on the diploma privilege versus the bar examination is a continuous and ongoing” question and that any determination made in this context should be “mindful of precedent for the future.”²⁰³

On July 14, 2020, the Minnesota Supreme Court, with one dissent, denied the petition for an emergency diploma privilege.²⁰⁴ The three-page order noted it had approved the safety precautions taken by the MBLE and while it acknowledged there was no “perfect solution,” it concluded that “now more than ever public confidence and trust in the competency of Minnesota’s lawyers must be honored, and thus we decline to discard a longstanding requirement for admission to the Minnesota bar, even temporarily.”²⁰⁵ It is not clear what other factors may have influenced the court’s decision.

<https://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=1104848&csNameID=69135&csInstanceID=75906&csIID=75906> (devoting a paragraph to the “well-known deficiencies of the UBE”); Deborah Jones Merritt, Comment Letter on Proposed Temporary Waiver of Bar Examination Requirement for Admission to the Minnesota Bar (July 3, 2020), <https://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=1104517&csNameID=69135&csInstanceID=75906&csIID=75906> (devoting three paragraphs to discussion of why the UBE is “a poor guarantor of minimum competence”).

199. Telephone Interview with Minn. Bar Applicant, *supra* note 194. When the Council met, the Executive Committee of the New Lawyers Section had previously voted not to submit a comment regarding the petition because it felt it would be inconsistent with its May 2020 comment supporting an expanded student practice rule that would allow recent graduates to practice under the supervision of a licensed lawyer. *See* E-mail from Minnesota State Bar Ass’n, Official to author (Sept. 24, 2020, 9:10 EDT) (on file with author). The Professional Regulation Committee opposed the diploma privilege due to concerns about public protection. Telephone Interview with Minn. State Bar Ass’n Off. (Sept. 23, 2020).

200. Cheryl Dalby, Comment Letter on Proposed Temporary Waiver of Bar Examination Requirement for Admission to the Minnesota Bar (July 6, 2020), <https://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=1104685&csNameID=69135&csInstanceID=75906&csIID=75906>. The Minnesota State Bar Association’s (“MSBA”) comments noted that the MSBA believed that many of the arguments regarding “the importance, efficacy, and potential disparate impact of the bar examination have merit” and that the “MSBA intends to commit further time and resources to the study of these issues.” *Id.*

201. Minn. Bd. of L. Exam’rs, Comment Letter on Proposed Temporary Waiver of Bar Examination Requirement for Admission to the Minnesota Bar, *supra* note 196, at 2.

202. *Id.* at 2-4, 9-12.

203. *Id.* at 3.

204. Order Denying Petition for Proposed Temporary Waiver of Bar Examination Requirement and Provision of Emergency Diploma Privilege at 3, No. ADM10-8008 (Minn. July 14, 2020).

205. *Id.* at 2-3.

3. New York—Remote October Exam

In March 2020, New York was reeling from the highest COVID-19 infection rates in the country.²⁰⁶ On March 7, 2020, Governor Andrew Cuomo issued an Executive Order declaring a disaster emergency in New York State.²⁰⁷ Coincidentally, two days earlier, a New York State Bar Association (“NYSBA”) Task Force on the New York Bar Exam, that had been formed to study “the impact of New York’s adoption of the [UBE],” issued a report stating that “the adoption of the UBE has had the unintended, though foreseeable, consequence of rendering applicants less, not more, equipped to meet the challenges of practicing law in New York.”²⁰⁸ While the voluntary NYSBA has traditionally provided recommendations to the New York Court of Appeals on issues relating to lawyer regulation,²⁰⁹ it has no official rulemaking role. Nevertheless, this particular task force was chaired by Alan Scheinkman, presiding justice of New York’s Appellate Division, Second Department,²¹⁰ and it quickly turned its attention to COVID-19 and the July bar exam.²¹¹

On March 26, 2020, the New York State Law Grad Coalition sent a letter signed by more than 1,000 law students from the fifteen New York law schools and elsewhere asking the NYSBA’s Task Force to recommend a diploma privilege for 2020 graduates of ABA-accredited law schools.²¹² It argued that diploma privilege was the fairest way to address the challenges and inequities presented by the pandemic and to ensure new lawyers could be available to provide access to justice to

206. See Marina Villeneuve & Michael Hill, *COVID-19 Infections Rise in New York with Peak Weeks Away*, AP NEWS (Mar. 25, 2020), <https://apnews.com/article/7c7563cb82626a4042797c6aa6da260a>.

207. N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202 (2020).

208. N.Y. STATE BAR ASS’N, REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON THE NEW YORK BAR EXAMINATION 1-2 (2020), <https://nysba.org/app/uploads/2020/03/Report-of-the-Task-Force-on-the-New-York-Bar-Examination.pdf> [hereinafter FIRST NYSBA TASK FORCE REPORT].

209. See, e.g., Patrick M. Connors, *Transition to the ‘New’ New York Rules of Professional Conduct: New York Practice*, N.Y. L.J. (May 18, 2009), <https://plus.lexis.com/document/?pdmfid=1530671&crd=eaddcca-6039-4154-bd41-6a6421769c31&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A53HW-37M1-DY35-F52T-00000>.

210. FIRST NYSBA TASK FORCE REPORT, *supra* note 208, at 79; *Justices of the Court*, SUP. CT. STATE N.Y. APP. DIV. SECOND JUD. DEP’T, https://nycourts.gov/courts/ad2/justice_scheinkman.shtml (last visited Oct. 13, 2021).

211. See TASK FORCE ON N.Y. BAR EXAMINATION, *supra* note 77, at 1-2.

212. See Letter from L. Students to the New York State Bar Ass’n Task Force on the New York Bar Examination (Mar. 26, 2020), <https://images.law.com/contrib/content/uploads/documents/292/Law-Student-Letter-to-NYSBA-RE-COVID.pdf>.

Americans in need due to the pandemic.²¹³ That same day, the NYSBA Task Force met remotely and concluded that the in-person bar exam should be postponed until early September 2020.²¹⁴ The next day, the New York Court of Appeals announced that it was canceling the July bar exam and rescheduling the in-person exam in the fall.²¹⁵ On March 30, the NYSBA Task Force issued a report maintaining that the NYSBA has a responsibility to “champion and advocate for the interests of the legal profession,” and expressed opposition to the law students’ request for diploma privilege, largely on public protection grounds.²¹⁶

On April 1, 2020, the New York law school deans wrote to Chief Judge Janet DiFiore about their concerns surrounding the administration of the in-person bar exam.²¹⁷ They asked the court to consider a remote exam and temporary authorization for graduates to engage in supervised practice.²¹⁸ They further requested that the court consider allowing graduates, after a period of supervised practice, “to seek admission to the bar without sitting for the bar examination.”²¹⁹ The New York Court of Appeals announced on April 9, 2020 that it was considering contingencies in the event that further postponement of the September bar exam became necessary.²²⁰ It also announced that the Chief Judge had convened a Working Group led by Associate New York Court of Appeals Judge Michael Garcia “to evaluate potential solutions and prepare for possible eventualities.”²²¹ In late April, the Chief Judge—who was seemingly making the decisions on behalf of the court²²²—

213. *See id.* The letter also referenced a working paper that had been released by eleven law faculty members four days earlier suggesting diploma privilege was a viable option. *Id.*; Angelos et al., *supra* note 1, at 5-6.

214. *See* TASK FORCE ON N.Y. BAR EXAMINATION, *supra* note 77, at 3, 5-6.

215. Press Release, Janet DiFiore, C.J., New York Ct. of Appeals, New York State Bar Exam Rescheduled for Fall 2020 (Mar. 27, 2020), http://www.nycourts.gov/courts/appeals/news/AV20_05.pdf. Although the court’s announcement did not reference the Task Force’s vote the previous day, given the timing and Justice Scheinkman’s role on the New York State Bar Association (“NYSBA”) Task Force, the court was undoubtedly aware of the vote. The exam was subsequently rescheduled for September 9-10, 2020. Michael Marciano, *Bar Exam Dates Finalized*, N.Y. L.J. (Apr. 6, 2020, 5:15 PM), <https://www.law.com/newyorklawjournal/2020/04/06/bar-exam-dates-finalized>.

216. *See* TASK FORCE ON N.Y. BAR EXAMINATION, *supra* note 77, at 2, 15-18.

217. Letter from the New York L. Sch. Deans to Janet DiFiore, C.J., New York Ct. of Appeals (Apr. 1, 2020), <https://images.law.com/contrib/content/uploads/documents/292/Chief-Judge-DiFiore3-2-1.pdf>.

218. *Id.*

219. *Id.*

220. *Rescheduling of July 2020 N.Y. State Bar Exam*, NYCOURTS.GOV (Apr. 9, 2020), <http://www.nycourts.gov/covid-archive.shtml>.

221. *Id.*

222. This appears to have been consistent with the practice of her predecessors.

approved a temporary program for law graduates employed in New York to engage in supervised law practice.²²³

The New York deans again sent a letter to Chief Judge DiFiore on June 15, 2020, that advocated for a remote exam or diploma privilege.²²⁴ Associate Judge Garcia responded to the letter, expressing skepticism about the wisdom of a remote bar exam and stating that a diploma privilege “is not a viable option.”²²⁵ Meanwhile, New York bar applicants were continuing to advocate for their own interests. In early July, Diploma Privilege for New York (@dp4ny) first appeared on Twitter, and announced that it was seeking a hearing before the New York Court of Appeals and collecting signatures on a petition supporting diploma privilege.²²⁶ It urged its Twitter followers to call their New York state representatives or the Governor to advocate for the diploma privilege.²²⁷ On July 6, 2020, Brad Hoylman, Chair of the New York Senate Judiciary Committee and himself a lawyer, tweeted that he was introducing legislation to authorize an emergency diploma privilege for graduates of ABA-approved law schools.²²⁸ Assembly member Joanne Simon, also a lawyer, introduced a parallel bill in the State Assembly.²²⁹ On July 13, Senate Deputy Leader Michael Gianaris called on Chief Judge DiFiore to seek alternatives for this year’s bar exam, including moving the test online and offering diploma privilege to applicants.²³⁰

223. *Chief Judge Approves Temporary Authorization Program*, NYCOURTS.GOV (Apr. 28, 2020), <https://www.nycourts.gov/whatsnew/pdf/Chief-Judge-TemporaryAuthorizationProgram.pdf>. Shortly thereafter, law school deans outside the state began advocating for their graduates to be able to sit for the New York exam. *See Sloan, supra* note 110.

224. The deans’ letter was referenced in a letter from Associate Judge Michael Garcia to the Deans. *See Letter from Michael J. Garcia, Assoc. J., New York Ct. of Appeals, to the New York L. Sch. Deans* (June 22, 2020) (on file with author). The deans’ letter is not publicly available.

225. *See id.*

226. Diploma Privilege for New York (@dp4ny), TWITTER (July 6, 2020, 12:06 PM), <https://twitter.com/dp4ny/status/1280171210639314945>. This group had organized after two founders of United for Diploma Privilege introduced a few New York bar applicants via Twitter. E-mail from New York Bar Applicant to author (Oct. 30, 2020, 10:03 EDT) (on file with author).

227. *See Diploma Privilege for New York (@dp4ny)*, TWITTER (July 6, 2020, 8:52 PM), <https://twitter.com/dp4ny/status/1280303660984143872>; *Diploma Privilege for New York (@dp4ny)*, TWITTER (July 11, 2020, 9:16 PM), <https://twitter.com/dp4ny/status/1282121635915497472>.

228. Brad Hoylman (@bradhoylman), TWITTER (July 6, 2020, 6:30 PM), <https://twitter.com/bradhoylman/status/1280261114262142977?lang=en>; *see also* S. 8682-A, 2019-2020 Leg. Sess. (N.Y. 2020), <https://legislation.nysenate.gov/pdf/bills/2019/S8682A>; Joe Patrice, *New York Legislature Gets Involved in Push for Diploma Privilege*, ABOVE L., (July 7, 2020, 11:49 AM), <https://abovethelaw.com/2020/07/new-york-legislature-gets-involved-in-push-for-diploma-privilege/?rf=1>.

229. Assemb. 10794, 2019-2020 Leg. Sess. (N.Y. 2020), <https://legislation.nysenate.gov/pdf/bills/2019/A10794>. State Senator Kevin Thomas also introduced a bill on July 10 calling for the bar exam to be administered online. S. 8712, 2019-2020 Leg. Sess. (N.Y. 2020), <https://legislation.nysenate.gov/pdf/bills/2019/S8712>.

230. Press Release, Michael Gianaris, Deputy Leader, New York Senate, With Just Weeks to Go Before Bar Exam, Senate Deputy Leader Gianaris Calls on Court System to Consider

That same day, United for Diploma Privilege of New York sent a letter to the New York Court of Appeals with 1,500 signatories asking for a hearing to discuss the planned administration of the September test.²³¹ The New York law deans also wrote again to Chief Judge DiFiore asking for online administration of the New York bar exam and repeated their request that the court grant the 2020 graduates a diploma privilege.²³² They primarily discussed the health situation and made no reference to the protests associated with George Floyd's death.²³³ On July 16, 2020, the court of appeals announced that the New York Board of Law Examiners ("NYBOLE") had decided to cancel the in-person September bar exam, and that the court had assembled a working group headed by former New York Court of Appeals Judge Howard Levine to determine how bar applicants should be assessed, including "a fully remote bar exam and a diploma privilege, among other alternatives."²³⁴

A flurry of activity followed that announcement. That day, the New York State Law Grad Coalition sent a letter to Governor Cuomo asking him to use his authority to implement a diploma privilege.²³⁵ The next day, the New York law school deans again wrote a letter advocating for diploma privilege that they addressed not only to Chief Judge DiFiore, but to Governor Cuomo, the New York Attorney General, and legislative leaders.²³⁶ The elite New York City Bar also sent a letter to the court recommending an online exam or diploma privilege.²³⁷ On July 21, 2020, more than 300 law school professors sent a letter to the court and

Alternatives to In-Person Exam (July 14, 2020), <https://www.nysenate.gov/newsroom/press-releases/michael-gianaris/just-weeks-go-bar-exam-senate-deputy-leader-gianaris-calls>.

231. Karen Sloan, *Push for Diploma Privilege in New York Intensifies as September Exam Looms*, LAW.COM (July 13, 2020, 12:21 PM), <https://www.law.com/2020/07/13/push-for-diploma-privilege-in-new-york-intensifies-as-september-exam-looms>.

232. Letter from the New York L. Sch. Deans to Janet DiFiore, C.J., New York State Ct. of Appeals (July 13, 2020) (on file with author).

233. *Id.*

234. *Bar Examination & Temporary Practice Order Update*, CT. APPEALS STATE N.Y. (July 16, 2020), <http://nycourts.gov/ctapps/news/TempPracticeOrder.pdf>.

235. Letter from the New York State L. Grad Coal. to Andrew M. Cuomo, Governor, State of New York (July 16, 2020), <https://images.law.com/contrib/content/uploads/documents/407/15492/New-York-State-Law-Grad-Coalition-Letter.pdf>; see also Karen Sloan, *New York Law Deans Back Diploma Privilege After Bar Exam Cancellation*, LAW.COM (July 20, 2020, 1:28 PM), <https://www.law.com/newyorklawjournal/2020/07/20/new-york-law-deans-back-diploma-privilege-after-bar-exam-cancelation>.

236. Newsroom, *Letter from New York Deans to Government Leaders on Bar Exam*, FORDHAM L. NEWS (July 17, 2020), <https://news.law.fordham.edu/blog/2020/07/17/letter-from-new-york-deans-to-government-leaders-on-bar-exam>.

237. See Christine Simmons, *Citing 'Chaos' in Profession, City Bar Urges Certainty for Fall '20 Exam*, N.Y. L.J. (July 20, 2020), <https://www.law.com/newyorklawjournal/2020/07/17/citing-chaos-in-legal-profession-city-bar-urges-ny-court-to-provide-certainty>.

elected officials endorsing a temporary diploma privilege and raising concerns about the administration of an online exam.²³⁸

Somewhat surprisingly, the NYBOLE took no position on the administration of a remote exam.²³⁹ On July 23, 2020, the court announced that the Working Group had recommended a remote October exam and had recommended against the diploma privilege, “noting that the bar exam provides critical assurance to the public that admitted attorneys meet minimum competency requirements, emphasizing New York’s immense candidate pool as well as the degree of variation in legal curricula across the country.”²⁴⁰ The court adopted the Working Group’s recommendations.²⁴¹

The announcement did not, however, end the advocacy. In early August, the New York State Law Grad Coalition and United for Diploma Privilege New York wrote to NYSBA president Scott Karson and advised him that they planned to boycott future membership in the NYSBA unless it supported diploma privilege.²⁴² Later that month, New York’s Senate Judiciary Committee held a virtual public meeting concerning the administration of the New York bar exam and alternatives to admission.²⁴³ The next day, there was a meeting among representatives of New York State Law Grad Coalition, United for Diploma Privilege, Justice Scheinkman, John McAlary, Executive Director of the NYBOLE (and an NCBE Trustee), and Scott Karson.²⁴⁴ It failed to produce any movement and left the bar applicants feeling like they had not been given an adequate opportunity to be heard.²⁴⁵ In

238. Karen Sloan, *Hundreds of New York Law Professors Endorse Emergency Diploma Privilege*, LAW.COM (July 22, 2020, 3:40 PM), <https://www.law.com/newyorklawjournal/2020/07/22/hundreds-of-new-york-law-professors-endorse-emergency-diploma-privilege>.

239. See WORKING GRP. ON FUTURE OF N.Y. BAR EXAMINATION, INITIAL REPORT ON THE OCTOBER 2020 EMERGENCY REMOTE TESTING OPTION OFFERED BY THE NCBE (2020), <https://www.scribd.com/document/473475892/BarExamWorkingGroup-report>.

240. *Bar Examination Update*, CT. APPEALS STATE N.Y. (July 23, 2020), <http://nycourts.gov/ctapps>.

241. *Id.*

242. Letter from the New York State L. Grad Coal. & United for Diploma Privilege New York to Scott Karson, President, New York State Bar Ass’n (Aug. 11, 2020) (on file with author).

243. *Public Meeting: A Discussion About the Impact of the COVID-19 Pandemic on Recent Law School Graduates, the New York Bar Exam, and Alternate Pathways to Attorney Admission*, N.Y. STATE SENATE (Aug. 18, 2020, 10:00 AM), <https://www.nysenate.gov/calendar/events/judiciary/brad-hoylman/august-18-2020/public-meeting-discussion-about-impact-covid>; Kate Lisa, *Panel Seeks Diploma Privilege for Law Grads*, HUDSON VALLEY 360 (Aug. 20, 2020), https://www.hudsonvalley360.com/top_story/panel-seeks-diploma-privilege-for-law-grads/article_e935851a-929d-5ccb-8bd1-9e4c3e01204a.html.

244. Memorandum from the New York State L. Grad Coal. & United for Diploma Privilege New York (Aug. 19, 2020) (on file with author).

245. See *id.* The applicants reportedly only received twenty minutes to speak. One observer noted on Reddit that the meeting was not productive at all and it seemed like the NYSBA did not go into the meeting with an open mind.

September, forty-three New York legislators sent a letter to Chief Judge DiFiore expressing concerns about the security and equity of the planned online exam, noting that “[o]ur offices have collectively heard from thousands of law school graduates detailing the hardships they are facing,” and suggested a diploma privilege program that would license graduates after completing 100 hours of legal work under the supervision of a lawyer.²⁴⁶ The remote bar exam proceeded as scheduled in October 2020, with a little more than half the usual test takers.²⁴⁷

4. Delaware—Canceled Exam

Delaware differs from the other states, not only because of its small size, but because it is the legal domicile for sixty percent of all publicly held companies.²⁴⁸ Delaware has a close knit and professional bar²⁴⁹ and most belong to the voluntary Delaware State Bar Association (“DSBA”).²⁵⁰ The DSBA is unique in the outsized role it plays in drafting Delaware corporate law.²⁵¹ Delaware lawyers and the Delaware Supreme Court benefit from the number of corporate issues decided in Delaware, which create lucrative work for practitioners and enhances the court’s prestige.

Delaware needs high quality lawyers to attract corporations and their legal work to Delaware. As one bar leader noted, Delaware “is very purposefully exclusive and selective in the people it allows to become attorneys”²⁵² Delaware does not offer reciprocity to lawyers admitted in other states so all lawyers wishing to practice there must take its bar examination.²⁵³ The Delaware bar exam, which is offered only

246. Letter from New York State Legislators to Janet DiFiore, C.J., New York State Ct. of Appeals (Sept. 15, 2020), <https://images.law.com/contrib/content/uploads/documents/292/73767/State-Legislators-Letter-to-Court-of-Appeals-re-Diploma-Privilege-Sept.-15-2020-1.pdf>.

247. See Karen Sloan, *With Far Fewer Takers, Pass Rate on New York’s First Online Bar Exam Soars*, LAW.COM (Dec. 16, 2020, 1:57 PM), <https://www.law.com/newyorklawjournal/2020/12/16/with-far-fewer-takers-pass-rate-on-new-yorks-first-online-bar-exam-soars> (noting the jurisdiction had about 5,150 rather than 10,000 test-takers). This was due, in part, to the decision by some applicants to take the exam elsewhere because of the early uncertainty surrounding the administration of the New York bar exam.

248. Minor Myers, *How Delaware Makes its Corporate Law 6* (Nov. 2019) (unpublished manuscript) (on file with author).

249. Rose Krebs, *Delaware: An Elite Legal Venue Struggling with Inclusivity*, LAW360 (Sept. 1, 2020, 11:38 AM), <https://www.law360.com/articles/1305494/print?section=delaware>.

250. See *supra* note 101.

251. See Myers, *supra* note 248, at 20-22 (noting that the Delaware State Bar Association’s (“DSBA”) Corporation Law Section “is the source of virtually all proposed legislative change to the DGCL”).

252. Krebs, *supra* note 249. A bar applicant confirmed, “it is stressed to us from our summer positions that the Delaware bar is very small, collegial, and protectionist. It wants to maintain its position as the place where corporations incorporate. It has a desire to keep that status.” Telephone Interview with Del. Bar Applicant (Nov. 13, 2020).

253. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 44, at 42.

once a year, is a significant barrier to entry. It is one of the hardest in the country, with only about 200 people taking it every year and about a sixty percent first-time pass rate.²⁵⁴ Delaware is also unique in requiring lawyers to serve a five-month apprenticeship as an admission requirement.²⁵⁵

Most Delaware bar applicants come from out-of-state and do not attend Widener, the state's only law school.²⁵⁶ They had heard, however, about the close-knit nature of the bar and were concerned that advocacy concerning the bar exam might affect them in the character and fitness process or even after admission.²⁵⁷ Thus, the applicants did not advocate publicly early in the process and those that tried found it difficult to find others to join them.²⁵⁸ According to one Widener graduate, the dean there seemingly wanted to avoid taking any public stance and it is unclear whether the dean engaged in any informal advocacy concerning the bar exam.²⁵⁹

The Delaware Supreme Court announced on May 11, 2020, that the bar exam would be rescheduled as an in-person exam on September 9-11 "due to the ongoing public health emergency."²⁶⁰ On July 8, the chair of the Delaware Board of Bar Examiners ("DBBE") announced that the September bar examination would be administered at the Delaware State Fairgrounds due to the need for social distancing and other safety measures.²⁶¹ This was the same date on which adjoining Pennsylvania

254. See *2019 Bar Results*, BD. BAR EXAM'RS SUP. CT. DEL., <https://www.courts.delaware.gov/bbe/2019barresults.aspx> (last visited Oct. 13, 2021) (reporting that in 2019, only 213 people took the July bar exam and the first-time pass rate was sixty-one percent); see also Kyleigh Panetta, *Delaware Cancels Bar Exam, Candidates Left in "Limbo,"* 47ABC (July 27, 2020), <https://www.wmdt.com/2020/07/delaware-cancels-bar-exam-candidates-left-in-limbo>; *Bar Exam Critics Push for National Standard*, NEWS J. (Nov. 12, 2009), <https://1.next.westlaw.com/Document/I52165890cf9011dea94fcee5a2fed7f7/View/FullText.html?navigation>.

255. Myers, *supra* note 248, at 25.

256. See Panetta, *supra* note 254. Half of Widener's graduates generally sit for the Pennsylvania bar. See Krebs, *supra* note 249. Fewer than twenty-five Widener graduates usually sit for the Delaware bar. See *Bar Passage Outcomes*, A.B.A. SECTION LEGAL EDUC. & ADMISSIONS TO BAR, <https://www.abarequireddisclosures.org/BarPassageOutcomes.aspx> (last visited Oct. 13, 2021).

257. Telephone Interview with Del. Bar Applicant, *supra* note 252; Telephone Interview with Widener L. Sch. Graduate (Oct. 23, 2020).

258. See National Assn. for Equity in the Legal Profession (@NA4ELP), TWITTER (June 30, 2020, 10:39 PM), https://twitter.com/search?q=delaware%20folx%20diploma%20privilege&src=typed_query ("DELAWARE FOLX: please DM us if you are interested in organizing for diploma privilege! We have someone looking for help."). This Twitter account's name was formerly Diploma Privilege (@DiplomaPriv4All). *Id.*

259. Telephone Interview with Widener L. Sch. Graduate, *supra* note 257. The dean declined to be interviewed for this Article.

260. Press Release, Sup. Ct. of Delaware, Supreme Court of Delaware Postpones July Bar Exam (May 11, 2020), <https://courts.delaware.gov/forms/download.aspx?id=121448>.

261. Press Release, Delaware Bd. of Bar Exam'rs, Delaware Board of Bar Examiners Announce 2020 Bar Exam to Be Held at Delaware State Fairgrounds in Harrington September 9 – 11, 2020 (July 8, 2020), <https://courts.delaware.gov/Forms/Download.aspx?id=122738>.

moved to a remote exam; Maryland had already done so and New Jersey moved to a remote exam on July 15.²⁶² Delaware bar applicants assumed that Delaware would soon do the same.²⁶³

Instead, on July 24, 2020, the Delaware Supreme Court cancelled the 2020 bar exam, citing public health concerns.²⁶⁴ It noted that nearly sixty percent of the applicants were from out of state, including from COVID-19 hotspots, and that the court and the DBBE were working on a temporary limited practice rule that would enable applicants to practice under the supervision of a lawyer.²⁶⁵ In a news story that same day, Widener's dean stated, "I commend the chief justice and the Supreme Court and the bar authorities for this wise decision."²⁶⁶ The dean's response was somewhat surprising, given that there were probably close to twenty-five Widener graduates planning to take the Delaware bar exam.²⁶⁷

In response to emails from some applicants, the DBBE emailed applicants on July 31 reiterating that the court and the Board would be implementing a "temporary practice privilege *in lieu of* the in-person bar exam" and that "Delaware is not a UBE state and has no plans to administer the emergency online UBE exam that the NCBE is making available in October."²⁶⁸ One out-of-state lawyer tweeted in response, "Delaware gonna be protectionist Delaware."²⁶⁹ In mid-August, the Delaware Supreme Court adopted a limited practice rule which allowed 2020 bar applicants to do certain work under lawyer supervision.²⁷⁰

Neither the court nor the DBBE explained further why it would not offer a remote exam.²⁷¹ While it was not a UBE state, Delaware uses the MBE and the MPT as part of its exam, in addition to eight

262. See *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 118.

263. See Telephone Interview with Del. Bar Applicant, *supra* note 252.

264. Press Release, Sup. Ct. of Delaware, Delaware Supreme Court Cancels In-Person 2020 Bar Exam; Bar Candidates May Obtain Temporary Limited Practice Status (July 24, 2020), <https://courts.delaware.gov/forms/download.aspx?id=122898>.

265. *Id.*

266. Ellen Bardash, *Delaware Cancels In-Person Bar Exam, Citing Health Concerns, Travel for Out-of-State Takers*, DEL. L. WKLY. (July 24, 2020, 4:42 PM), <https://www.law.com/delawarelawweekly/2020/07/24/delaware-cancels-in-person-bar-exam-citing-health-concerns-travel-for-out-of-state-takers>.

267. See *supra* note 256 and accompanying text.

268. Bar Exam Tracker (@BarExamTracker), TWITTER (Aug. 1, 2020, 6:00 PM), <https://twitter.com/BarExamTracker/status/1289682319121448961>.

269. Sean Marotta (@smmarotta), TWITTER (Aug. 1, 2020, 6:07 PM), <https://twitter.com/smmarotta/status/1289684210584887303>.

270. See Order Regarding Certified Limited Practice Privilege for 2020 Delaware Bar Applicants at 1, 3-4 (Del. Aug. 12, 2020).

271. DBBE officials also declined to answer questions for this Article. See, e.g., E-mail from Jennifer C. Wasson, Chair, Delaware Bd. of Bar Exam'rs, to author (Oct. 19, 2020, 2:08 PM) (on file with author).

jurisdiction-drafted essay questions.²⁷² The DBBE may not have wanted to work with a software vendor to offer a remote exam to only 200 applicants, especially when applicants elsewhere were questioning whether such an exam could be successfully administered. Regulators may have been worried about maintaining the security of Delaware's notoriously difficult exam. They may have viewed the temporary practice rule as adequate to protect the applicants, although it would only benefit the most accomplished graduates who had jobs or who could find a Delaware lawyer who was willing to supervise them. In any case, the decision to simply cancel the exam for a year was no doubt made easier because applicants did not organize to advocate for alternatives and Widener's dean and faculty did not do so.

C. *Diploma Privilege States*

1. Utah

Utah was the first state to grant a diploma privilege to some bar applicants in response to the pandemic. The Utah Supreme Court made this decision on April 21, 2020²⁷³: before students organized, before the NCBE offered a remote exam, and before George Floyd's death. Utah's Supreme Court has been active in court administrative reform²⁷⁴ and more recently, in the forefront of regulatory reform relating to the provision of legal services.²⁷⁵ Even before the pandemic, Utah's two law school deans had briefly spoken with Utah Supreme Court Justice Constandinos ("Deno") Himonas, who co-chaired Utah's Work Group on Regulatory Reform, about the idea that granting a diploma privilege

272. Bd. of Bar Exam'rs of Sup. Ct. of Del., *Frequently Asked Questions*, DEL. CTS., <https://www.courts.delaware.gov/bbe/faqs.aspx> (last visited Oct. 13, 2021).

273. Press Release, Utah Sup. Ct., Utah Supreme Court Issues Order Providing a Temporary Path to Bar Licensure for Certain Applicants Impacted by the Global Pandemic (Apr. 21, 2020), <https://images.law.com/contrib/content/uploads/documents/292/Utah-Bar-Exam-Press-release.pdf>.

274. In 2010, its then-Chief Justice and State Court Administrator, who served as president of the Conference of Chief Justices and the Conference of State Court Administrators, respectively, authored proposed governance principles to improve state court governance. See Christine M. Durham & Daniel J. Becker, *A Case for Court Governance Principles*, in EXECUTIVE SESSION FOR STATE COURT LEADERS IN THE 21ST CENTURY 1, 4-6 (2011).

275. See, e.g., Bob Ambrogio, *Utah Supreme Court Votes to Approve Pilot Allowing Non-Traditional Legal Services*, LAWSITES (Aug. 29, 2019), <https://www.lawsitesblog.com/2019/08/utah-supreme-court-votes-to-approve-pilot-allowing-non-traditional-legal-services.html>; Lyle Moran, *Utah's High Court Proposes Nonlawyer Ownership of Law Firms and Wide-Ranging Reforms*, A.B.A. J. (Apr. 27, 2020, 3:10 PM), <https://www.abajournal.com/news/article/utahs-high-court-proposes-wide-ranging-legal-industry-reforms>.

would admit more lawyers who would provide pro bono and low bono services.²⁷⁶

In March 2020, two faculty members from Utah's law schools met to brainstorm about possible alternatives to an in-person July bar exam.²⁷⁷ They were already somewhat skeptical about the value of the exam and they were concerned about their students, especially those who lacked the financial means to study adequately for the exam.²⁷⁸ After one of the deans learned that the court might be open to granting 2020 bar applicants the diploma privilege, the two deans and the two faculty members worked to draft an eleven-page memo to the supreme court that laid out the options for bar exam administration and advocated for "Diploma Privilege Plus."²⁷⁹ The March 27, 2020 memo emphasized the deficiencies of the current bar exam, the bar's disproportionate burdens and disadvantages (for women, people of color, individuals with ADA-recognized disabilities, and low-income earners), the resources spent on the bar exam, and the possibility diploma privilege would increase access to justice.²⁸⁰ It also provided the court with draft language for "Diploma Privilege Plus," which included the requirement that applicants complete 240 hours of supervised legal practice within a year after graduation.²⁸¹

The Utah Supreme Court subsequently held a series of online meetings with the law schools, the head of the Utah State Bar's Admissions Office (a part of the mandatory state bar), members of the State Bar Admissions Committee, the State Bar's general counsel, and the president of the Utah State Bar to discuss the diploma privilege and proposed rule language changes. Although the head of the Utah State Bar Admissions Office, the Bar Admissions Committee, and the State Bar president opposed granting diploma privilege, the justices continued to work on revisions to the law schools' proposals, with input from the law schools and others.²⁸² On April 9, 2020, after a series of intense discussions,²⁸³ the Utah Supreme Court circulated a draft Order for public comment that would provide a path for licensure for some law

276. See Univ. of Utah L. Sch. Town Hall, *Diploma Privilege Town Hall*, YOUTUBE (June 9, 2020), <https://www.youtube.com/watch?v=KySjJForP9E> (referencing comments by Dean Elizabeth Kronk Warner).

277. Univ. of Utah L. Sch. Town Hall, *supra* note 276 (referencing comments by Dean Elizabeth Kronk Warner).

278. *Id.* (referencing comments by Dean Elizabeth Kronk Warner and Professor Louisa Heiny).

279. Memorandum from D. Gordon Smith, Dean, J. Reuben Clark L. Sch., et al., to the Utah Sup. Ct. 7-9 (Mar. 27, 2020) (on file with author).

280. *Id.* at 3-6.

281. *Id.* at 12-13.

282. Telephone Interview with Utah source, *supra* note 276.

283. See Univ. of Utah L. Sch. Town Hall, *supra* note 276 (referencing comments by Justice Deno Himonas and Justice John Pearce).

school graduates without a bar exam.²⁸⁴ The proposal would admit graduates of ABA-approved law schools with an eighty-six percent or higher first-time bar passage rate—which would include the graduates of the University of Utah and Brigham Young University Law Schools—so long as they performed 360 hours of supervised practice.²⁸⁵ The court’s explanation for the proposal focused on the unpredictability of when the bar exam could be safely offered, the disruption and uncertainty for the applicants, and to a lesser extent, the increased access to the justice gap created by COVID-19.²⁸⁶ After receiving more than 300 comments,²⁸⁷ including from law students,²⁸⁸ the court announced on April 21, 2020, that it would grant the diploma privilege to law school graduates with a Juris Doctor from ABA-approved law schools that had an overall first-time bar exam passage rate of eighty-six percent.²⁸⁹ Utah Supreme Court Chief Justice Matthew Durrant stated, “[b]ecause of the crisis, not only could we not guarantee that Utah could offer the bar examination safely, we could not tell applicants when they should start to invest the time and money to prepare for the exam.”²⁹⁰ Some justices also questioned the value of the bar exam, viewed it as discriminatory, and believed that the exam adversely affected access to justice.²⁹¹

2. Washington

Meanwhile, in Washington, law students began asking in March 2020 about plans for the July bar exam and started organizing. One of those students was Efrain Hudnell, the Seattle University Law School’s Student Bar Association (“SBA”) president, who became a co-founder

284. Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak 1-7 (proposed Utah Apr. 9, 2020) [hereinafter Utah Proposed Order]; see also *Utah Supreme Court Considers Waiver for 2020 Bar Examination*, UNIV. UTAH S.J. QUINNEY COLL. L. (Apr. 9, 2020), <https://law.utah.edu/news/utah-supreme-court-considers-waiver-for-2020-bar-examination>.

285. See Utah Proposed Order, *supra* note 284, at 1-2.

286. *Statement Accompanying Emergency Proposed Order* (Apr. 9, 2020), <http://www.utcourts.gov/utc/rules-comment/wp-content/uploads/sites/31/2020/04/Statement-Accompanying-Emergency-Proposed-Order.pdf>.

287. See Univ. of Utah L. Sch. Town Hall, *supra* note 276 (referencing comments by Justice John Pearce). This issue put out for comment sparked the most debate that the court had ever seen. *Id.* Justice Pearce noted that some of the comments in opposition expressed concern about having no test of competence. In addition, “a surprising number” simply viewed it as a rite of passage, and some were candid about it being a barrier to entry. *Id.*

288. The law schools encouraged students to tell their stories so that the court could see the reality with which they were dealing. See Telephone Interview with Utah source, *supra* note 276.

289. See Press Release, Utah Sup. Ct., *supra* note 273.

290. *Id.*

291. Univ. of Utah L. Sch. Town Hall, *supra* note 276 (comments by Justice Deno Himonas and Justice John Pearce). In addition, because the NCBE was not offering to provide an online bar exam at that time, at least one of the justices was concerned that Utah would have to deal with the logistics and expense of creating and grading its own exam if it wished to administer an online exam. See *id.* (comments by Justice John Pearce).

of United for Diploma Privilege.²⁹² On March 31, 2020, he and the SBA presidents from the states' other two law schools sent a notice of intent to circulate a petition, with a copy of the petition, to Washington Supreme Court Chief Justice Debra L. Stephens.²⁹³ They also sent a copy to the Washington State Bar Association (“WSBA”), which administered the bar exam.²⁹⁴ The petition asked the Washington Supreme Court to enact a diploma privilege scheme in lieu of the July 2020 bar.²⁹⁵ It stressed safety concerns, the disproportionate impact of COVID-19 on certain students, and access to justice arguments.²⁹⁶ In late March, Washington’s law school deans also reached out to Jean McElroy, the WSBA’s Chief Regulatory Counsel, to discuss the plans for the bar exam.²⁹⁷

Students then obtained signatures on the petition and presented it to the WSBA,²⁹⁸ whose Board of Governors was responsible for adopting bar admission policies.²⁹⁹ On April 17, students appeared at a WSBA Board of Governors meeting, which was attended by Supreme Court Justices, to advocate for diploma privilege.³⁰⁰ The Board of Governors also considered arguments in opposition by McElroy³⁰¹ and subsequently voted against a diploma privilege by a twelve-to-one vote.³⁰² After the vote, the students again wrote to the supreme court on April 20, 2020, raising health safety and fairness concerns, responding to issues raised in the WSBA meeting, and providing brief impact statements from applicants.³⁰³ At that point, the court asked for input from stakeholders. The WSBA president, its executive director, and regulatory counsel responded in a memo, explaining the plans for test

292. See *Croucher, Escontrias, Hudnell & Saadati-Soto on Diploma Privilege*, *supra* note 115; Stone, *supra* note 115.

293. Letter from L. Sch. Students & Graduates to Debra L. Stephens, C.J., Washington Sup. Ct. (Mar. 31, 2020) (on file with author). The letter was modeled after a letter and petition submitted to the State Bar of California. *Id.* at 1 n.1.

294. *Id.* at 1.

295. *Id.*

296. *Id.* at 1-2.

297. Telephone Interview with a L. Dean in Wash. (Aug. 27, 2020). McElroy oversaw the bar exam planning. *Id.*

298. See *WSBA Board of Governors Meeting Minutes* (Apr. 17, 2020), https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-minutes-2019-2020/board-of-governors-meeting-minutes-final-april-17-2020.pdf?sfvrsn=c62009f1_4.

299. See WASH. ADMISSION & PRAC. R. 2.

300. *WSBA Board of Governors Meeting Minutes*, *supra* note 298, at 4.

301. *Id.*

302. See Annette Clark, *Diploma Privilege and the Future of the Bar Exam*, GPSOLO (Nov./Dec. 2020), www.americanbar.org/gpsolo.

303. See Letter from L. Sch. Students to Debra L. Stephens, C.J., Washington Sup. Ct. (Apr. 20, 2020) (on file with author).

administration and its exploration of alternatives.³⁰⁴ The students provided the court with a detailed impact survey that contained almost 300 responses.³⁰⁵ The law school deans also wrote, stating that they did not view the diploma privilege as ripe for consideration, but instead advocated for a lower exam cut score.³⁰⁶ On May 15, 2020, the Washington Supreme Court entered an order to proceed with the administration of the in-person July bar exam and to also administer an in-person September exam.³⁰⁷ In addition, the court's order eased the temporary practice rule and reduced the cut score to 266.³⁰⁸

After George Floyd's death in late May, faculty at Seattle University School of Law, which was located in an area that experienced large protests, wanted the school to go back to the Washington Supreme Court and advocate for the diploma privilege.³⁰⁹ The faculty voted unanimously to support diploma privilege and on June 10, 2020, Dean Annette Clark wrote to Chief Justice Stephens stating that the entire faculty supported a diploma privilege.³¹⁰ Dean Clark pointed to the lost jobs and difficulty finding a place for applicants to study, and also to the impact of the protests due to "the senseless killings" of Black victims, which "have further affected our graduates, particularly those of color."³¹¹ She graphically described the impact of the events on applicants who had trouble sleeping, "with the sound of helicopters overhead, the thunder of flash bang grenades nearby, and the stench of tear gas drifting indoors."³¹² The letter reminded the court of its recent statement on racial justice and noted the challenges that applicants of color experience when taking the bar exam, as well as possible biases in testing.³¹³ Dean Mario Barnes of the University of Washington Law School separately communicated to the court his concerns for applicants dealing with recent police shootings and the national reckoning over

304. Memorandum from Rajeev Majumdar, President, Washington State Bar Ass'n, to the Washington Sup. Ct. (Apr. 23, 2020) (on file with author). At that time, there were 683 bar applicants. *Id.*

305. Memorandum from Washington L. Sch. Students & Graduates to Debra L. Stephens, C.J., Washington Sup. Ct. (Apr. 27, 2020) (on file with author).

306. Letter from the Washington L. Sch. Deans to Debra L. Stephens, C.J., Washington Sup. Ct. (Apr. 28, 2020), <https://www.gonzaga.edu/-/media/Website/Documents/Academics/School-of-Law/About/COVID-Info/Letter-to-WA-Supreme-Court6.ashx?la=en&hash=F41D3B1374B32D247E0855273C673DACF018D476>.

307. Order Temporarily Modifying Admission and Practice Rules at 1-2, No. 25700-B-623 (Wash. May 15, 2020).

308. *Id.*

309. Telephone Interview with a L. Dean in Wash., *supra* note 297.

310. Letter from Annette E. Clark, Dean, Seattle Univ. L. Sch., to Debra L. Stephens, C.J., Washington Sup. Ct. (June 10, 2020) (on file with author).

311. *Id.* at 1.

312. *Id.* at 1-2.

313. *Id.* at 3.

race.³¹⁴ He later stated “I was especially concerned that our most vulnerable graduates, to include those who are immunocompromised, persons in financial distress, and students from historically underrepresented backgrounds would be disproportionately negatively impacted if no diploma privilege were granted.”³¹⁵

Just two days later, on June 12, 2020, the Washington Supreme Court issued an order granting a diploma privilege “by majority” to anyone who graduated from an ABA-accredited law school and had registered for Washington’s July or September 2020 bar exam.³¹⁶ The court did not propose a rule in advance or seek public comment.³¹⁷ The court’s explanation for its decision was quite brief, noting only the “extraordinary barriers” facing bar applicants.³¹⁸ As Dean Clark noted, “I think what really tipped it was the killing of George Floyd and the unrest that happened after that.”³¹⁹ Some WSBA members were deeply unhappy about not being allowed an opportunity to express their views and some argued that the WSBA should ask the court for reconsideration,³²⁰ but it ultimately did not do so.

3. Oregon

In late June 2020, the Oregon Supreme Court followed Washington, granting the diploma privilege to certain 2020 graduates.³²¹ Representatives from the three Oregon law schools had begun meeting regularly with the Oregon State Bar Board of Bar Examiners (“OSBBE”) in March 2020 to discuss concerns about the bar exam, to think through options, and to identify ways in which the law schools might be helpful.³²² Law students were also asking questions which the

314. See Karen Sloan, *Second State Lets Law Grads Skip the Bar Exam Amid Covid-19*, LAW.COM (June 15, 2020, 3:42 PM), <https://www.law.com/2020/06/15/second-state-lets-law-grads-skips-the-bar-exam-amid-covid-19>.

315. *Id.* Gonzaga’s dean took no position. Gonzaga is in the eastern part of Washington, which is traditionally more politically conservative.

316. Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules at 1, No. 25700-B-630 (Wash. June 12, 2020). No justice wrote a dissenting opinion. See *id.*

317. Hugh Spitzer, *Washington’s Supreme Court Should Do All Its Business in the Sunshine*, SEATTLE TIMES (June 26, 2020, 4:07 PM), <https://www.seattletimes.com/opinion/washingtons-supreme-court-should-do-all-its-business-in-the-sunshine>.

318. Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules, *supra* note 316.

319. Sloan, *supra* note 314.

320. See WASH. STATE BAR ASS’N, BOARD OF GOVERNORS MEETING: REVISED LATE MEETING MATERIALS 42, 46-47, 55 (2020), https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-materials-2019-2020/board-of-governors-meeting-revised-late-materials-june-2020.pdf?sfvrsn=512909f1_4.

321. Order Approving 2020 Attorney Admissions Process, No. 20-012 (Or. June 30, 2020).

322. Telephone Interview with a L. Dean in Or. (Sept. 8, 2020). The Oregon State Bar Board of Bar Examiners (“OSBBE”) is administered through the Oregon State Bar. See OR. SUP. CT. R. ADMISSION ATTORNEYS 2.05.

law schools transmitted to the OSBBE.³²³ Although the deans were advocating for alternatives to the in-person exam, they were not seeking diploma privilege at that time.³²⁴ In mid-May, the OSBBE announced its plans to move forward with the in-person July 2020 bar and explained in a letter why it did not consider other options, including the diploma privilege, to be feasible.³²⁵ The OSBBE stated that it had had discussions with the Oregon State Bar (“OSB”), the Oregon Supreme Court, and Oregon law school deans, and rested its decision in large part on the fact that it was statutorily required to examine all applicants and its belief that it could administer the bar exam safely.³²⁶

Circumstances changed two weeks later, after the death of George Floyd, which was followed by large protests in Portland.³²⁷ Nevertheless, the OSBBE maintained that it lacked the power to do anything other than administer the bar exam and that only the legislature could remedy the situation.³²⁸ The law school deans, however, felt that it was unlikely for advocates to be able to get the legislature to act quickly and that the only recourse was the Oregon Supreme Court. They knew that the students were already working on a petition to the court, and asked them to hold off for a few days.³²⁹ On June 15, 2020, the three Oregon law deans wrote to the Oregon Supreme Court asking it to grant diploma privilege to anyone from an ABA-accredited law school who had applied to take Oregon’s July bar exam.³³⁰ The letter was also signed by ninety-seven Oregon law faculty members.³³¹ The letter noted the COVID-19 cases spiking to their highest level, the difficulties posed for the applicants, and the impact of the racial reckoning that summer, resulting in (at that time) eighteen straight days of protests in Oregon.³³² They also emphasized that the previous week, the Washington Supreme

323. Telephone Interview with a L. Dean in Or., *supra* note 322. The law students were not then advocating directly to the OSBBE.

324. *Id.*

325. Letter from the Oregon State Bd. of Bar Exam’rs to Oregon Legal Cmty. (May 15, 2020), https://www.osbar.org/_docs/admissions/BBXResponsetoDiplomaPrivilegeDiscussions.pdf.

326. *Id.*

327. See Gillian Flaccus, *Portland, Oregon, City of Protest, Reels from Nightly Chaos*, AP NEWS (June 3, 2020), <https://apnews.com/article/bf30b131c23b5292c9b07c29313a8c0e>. Protests also occurred elsewhere in Oregon. See Tatiana Parafiniuk-Talesnick, *Over 1,000 Gather for a Fifth Night Honoring George Floyd in Eugene*, REG.-GUARD (June 3, 2020, 12:01 AM), <https://www.registerguard.com/story/news/2020/06/03/over-1000-gather-for-fifth-night-honoring-george-floyd-in-eugene/42108975>; Connor Radnovich, *Thousands Gather at Oregon Capitol for Salem’s Largest George Floyd Rally*, STATESMAN J. (June 7, 2020, 10:21 AM), <https://www.statesmanjournal.com/story/news/2020/06/06/thousands-capitol-salem-george-floyd-rally-protest-police-oregon-police-reform/3163370001>.

328. Telephone Interview with a L. Dean in Or., *supra* note 322.

329. *Id.*

330. See Letter from the Oregon L. Sch. Deans to the Oregon Sup. Ct. 1 (June 15, 2020), <https://taxprof.typepad.com/files/oregon-deans.pdf>.

331. *Id.* at app.

332. *Id.* at 1-2.

Court had reversed its decision to proceed with the bar exam, and had granted the diploma privilege to certain applicants.³³³ That same day, more than 300 bar applicants and attorneys submitted a letter to the court asking it to grant diploma privilege.³³⁴ The letter echoed many of the deans' arguments and also asserted that “[t]he confluence of the viral pandemic and the response of civil unrest in the wake of racial injustice has made diploma privilege the only ethical and just path to licensure.”³³⁵ They included personal stories about the impact of recent events and a survey of the Oregon legal community demonstrating support for diploma privilege.³³⁶ The OSB and OSBBE opposed the idea, both because of the statutory requirement to test for competency and because “we could put consumers at risk.”³³⁷

On June 25, 2020, the Oregon Supreme Court announced that it would hold a public meeting to cover the letter from the deans “and others re: July 2020 Bar Exam,” but indicated it would not take public testimony.³³⁸ At the meeting on June 29, 2020, the court heard the recommendation of two justices who the Chief Justice had charged with researching the diploma privilege issue.³³⁹ By a four-to-three vote, the Oregon Supreme Court decided to grant diploma privilege to July bar applicants who were 2020 graduates of Oregon law schools and graduates from ABA-accredited law schools with a first-time bar pass rate of eighty-six percent or higher.³⁴⁰ In its order, the court noted as reasons only that the “spread of the COVID-19 virus represents an

333. *Id.* at 1. Like the Washington deans, the Oregon deans noted the Oregon Supreme Court’s previous recognition of the “tremendous impact on all of us, but especially on [individuals] . . . from communities of color . . .” *Id.* at 2. Likewise, the Oregon deans similarly noted that the graduates “can assist on the front lines of helping to address” the legal needs of Oregon citizens. *Id.* at 3.

334. Letter from Oregon L. Sch. Graduates & Attorneys to the Oregon Sup. Ct. & Oregon State Bd. of Bar Exam’rs (June 15, 2020), <https://s3.amazonaws.com/arc-wordpress-client-uploads/wweek/wp-content/uploads/2020/06/19124947/6.15.2020-Oregon-Bar-Applicant-and-Atty-Cl-and-Ltr-re-Diploma-Privilege.pdf>.

335. *Id.*

336. *Id.*

337. Nigel Jaquiss, *Oregon’s Law Schools Ask Supreme Court to Waive Bar Exam Due to COVID-19. The Bar Is Not Pleased.*, WILLAMETTE WK. (June 17, 2020, 12:50 PM), <https://www.wweek.com/news/2020/06/17/oregons-law-schools-ask-supreme-court-to-waive-bar-exam-due-to-covid-19-bar-not-pleased> (describing opposition by OSB); Cara Nixon, *Should Law Students Get a Pandemic Pass on this Year’s Bar Exam?*, CORVALLIS ADVOC. (June 20, 2020), <https://www.corvallisadvocate.com/2020/should-law-students-get-a-pandemic-pass-on-this-years-bar-exam> (describing opposition by OSBBE).

338. Press Release, Oregon Sup. Ct., Notice of Public Meeting (June 25, 2020), <https://www.courts.oregon.gov/news/Lists/ArticleNews/Attachments/1274/9023fc25635e634fa888c1763bbb745d-Bar%20Exam%20Public%20Meeting%20Press%20Release%20-%20AMENDED.pdf>.

339. Telephone Interview with a L. Dean in Or., *supra* note 322.

340. Order Approving 2020 Attorney Admissions Process, *supra* note 321. Although this percentage exceeded the bar passage rate of some of the Oregon law schools, it was justified on the theory that the justices knew the Oregon schools. *See id.* It also aligned with the standard applied in Utah. *See supra* note 289 and accompanying text.

extraordinary burden to applicants . . . and that that burden has had a significantly unequal impact on applicants.”³⁴¹ The Oregon Supreme Court also decided to offer a remote October exam and like Washington, temporarily reduced the bar exam cut score to 266.³⁴²

4. Louisiana

The story in Louisiana began much as it did in other states. The four law school deans wrote to the Louisiana Supreme Court in March 2020 offering to assist in its consideration of what to do about its three-day bar exam scheduled to begin on July 20, 2020.³⁴³ At the court’s request, the deans worked with the Louisiana Supreme Court’s Bar Admissions Advisory Committee to discuss the best way to handle the exam.³⁴⁴ The court was dealing with a “firestorm” of administrative issues and was looking to the Advisory Committee for recommendations.³⁴⁵ Like the deans in Washington and Oregon, the Louisiana deans did not advocate for diploma privilege from the outset, but they did mention it as one possibility as they were considering alternatives.³⁴⁶

Because Louisiana does not use any portion of the UBE, it could chart its own course. On May 8, 2020, the court and the Louisiana Supreme Court Committee on Bar Admissions (“LASCBA”)—its bar examiners—announced that in lieu of the three-day exam, a one-day bar exam would be held in four cities on July 27 and October 10.³⁴⁷ This would enable social distancing and allow applicants to avoid staying overnight in a hotel. On June 3, 2020, the court and LASCBA also provided applicants with the option to take a remote exam on the

341. Order Approving 2020 Attorney Admissions Process, *supra* note 321.

342. *Id.* The decision prompted an unfavorable editorial in Oregon’s largest newspaper. *Editorial: No Bar Exam, No Problem—Except for the Public*, OREGONIAN (July 1, 2020, 6:57 AM), <https://www.oregonlive.com/opinion/2020/07/editorial-no-bar-exam-no-problem-except-for-the-public.html>.

343. Telephone Interview with a L. Dean in La. (Aug. 26, 2020).

344. *Id.* The Advisory Committee typically includes a faculty member from each of the law schools who advises and assists the Louisiana Supreme Court Committee on Bar Admissions. *See* LA. R. SUP. CT. ADMISSION BAR XVII, § 10.

345. Telephone Interview with a L. Dean in La., *supra* note 343.

346. *Id.* In early April, however, more than a dozen Loyola law students sent a letter to the Louisiana Supreme Court asking that the July bar exam be cancelled and to consider granting diploma privilege. Andrea Gallo, *Louisiana Bar Exam Canceled Amid Statewide Coronavirus Increases, Law Grads Left Reeling*, NOLA.COM (July 15, 2020, 2:24 PM), https://www.nola.com/news/courts/article_ce7db356-c6ce-11ea-9612-532cc11385d3.html. The court did not directly respond.

347. Press Release, Louisiana Sup. Ct., The Louisiana Supreme Court and Louisiana Supreme Court Committee on Bar Admissions Announce Changes to July 2020 Bar Examination (May 8, 2020), https://www.lasc.org/Press_Release?p=2020-13.

previously announced dates, while maintaining the in-person options.³⁴⁸ Even though Louisiana was then experiencing protests following George Floyd's death,³⁴⁹ they did not immediately trigger further advocacy for diploma privilege. The protests did, however, prompt Chief Justice Bernette Joshua to send a letter to government leaders on June 8 that discussed the disproportionate impact of the pandemic on African Americans and called on leaders to "hear the voices of the protesters" and address inequalities in the justice system.³⁵⁰

Louisiana's governor announced additional mitigation measures on July 11, 2020, due to the rise of COVID-19 cases,³⁵¹ and on July 15, 2020, the supreme court announced that after consultation with LASCBA and the law school deans, it was cancelling the July 27 exam.³⁵² It noted the rate of infection had increased substantially, with each of the test sites chosen being in areas which had seen some of the highest infection rates.³⁵³ It further stated that the court would "meet soon to determine the next steps."³⁵⁴

The cancellation of the exam twelve days before it was scheduled shocked and angered applicants, who had been studying hard for the exam and were uncertain when it would be rescheduled.³⁵⁵ Two applicants immediately began to organize to advocate for diploma privilege, establishing a Facebook group named "United for Emergency Admission Louisiana chapter."³⁵⁶ The group contacted United for Diploma Privilege and obtained assistance in preparing an applicant impact survey to gauge the impact of the cancellation, and with other documents.³⁵⁷

348. Press Release, Louisiana Sup. Ct., The Louisiana Supreme Court and the Louisiana Supreme Court Committee on Bar Admissions Announce Online Bar Examination Option (June 3, 2020), https://www.lasc.org/Press_Release?p=2020-16.

349. See, e.g., Jessica Williams & Bryn Stole, *How Does a Community Balance Health, Protests? Masks, No Tear Gas Are Key, Officials Say*, NOLA.COM (June 8, 2020, 8:12 PM), https://www.nola.com/news/coronavirus/article_52634c92-a9b7-11ea-801b-c3377db8d1ee.html.

350. Letter from Bernette Joshua Johnson, C.J., Louisiana Sup. Ct., to Colleagues in the Jud., Exec., and Legis. Branches (June 8, 2020), <http://louisianajudgesnoir.org/wp-content/uploads/2020/09/6.8.20-Ltr-from-Chief-Justice-Bernette-Joshua-Johnson.pdf>.

351. See STATE OF LA. EXEC. DEP'T, 89 JBE 2020, COVID-19 PUBLIC HEALTH EMERGENCY ADDITIONAL PHASE 2 MITIGATION MEASURES (2020).

352. Press Release, Louisiana Sup. Ct., Announcement Regarding the July 27, 2020 Bar Examination (July 15, 2020), https://www.lasc.org/Press_Release?p=2020-19.

353. *Id.*

354. *Id.*

355. See Gallo, *supra* note 346.

356. See Emma Kennedy, *After Bar Exam Canceled, Louisiana Law Grads Will Appeal for 'Diploma Privilege;' Here's What That Means*, ADVOC. (July 17, 2020, 11:13 PM), https://www.theadvocate.com/baton_rouge/news/article_4cce5692-c84c-11ea-9ccd-ff7ae641b941.html.

357. Telephone Interview with La. Bar Applicant 1 (Aug. 26, 2020); Telephone Interview with La. Bar Applicant 2 (Aug. 26, 2020).

Meanwhile, the Louisiana law school deans wrote the Louisiana Supreme Court on July 16, 2020, in response to an invitation from the court, advocating for “emergency admission,” with additional educational requirements to ensure competence.³⁵⁸ The letter noted that the deans had written twice before that week to recommend some form of emergency admission and described the hardship the applicants had already undergone and the fact that the test had been canceled on short notice. They noted that a rescheduled exam would be “a test of the individual examinee’s circumstances, far more than their professional preparation and competence,” and that the burden would skew according to race, gender, age, and economic advantage, falling disproportionately on examinees of color, applicants with significant caregiving responsibilities, and non-traditional applicants.³⁵⁹ As one dean noted, “we didn’t view it as a privilege after what they had gone through. We called it a COVID emergency measure.”³⁶⁰

The next day, United for Emergency Admission of Louisiana submitted to the court a “brief” that was signed by about 190 bar applicants.³⁶¹ It echoed the arguments in the deans’ letter submitted the previous day. It also reported on the survey results from 170 of the 535 applicants registered for the July exam.³⁶² Of that group, 69.1% said they could not support themselves financially if they did not obtain licensure until the October 2020 bar exam.³⁶³ The president of the voluntary Louisiana State Bar Association (“LSBA”) asked the court to make its decision with “special consideration of the precariousness” of the applicants’ situation, although the LSBA did not expressly support emergency admission.³⁶⁴ LASCBA recommended against emergency admission.³⁶⁵

On July 22, 2020, the Louisiana Supreme Court decided by a four-to-three vote that it would grant emergency admission to first-time applicants who graduated from ABA-approved law schools with the additional requirement that they complete twenty-five hours of continuing legal education and the LSBA’s “Transition Into Practice”

358. See Letter from the Louisiana L. Sch. Deans to the Louisiana Sup. Ct. (July 16, 2020), <https://law.tulane.edu/sites/law.tulane.edu/files/Deans%20Letter%20on%20JULY2020%20BAR.pdf>. Some faculty also supported diploma privilege, but concluded it was preferable to let the deans advocate. Telephone Interview with La. Bar Applicant 1, *supra* note 357.

359. See Letter from the Louisiana L. Sch. Deans to the Louisiana Sup. Ct., *supra* note 358.

360. Telephone Interview with a L. Dean in La., *supra* note 343.

361. See Amicus Brief by United for Emergency Admission Louisiana (La. July 17, 2020) (on file with author). A handful of additional applicants indicated their law schools but signed as “anonymous.” *Id.*

362. *Id.* at 3-4.

363. *Id.* at 3.

364. Kennedy, *supra* note 356.

365. See Order of the Supreme Court of Louisiana (La. July 22, 2020), https://www.lasc.org/COVID19/Orders/2020-07-22_LASC_BarExam.all.pdf (Hughes, J., dissenting).

program.³⁶⁶ Due to a vacancy on the supreme court, Chief Justice Johnson had appointed an additional judge to vote, who along with the Chief Justice, voted in favor of emergency admission.³⁶⁷ The order stated that the court had considered input from LASCBA and the deans and noted the “unprecedented and extraordinary burden on applicants” registered for the July and October bar exams.³⁶⁸ Each of the three dissenting justices wrote an opinion, with one complaining that the move was an “overreaction” and that the court had ignored LASCBA’s “objective recommendations.”³⁶⁹ Another vehemently disagreed with the majority and asserted that today we “follow a small group of students who organized to advocate that they not be tested for minimal competency” and the “conflicted interests” of the Louisiana law school deans.³⁷⁰ That Justice noted that he feared “we may unintentionally be joining a broader effort to eliminate such high-stakes testing.”³⁷¹ Shortly after the supreme court issued its order, the LSBA president issued a message stating that she was “pleased” with how the court had resolved the issue, but stressed that the LSBA “was not involved and had no role in the decision.”³⁷²

V. THE POLITICS OF BAR ADMISSION

Case studies have limitations: they do not allow for rigorous systematic analysis of all the factors at work, or the interplay among factors, in every state.³⁷³ They can be useful, however, to help identify factors that can be studied later in a larger number of states, using quantitative methods. This Part therefore identifies some factors that seemingly affected decisions concerning the 2020 bar exam and considers what they might tell us about the regulators, the advocates, and the politics of bar admission.

366. *Id.* (majority opinion).

367. The Chief Justice appointed a retired judge, James Boddie, who was serving as a pro tempore. See Andrea Gallo & John Simerman, *A Supreme Court Justice Voted to Let Law Grads Forgo the Bar Exam. Among Them: His Daughter*, NOLA.COM (Aug. 7, 2020, 2:23 PM), https://www.nola.com/news/courts/article_c265f7fe-d8df-11ea-9e9e-3769a9dcf83b.html. One of the other justices who voted for emergency admission had a daughter who was a bar applicant. *Id.*

368. Order of the Supreme Court of Louisiana, *supra* note 365.

369. *Id.* (Hughes, J., dissenting).

370. *Id.* (Crain, J., dissenting). The third dissenting justice also “vehemently disagree[d]” and made essentially the same points. *Id.* (Genovese, J., dissenting).

371. *Id.* (Crain, J., dissenting).

372. Alainna R. Mire, *A Message from the LSBA President Regarding Emergency Admission to the Bar*, LA. STATE BAR ASS’N, <https://www.lsba.org/NewsArticle.aspx?Article=a4523cad-fb5b-4535-b0d1-1329f5e5225c> (last visited Oct. 13, 2021).

373. See Paul Brace et al., *Placing State Supreme Courts in State Politics*, 1 STATE POL. & POL’Y Q. 81, 83-84 (2001).

A. Courts as Regulators

In each case described above—except North Carolina—the highest court (or Chief Judge) ultimately decided how to handle the administration of the July 2020 bar exam. Their decisions cannot be entirely explained by differences in their bar applicant numbers or the in-state law schools' bar passage rates, although those factors played some role in some jurisdictions.³⁷⁴ Judicial decisions are also influenced by the external *political context* and *institutional arrangements*.³⁷⁵ Moreover, the state's *political culture* often plays some role. Each supreme court develops “its own understanding of its responsibilities—its particular jurisprudential orientation and attitude toward legal change”³⁷⁶ The discussion below considers how these factors seemingly influenced courts' decisions about the July 2020 bar exam.

1. Political Context (Broadly Defined)

Like all political actors, supreme court justices are a product of the political context in which they operate.³⁷⁷ There were two external political factors at play in the decision about administration of the July 2020 bar exam. As previously noted, attitudes toward COVID-19 were themselves politicized, especially early in the pandemic, with Republicans questioning the need to close down commercial activity. This seemingly helps to explain why several states with Republican leadership decided to stick with the July in-person exam as the only option.³⁷⁸ As one of the Republican dissenters to Louisiana's decision to grant diploma privilege complained, “[i]t is an overreaction, to the earlier overreaction to the virus, whereby the scheduled July bar examination was canceled.”³⁷⁹

The external political context also included the nationwide protests following George Floyd's death. Support for the protestors divided roughly along party lines, with Democrats supportive and Republicans much less so.³⁸⁰ Democratic Oregon and Washington experienced large

374. No state that granted applicants the diploma privilege had more than about 700 bar applicants. Yet the Montana Supreme Court would not risk the possibility of admitting even fifteen applicants who might not pass the bar on the first attempt. *See* Order at 5, No. AF 11-0244 (Mont. July 14, 2020), <https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=321470> [hereinafter Order of the Supreme Court of Montana].

375. Brace et al., *supra* note 373, at 84.

376. G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 237 (1988).

377. Brace et al., *supra* note 373, at 99.

378. *See supra* notes 130-33 and accompanying text.

379. *See* Order of the Supreme Court of Louisiana, *supra* note 365 (Hughes, J., dissenting).

380. *See* Amber Phillips, *The Difference Between Democratic and Republican Reactions to the Protests: Elevate George Floyd or 'Antifa'?*, WASH. POST (June 1, 2020),

statewide protests and their supreme courts' decisions to grant the diploma privilege were affected, in part, by those events.³⁸¹ In Louisiana, the court's order granting diploma privilege did not mention the protests, but they were probably on the mind of Chief Justice Johnson, a Black Democrat who had authored a letter to state leaders the previous month asking them to "hear the voices of the protestors."³⁸² Yet this political backdrop is by no means a full explanation for these courts' decisions. Democratic Minnesota and New York experienced weeks of large public protests and did not grant applicants the diploma privilege.

Another political factor—which was internal to the legal profession itself—was the long-running debate over the value of the bar exam. Some Utah Supreme Court justices already harbored concerns about the fairness of the exam to minorities and were willing to quickly grant diploma privilege in a state where the bar pass rate by in-state law school graduates exceeded eighty-five percent. Arguments about minority performance on the exam and test bias may have had particular salience in Washington when coupled with the impact of the street protests over racial inequality. Yet in New York, where the NYSBA had just concluded in its March 2020 report that the UBE was inadequately preparing applicants for New York practice, the argument to forego the exam was probably doomed. Applicant advocacy through state chapters of United for Diploma Privilege and statements by some law faculty triggered concerns among some justices and bar examiners that the 2020 diploma privilege initiative was part of a larger effort to abolish the bar exam.³⁸³

The political context also included the supreme courts' observations of how other states were handling the administration of their July 2020 bar exams. States have long emulated other states' policies through a process known as policy diffusion.³⁸⁴ This process is affected by many variables and can occur through mechanisms including imitation and learning.³⁸⁵ Diffusion can be seen in several states' responses to the

<https://www.washingtonpost.com/politics/2020/06/01/difference-between-democratic-republican-reactions-protests-elevate-george-floyd-or-antifa>.

381. See *supra* notes 309, 318-19, 327, 341 and accompanying text.

382. Letter from Bernette Joshua Johnson to Colleagues in the Jud., Exec., and Legis. Branches, *supra* note 350; see Order of the Supreme Court of Louisiana, *supra* note 365.

383. See *supra* text accompanying note 203. One of the Louisiana dissenters also noted: "I fear we may unintentionally be joining a broader effort to eliminate such high-stakes testing." See Order of the Supreme Court of Louisiana, *supra* note 365 (Crain, J., dissenting.). Another dissenter expressed similar concerns. *Id.* (Genovese, J., dissenting).

384. See Lawrence J. Grossback et al., *Ideology and Learning in Policy Diffusion*, 32 AM. POL. RSCH. 521, 521 (2004).

385. See Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841-43 (2008); see also Tiffany Bergin, *How and Why Do Criminal Justice Public Policies Spread Throughout U.S. States? A Critical Review of the Diffusion Literature*, 22 CRIM. JUST. POL'Y REV. 403, 416 (2011). Scholars are still attempting to identify all the factors that affect

District of Columbia's decision in early June 2020 to offer the online exam, which was followed by Maryland, and the announcement that the two jurisdictions had worked out reciprocity.³⁸⁶ Eleven other states emulated those jurisdictions, offering the remote bar exam and affording reciprocity to test-takers from other states taking that exam.³⁸⁷ Policy diffusion is often seen in geographically proximate states,³⁸⁸ which may help explain why twelve of the thirteen jurisdictions that granted reciprocity for the remote exam were east of the Mississippi River.³⁸⁹ Similarly, Oregon's decision to grant emergency diploma privilege was seemingly affected by the decision of its larger neighbor in Washington.³⁹⁰ Montana rejected the diploma privilege, noting the bar examiners' argument that neighboring states were requiring an in-person exam.³⁹¹ Likewise, when the Nebraska Supreme Court denied a request to grant diploma privilege, it cited to Missouri's decision reaching the same conclusion.³⁹² Some other courts that denied the diploma privilege looked to the fact that most states had denied the request.³⁹³ When supreme courts were dealing with so many other issues, they could take comfort (over cover) from the fact that most other courts had taken the more familiar approach and required a bar examination.

2. Institutional Arrangements and Relations (with Bar Examiners and the Bar)

At a time when the supreme courts were addressing so many other challenges, they relied heavily on the judgments of their usual decisionmakers to determine what to do about the July 2020 bar exam.

diffusion. See Bruce A. Desmarais et al., *Persistent Policy Pathways: Inferring Diffusion Networks in the American States*, 109 AM. POL. SCI. REV. 392, 393-94 (2015).

386. Telephone Interview with Bar Regul. (July 20, 2020).

387. See *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 118. Three additional states also offered the NCBE's remote exam but did not afford reciprocity. *Id.*

388. See Bergin, *supra* note 385, at 405.

389. See *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 118.

390. Telephone Interview with a L. Dean in Or., *supra* note 322. States' reactions to innovative policies can also depend on their partisan affiliation. See Andrew Karch et al., *Policy Diffusion and the Pro-Innovation Bias*, 69 POL. RSCH. Q. 83, 86-87 (2016). This may help explain why Idaho (with Republican leadership), which adjoins Oregon and Washington, rejected a petition for diploma privilege. See Letter from Roger Burdick, C.J., Idaho Sup. Ct., to Members of the Idaho State Bar (July 20, 2020), <https://isc.idaho.gov/files/bar-exam.pdf>.

391. See Order of the Supreme Court of Montana, *supra* note 374, at 5.

392. See Order at 3-4, No. S-20-0495 (Neb. July 11, 2020) ("We agree with our colleagues in Missouri who recently denied a similar petition . . .").

393. See, e.g., Order at 3-4, No. ADKT 0558 (Nev. August 5, 2020), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F276NV> (stating that supreme court is not persuaded it should join the "small number of states" that have granted diploma privilege); Case Announcements at 2, No. 2020-0829 (Ohio July 28, 2020), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F273> (stating that supreme court "agrees with our colleagues in other jurisdictions" who recently denied diploma privilege).

The state bar examiners were working extremely hard to develop plans for exam administration under highly uncertain conditions. The courts were grateful and depended on their efforts. Some courts may have had a tradition of deferring to their boards' judgments and others may have done so during the pandemic out of necessity. In Minnesota, the MBLA appeared to be making the initial decisions in consultation with the Minnesota Supreme Court, and after the applicants filed their petition with the court, the court relied heavily on the MBLA's representations about the safety precautions it had taken for the in-person exams.³⁹⁴ The Delaware Supreme Court also relied heavily on its bar examiners when it rescheduled and then cancelled the exam.³⁹⁵ Some other supreme courts that considered diploma privilege requests seemingly afforded the bar examiners' recommendations substantial weight when declining those requests.³⁹⁶

In some states, the courts were also seemingly responsive to the state bar's interests. In Delaware, the supreme court and the DBBE no doubt shared with the close-knit state bar the desire to preserve Delaware's reputation for having an elite bar with notoriously difficult admission requirements.³⁹⁷ A remote exam, in addition to posing administrative challenges, would not be as rigorous as the in-person exam and also increased the possibility of cheating.

In New York, the Chief Judge seemingly relied on the voluntary NYSBA's recommendations rather than the NYBOLE.³⁹⁸ This differed from the approach of her predecessor, Chief Judge Jonathan Lippmann, who had disregarded the recommendations of the NYSBA when he decided five years earlier that New York would adopt the UBE.³⁹⁹ Chief Judge DiFiore may have relied on the NYSBA Task Force's views because it had very recently studied the New York bar exam and the court was triaging other issues. She may have been particularly disposed

394. See Order Denying Petition for Proposed Temporary Waiver of Bar Examination Requirement and Provision of Emergency Diploma Privilege, *supra* note 204, at 2.

395. See Press Release, Sup. Ct. of Delaware, *supra* note 264 (noting that "the Court and the Board believe that cancelling the in-person exam is the only way to protect the health and safety" of the applicants and others participating in the exam).

396. See *e.g.*, Order of the Supreme Court of Montana, *supra* note 374, at 1-5 (relying heavily on arguments and assertions of Montana Board of Bar Examiners); *Clerk of Court's Statement Regarding July Bar Examination*, MO. CTS. (July 9, 2020), <https://www.courts.mo.gov/page.jsp?id=161854> (noting that "the Court and the Board [of Law Examiners] have sought to balance the needs of this year's law school graduates" and that the court and the Board had evaluated the alternatives); Karen Sloan, *Pennsylvania High Court Rejects Calls for Diploma Privilege*, LAW.COM (Aug. 10, 2020, 2:03 PM), <https://www.law.com/thelegalintelligencer/2020/08/10/pennsylvania-high-court-rejects-calls-for-diploma-privilege> (noting that the Pennsylvania Board of Law Examiners' "considered opinion, which the court shares," is that it would not be "appropriate" to put in place a diploma privilege).

397. See Krebs, *supra* note 249.

398. See *supra* notes 239-41 and accompanying text.

399. See FIRST NYSBA TASK FORCE REPORT, *supra* note 208, at 11-17.

to rely on its recommendations because Justice Scheinkman, apparently a friend of DiFiore's,⁴⁰⁰ chaired the Task Force. Even in July 2020, when the court was deciding what to do about offering a remote exam or diploma privilege, the NYBOLE took no position on the remote exam issue. The Chief Judge instead relied on a four-person Working Group she appointed, which issued its written report so quickly that its recommendations may have been a foregone conclusion.⁴⁰¹

Of course, not all of the state supreme courts relied on their state bars' views. The Minnesota Supreme Court sided with its bar examiners rather than the views expressed by the voluntary MSBA.⁴⁰² In Utah, Oregon, and Washington, where the mandatory state bars had responsibility for bar admission, the courts ultimately discounted the state bars' views. For example, the Washington Supreme Court knew that the WSBA's Board of Governors had opposed the diploma privilege in April 2020 but granted diploma privilege in June without seeking additional input from the WSBA Board of Governors.⁴⁰³ Likewise, the Utah and Oregon Supreme Courts granted a diploma privilege notwithstanding opposition by the state bars.⁴⁰⁴ Why did this occur?

3. Political Culture

States are culturally and politically different. The political culture of a state is affected by historic migration settlement patterns, with settlers of different ethnic and religious backgrounds molding the community's perception of the purpose of politics and directing the ways in which politics is practiced.⁴⁰⁵ Political culture is distinct from political ideology⁴⁰⁶ and has been used to help explain differences in institutional structures, political processes, and policies in states and local governments.⁴⁰⁷ Daniel Elazar identified three dominant cultures within

400. See Dan Murphy, *Pressure Continues on Dems to Support Young DiFiore for Judge*, YONKERS TIMES (Oct. 18, 2018), <https://yonkerstimes.com/pressure-continues-on-dems-to-support-young-difiore-for-judge>.

401. See *supra* notes 234, 240-41 and accompanying text.

402. See *supra* notes 199-204 and accompanying text.

403. See *supra* notes 301-02, 316-17, 320 and accompanying text.

404. See *supra* notes 282, 325, 337, 340 and accompanying text.

405. Russell L. Hanson, *Liberalism and the Course of American Social Welfare Policy*, in THE DYNAMICS OF AMERICAN POLITICS: APPROACHES AND INTERPRETATIONS 132, 138 (Lawrence C. Dodd & Calvin Jillson eds., 1994); Patrick I. Fisher, *Definitely Not Moralistic: State Political Culture and Support for Donald Trump in the Race for the 2016 Republican Presidential Nomination*, 49 POL. SCI. & POL. 743, 744 (2016); Joel Lieske, *The Changing Regional Subcultures of the American States and the Utility of a New Cultural Measure*, 63 POL. RSCH. Q. 538, 540 (2010).

406. Patrick Fisher, *State Political Culture and Support for Obama in the 2008 Democratic Presidential Primaries*, 47 SOC. SCI. J. 699, 703 (2010). States with any of the three subcultures mentioned above can be liberal or conservative. For example, Utah and Minnesota are both categorized as moralistic states. Fisher, *supra* note 405, at 744.

407. See, e.g., Lieske, *supra* note 405, at 538.

the United States, which he labeled moralistic, individualistic, and traditionalistic.⁴⁰⁸ Each is tied to specific areas of the country.⁴⁰⁹ In the moralistic political culture, which is found in some Western and upper Great Lakes states, politics is viewed as a positive activity in which citizens have an obligation to participate, and “[g]ood government is measured by the degree to which it promotes the public good.”⁴¹⁰ Individualistic political culture, which is associated with some of the Rocky Mountain, Midwest, and mid-Atlantic states, is based on a more utilitarian view that politics should work like a marketplace and places a premium on limiting government intervention into private activities.⁴¹¹ Traditionalistic political culture, found in many Southern states,⁴¹² accepts the inevitability of a hierarchical society and tries to limit the role of government to maintaining the existing social order.⁴¹³ While immigration, internal migration patterns, and differential rates of racial and ethnic fertility are altering these subcultures,⁴¹⁴ they still seem to have some explanatory power.⁴¹⁵

It may not be a coincidence that three of the four states that granted diploma privilege—Oregon, Utah, and Washington—have mostly moralistic political cultures.⁴¹⁶ Indeed, Utah, with its heavily Mormon population, is arguably the most moralistic state in the country.⁴¹⁷ There are two aspects of moralistic political cultures that may help explain those states’ decisions.

First, in moralistic political cultures, government service places moral obligations on public officials.⁴¹⁸ In Utah, some justices were

408. DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 115 (3d ed. 1984). He also labeled some states as a mixture of subcultures, such as moralistic/individualistic (meaning closer to moralistic) and individualistic/moralistic (meaning closer to individualistic). *Id.* at 136-37.

409. Fisher, *supra* note 405, at 744.

410. *Id.*

411. Fisher, *supra* note 406, at 702-03.

412. Lawrence M. Mead, *State Political Culture and Welfare Reform*, 32 *POL’Y STUD. J.* 271, 275 (2004).

413. Fisher, *supra* note 406, at 702.

414. See Lieske, *supra* note 405, at 547; David R. Morgan & Sheilah S. Watson, *Political Culture, Political System Characteristics, and Public Policies Among the American States*, *PUBLIUS J. FEDERALISM*, Fall 1991, at 31, 41.

415. See Fisher, *supra* note 406, at 703; Oguzhan Dincer & Michael Johnston, *Political Culture and Corruption Issues in State Politics: A New Measure of Corruption Issues and a Test of Relationships to Political Culture*, 47 *PUBLIUS J. FEDERALISM* 131, 143 (2017); Marc S. Mentzer, *Attitudes Toward Employee Rights Among the States: Why Vermont Is Not Like Mississippi*, 36 *BUS. & PRO. ETHICS J.* 67, 74-75 (2017). Scholars have suggested that political culture should not be viewed as causal. See Morgan & Watson, *supra* note 414, at 39. Rather, it provides contextual force in which to analyze public policy outcomes. *Id.* at 39, 45.

416. Oregon and Utah are moralistic while Washington is moralistic/individualistic, meaning it leans more heavily toward moralistic. Mead, *supra* note 412, at 275.

417. See *id.*; Fisher, *supra* note 405, at 744-45.

418. ELAZAR, *supra* note 408, at 117. Arguably, in a moralistic political culture, concerns about the public welfare could have resulted in the view that maintaining the exam requirement was

deeply concerned about the possibility that applicants might become ill as a result of being required to sit for the bar exam.⁴¹⁹ In Utah, advocates also expressly raised the fairness of the exam. This resonated with some justices on the Utah Supreme Court—the first to grant diploma privilege—who had serious questions about the fairness of the exam to minority test takers. So, too, did advocates’ suggestion that admitting applicants through diploma privilege would increase the number of lawyers available to serve clients of limited means. In Washington and Oregon, advocates expressly appealed to concerns about racial justice and fairness, with Oregon applicants arguing that diploma privilege was “the only ethical and just path to licensure.”⁴²⁰ The Washington Supreme Court’s order referenced the “extraordinary barriers” facing applicants while the Oregon court noted that COVID-19 “has had a significantly unequal impact on applicants.”⁴²¹

Second, public officials in states with moralistic political cultures are more likely to adopt innovations and reforms.⁴²² As previously noted, Utah has been at the forefront of lawyer regulatory reform and has been actively encouraging experimentation with new business models for the provision of legal services.⁴²³ Its openness to innovation may help explain why it was the first state to adopt diploma privilege in response to the challenges presented by COVID-19. The Washington Supreme Court has also proved to be innovative in lawyer regulation as it was the first state to approve the licensing of limited license legal technicians, notwithstanding the objections of some of the organized bar.⁴²⁴

Again, political culture is noted because it seemingly provides context for some courts’ decisions but is by no means a complete explanation. The Louisiana Supreme Courts’ decision granting the diploma privilege occurred in a state with a traditionalistic/individualistic political culture,⁴²⁵ with one of the dissenters referring to the bar exam as “sacrosanct.”⁴²⁶ Minnesota has a

needed to protect the public. But the Utah Supreme Court may have viewed increasing access to justice as more important to the public welfare than the need to protect clients from a few applicants who might not be competent.

419. Telephone Interview with Utah source, *supra* note 276.

420. *See supra* notes 335 and accompanying text.

421. *See supra* notes 318, 341 and accompanying text.

422. Fisher, *supra* note 405, at 745 (noting the “reformist, inclusive, good government nature of moralistic subcultures”); Morgan & Watson, *supra* note 414, at 34; *see also* ELAZAR, *supra* note 408, at 118.

423. *See supra* note 275 and accompanying text; Dan Packel, *Utah Justices Give OK to ‘Regulatory Sandbox,’* AM. LAW. (Aug. 14, 2020, 10:26 AM), <https://www.law.com/americanlawyer/2020/08/14/utah-justices-give-ok-to-regulatory-sandbox>.

424. *See* Levin, *supra* note 3, at 1007.

425. Mead, *supra* note 412, at 275.

426. *See* Order of the Supreme Court of Louisiana, *supra* note 365 (Genovese, J., dissenting).

mostly moralistic political culture,⁴²⁷ but insisted on administering two in-person bar examinations. As the case studies reveal, many other factors also came into play when courts decided how to handle the July 2020 bar exam.

B. Bar Examiners and the NCBE

The state bar examiners all took the same view when it came to decisions about the July 2020 bar exam: their job was to protect the public from unqualified applicants. They are legally required to administer a bar examination and they often cited to that requirement to explain their decisions. None of the bar examiners supported dispensing with a bar exam.

The bar examiners' views were likely reinforced by their relationships with the NCBE, which had its own reasons for opposing diploma privilege.⁴²⁸ The NCBE regularly supports the bar examiners, supplying them with all or parts of the UBE, training bar examiners to grade the exams, performing character and fitness inquiries, organizing annual meetings for bar examiners, and providing other services.⁴²⁹ Some of the state bar examiners interact even more closely with the NCBE, serving on its Board of Trustees or on one of its many policy committees.⁴³⁰ Thus, the state bar examiners made their recommendations about the July 2020 bar exam from a similar, and very particular, perspective.

In light of this perspective, the North Carolina experience raises questions about the wisdom of states delegating so much authority to bar examiners who are largely insulated from judicial review. Under these circumstances, the NCBE could be expected to stick to only offering the July in-person exam. A second exam would have required significant additional work for the NCBE, but there was no institution exercising oversight authority that might have encouraged the NCBE to consider it. Admittedly, the law school deans were not advocating for alternatives, but law professors and some lawyers were doing so. Due to the absence of judicial or legislative oversight, the NCBE's lawyer could largely insulate the NCBE from applicants' advocacy, and the

427. See *supra* note 406.

428. The NCBE benefits financially from its UBE. It opposed diploma privilege both in its white paper and during the ABA's House of Delegates debate over the resolution that identified the diploma privilege as one option for addressing the challenges of bar exam administration during the pandemic. See NAT'L CONF. BAR EXAM'RS, *supra* note 81, at 2-4; Sloan, *supra* note 105.

429. See 2020 YEAR IN REVIEW, *supra* note 79, at 4, 7, 10, 15-16, 18, 20.

430. See, e.g., *id.* at 11; see *supra* text accompanying note 244. Six of the NCBE's thirteen Board of Trustees members are currently executive directors or board members of their state bar examining committees. See 2020 YEAR IN REVIEW, *supra* note 79, at 22.

NCBLE could decline to even give the appearance of considering applicants' arguments.

C. State Legislatures

For many years, the organized bar has resisted regulation by the legislature, believing that the courts are better at protecting lawyers' interests.⁴³¹ Bar applicants, however, were challenging those interests, and sometimes turned to the legislatures for assistance. It was typically lawyer-legislators who became involved. In New York, a few state legislators went so far as to introduce bills and hold a public meeting.⁴³² A Pennsylvania state senator introduced diploma privilege bills, and in Arizona and Maryland, individual legislators expressed support for diploma privilege.⁴³³ The bills never advanced, and in most states, the legislatures stayed in their lanes and did not tread on the courts' claimed prerogative to determine the rules for bar admission.

Nevertheless, state legislators' willingness to become involved at all seems on its face somewhat surprising, because the public would arguably be at risk if graduates were admitted without passing a bar exam. Yet interest group theory suggests that this conduct by legislators could be predicted because bar applicants constituted an interest group with strong interests and the public was not advocating on this issue.⁴³⁴ In fact, some public interest organizations advocated for diploma privilege, arguing that it would increase the diversity of the profession and access to justice.⁴³⁵ Moreover, the lawyer-legislators who became involved may have identified with the applicants' plight and shared their skepticism about the bar exam. It appears, however, that any significant

431. See Rigertas, *supra* note 87, at 68-69, 71.

432. See *supra* notes 228-30, 243 and accompanying text.

433. See Heather L. Williams, *Maryland General Assembly Members Urge the State Court of Appeals to Allow New Law School Graduates to Practice Without Passing the Bar Exam*, LEXOLOGY (Aug. 17, 2020), <https://www.lexology.com/library/detail.aspx?g=327b6757-7212-435a-aa6b-3d0a008bb06a>; Anne Ryman, *Lawmakers Join Push to Delay This Month's Arizona Bar Exam*, ARIZ. REPUBLIC, July 9, 2020, at 1, [https://1.next.westlaw.com/Document/Ie1055260c1c211ea92a2f6688eb00542/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.Search\)&userEnteredCitation=2020+WLN+19078232](https://1.next.westlaw.com/Document/Ie1055260c1c211ea92a2f6688eb00542/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=2020+WLN+19078232); Karen Sloan, *Pa. Diploma Privilege Bill Is a Hail Mary Pass for Law Grads*, LAW.COM (Sept. 24, 2020, 6:32 PM), <https://www.law.com/thelegalintelligencer/2020/09/24/pa-diploma-privilege-bill-is-a-hail-mary-pass-for-law-grads>.

434. See Levin, *supra* note 3, at 979.

435. See Pub. Rts. Project, *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, MEDIUM (Aug. 11, 2020), <https://medium.com/@publicrightspjct/an-open-letter-from-public-interest-legal-organizations-supporting-diploma-privilege-20390dd50a8e>.

involvement by state legislators is unlikely to continue beyond the pandemic.⁴³⁶

D. Law School Deans and Faculty

Many law school deans and faculty were quite vocal on issues relating to the administration of the July 2020 bar exam. They were often able to garner regulators' attention for the need for quick action. Their advocacy gave credibility to applicants' representations about the difficult circumstances they were facing. They supplied counter-narratives to the bar examiners' representations about the exam's fairness and the plans for the exam.⁴³⁷ While the deans who advocated for diploma privilege did not always succeed in their efforts, it was only granted in states where the deans—and sometimes faculty—spoke out forcefully. When the deans were near-silent (in North Carolina and Delaware), applicants were stuck with the July in-person exam or with no exam at all.

What made law school deans speak out for the diploma privilege? They had all seen up close what their students had gone through—the illnesses and deaths in their families, the financial insecurity, and the other stressors—during their last semester of law school. Utah was a special case, because the deans had reason to believe its supreme court might be open to arguments for diploma privilege. But many other deans did not start out advocating hard (or at all) for diploma privilege. They knew it was a big—and possibly unattainable—request and may not have wanted to risk their credibility. Following George Floyd's death, however, they learned of the impact that the events had on their graduates of color, in particular, and were aware that Utah had already granted diploma privilege. In some cases, law faculty, after hearing from graduates, encouraged deans to advocate for diploma privilege. And, of course, deans had an obvious interest in making their graduates feel supported. These applicants were new alumni from whom the deans would someday be soliciting funds.⁴³⁸

But some deans were seemingly silent on the diploma privilege issue. The dean of Widener University Delaware Law School—the state's only law school—may have been reluctant to speak out in a small

436. Even in North Carolina, where the legislature has delegated power to the NCBLE, it has not shown interest in reviewing the NCBLE's activities, notwithstanding calls to do so. *See* Letter from Phillip E. Berger, Jr., Assoc. J., North Carolina Ct. of Appeals, to North Carolina Legis. Leaders (July 17, 2020) (on file with author).

437. *See, e.g.*, Letter from Deborah Jones Merritt, Professor, Ohio State Univ. Moritz Coll. of L., to Mary Ellen Barbera, C.J., Maryland Ct. App. (Aug. 23, 2020) (on file with author).

438. One Louisiana diploma privilege dissenter (correctly) noted the "conflicted interests" of the deans in their advocacy for diploma privilege. *See supra* note 370 and accompanying text.

legal community that took pride in its difficult admission standards. He may have even shared the community's interest in maintaining the Delaware bar's reputation. In Washington, Gonzaga's dean did not join with the other two Washington deans in calling for diploma privilege, possibly because of concerns about the legal community's response in the more conservative eastern part of the state. In North Carolina, where with one exception, the deans did not publicly support additional alternatives to the in-person July exam, it is conceivable that the deans could not reach agreement on an approach or believed that advocacy would be futile. And of course, some deans may not have spoken out because they did not believe there should be any changes in the plans for the July 2020 exam.

As a practical matter, even when the deans spoke out, the courts responded differently to their input. For example, deans worked with the Utah Supreme Court to help craft a diploma privilege.⁴³⁹ The Oregon Supreme Court cited the letter from the deans (and others) as the reason it held a hearing on the diploma privilege issue.⁴⁴⁰ Likewise, the two Washington deans' voices appear to have been highly persuasive as were the Louisiana deans, who included a former appellate court judge.⁴⁴¹ Yet in New York, notwithstanding the fifteen deans' extensive public advocacy, the group never got an audience with the Chief Judge or even a direct written response. These experiences reveal that the state supreme courts have different norms with respect to their accessibility and different views about the value of input from legal academics on issues pertaining to bar admission.

E. Bar Applicants

In most states, a sizable number of bar applicants engaged in some advocacy in connection with the July 2020 bar exam. Although some worried about repercussions, many were willing to take on the bar examiners and the courts to publicly advocate for changes. Applicants used both traditional advocacy methods (filings in courts, lobbying legislatures, media appearances) and less conventional methods (social media, Change.org petitions). Yet the fact that they advocated so publicly and attempted to garner support from so many political actors

439. See Telephone Interview with Utah Source (Aug. 21, 2020) (noting that the diploma privilege occurred because of the strength of personal relationships and the justices' knowledge of the law schools).

440. Press Release, Oregon Sup. Ct., *supra* note 338.

441. See *Madeleine Landrieu*, LOY. UNIV. NEW ORLEANS, <https://law.loyno.edu/academics/faculty-and-staff-directory/madeleine-landrieu> (last visited Oct. 13, 2021) (noting that Dean Madeleine M. Landrieu was a former circuit court of appeals judge).

was unusual in the realm of lawyer regulation. In their advocacy, bar applicants drew on some of the strategies seen in social movements.

Indeed, in several jurisdictions, applicants drew on the insights and rhetoric of the Black Lives Matter movement, employing narratives of inequality when describing the impact of COVID-19 and the protests on applicants of color. The applicants mobilized elite support by reaching out to law deans, faculty, and occasionally bar associations, to help them with their advocacy. This dynamic could be seen in jurisdictions like Oregon, where applicants mirrored the deans' arguments, and where the law schools transmitted applicants' questions and concerns to regulators.⁴⁴² While most bar applicants were concerned with their own circumstances, some viewed themselves as engaged in an ongoing movement and intend to advocate for changes in bar admission and in the legal profession even after they are admitted to the bar.⁴⁴³

VI. CONCLUSION

What does this examination of the events surrounding the July 2020 bar exam teach us more generally about the politics of bar admission? It is not surprising that during a pandemic, most state supreme courts were reactive rather than proactive. But even under normal circumstances, this is often true of lawyer regulation. Due to the many other pressing demands on supreme courts' time, they often rely on other actors to help them with their decision-making. In the case of the July 2020 bar exam, they mostly relied on the bar examiners. Mandatory bars with responsibilities for bar admission like North Carolina, Oregon, Utah, and Washington fell in line behind the recommendations of their bar examiners. Deans and faculty mostly supported the applicants who were advocating for changes. State legislators mostly stayed on the sidelines. As is often true of lawyer regulation, the public was uninvolved in the process.⁴⁴⁴

These events can also be seen as a case study of policy change. Faced with the enormous challenges presented by the pandemic, many state Supreme Courts responded with narrow, technical decisions recommended by elites (the lawyer-dominated bar examining

442. See *supra* notes 334-35, 323 and accompanying text.

443. See Karen Sloan, *Amid COVID-19, the Bar Exam Faces a Reckoning and a Revamp*, LAW.COM (Dec. 4, 2020, 11:26 AM), <https://www.law.com/2020/12/02/amid-covid-19-the-bar-exam-faces-a-reckoning-and-a-revamp>. In fact, United for Diploma Privilege organizers have changed the name of the organization to National Association for Equity in the Legal Profession and plan to also advocate for ways to increase diversity in the profession and for changes to the law school curriculum. *Id.*; NAT'L ASS'N FOR EQUITY LEGAL PRO., <https://www.na4elp.org> (last visited Oct. 13, 2021).

444. See, e.g., Levin, *supra* note 3, at 1031.

committees).⁴⁴⁵ To the extent possible, policymakers tried to avoid debate as they attempted to preserve the status quo or make as few changes as possible. The Delaware Supreme Court, in order to preserve its rigorous admission standards, ultimately canceled the exam. In New York and North Carolina, advocates struggled to even meet with decisionmakers. But the Utah Supreme Court's decision to grant diploma privilege presented a window of opportunity for advocates in other jurisdictions to credibly call for more significant changes.⁴⁴⁶ Once the protests over racial inequality began in May 2020, they transformed the conversation, and advocates could push an agenda that some had long wanted to advance: to address racial inequality in bar admission standards and challenge the importance, fairness, and validity of the bar exam. The temporary changes in bar admission standards in 2020 may have created a window of opportunity for continuing advocacy for alternatives to the bar exam.

The case studies also raise many questions. For example, what role, if any, does political affiliation or ideology play in decisions about lawyer regulation? Why are some courts more open to regulatory change than others? What role does diffusion play in lawyer regulation? Does the size of the applicant pool or the number of lawyers in the jurisdiction affect courts' openness to innovation? Why are some courts more interested in law schools' views than others? Why were some courts willing to listen to new voices—the bar applicants—and others seemingly offended by that effort? What impact has this experience had on the bar applicants, who sometimes felt like the court and the organized bar did not care about their health or other concerns? And of course, will the thousand or so applicants who were admitted pursuant to the diploma privilege be any more problematic lawyers than those who passed the 2020 bar exam?

Finally, the case studies provide some useful lessons for policymakers considering bar admission standards. The 2020 bar exam debates have focused renewed attention on the value and disparate impact of the exam.⁴⁴⁷ State bar examiners have useful insights, but they come at these issues from a very particular perspective, and they should

445. This resembles the routine policy changes that can occur in legislatures. They are often handled by experts with technical changes occurring under the public's radar and with little media attention. *See, e.g.*, HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 11-13 (1988).

446. John Kingdon notes that separate streams of "problems, policies, and politics come together at critical times" creating windows of opportunity that enable advocates to address policy issues. *See* JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 21 (1984). Window openings can sometimes be triggered by focusing events such as crises or accidents. *See id.*

447. The Oregon Supreme Court is actively considering alternate paths to licensure. *See* Natalie Runyan, *Oregon Takes a Step Forward in Alternative Licensure of Attorneys*, REUTERS (July 23, 2021, 11:31 AM).

not be the only ones at the table. Mandatory bars also have their own interests, and can be expected to support the recommendations of bar examiners working within their organizations. Voluntary state bars are also likely to support the status quo (the bar exam), which enhances the profession's status and controls the supply of new lawyers.⁴⁴⁸ Deans and faculty can provide useful, and often different, insights into the validity of the bar exam and possible alternative ways to assess competence, but they, too, can have agendas. When considering bar admission requirements, courts or other policymakers should elicit all these views. But they should then draw their own evidence-based conclusions, remaining mindful of the competing values at stake and the very different interests of the advocates in this arena.

448. Even when sympathies for bar applicants ran high during the pandemic, most voluntary state bars declined to take a position. *See, e.g.*, Robert Storace, *5 Questions for Conn. Bar Association Executive Director Keith Soressi*, CONN. L. TRIB. (Aug. 7, 2020, 4:19 PM), <https://www.law.com/ctlawtribune/2020/08/07/5-questions-for-conn-bar-association-executive-director-keith-soressi> (noting that the Connecticut Bar Association “has not taken an official position”); *see also supra* note 372 and accompanying text. The three voluntary state bar associations that took positions split on the issue. *See supra* notes 200, 216 and accompanying text; Matt Fair, *Pa. Bar Association Board Recommends Diploma Privilege*, LAW360 (July 30, 2020, 8:39 PM), <https://www.law360.com/articles/1296909>.