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Diploma Privilege and the Constitution

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DIPLOMA PRIVILEGE AND THE CONSTITUTION

*Collaboratory on Legal Education and Licensing for Practice**

ABSTRACT

The COVID-19 pandemic and resulting shutdowns are affecting every aspect of society. The legal profession and the justice system have been profoundly disrupted at precisely the time when there is an unprecedented need for legal services to deal with a host of legal issues generated by the pandemic, including disaster relief, health law, insurance, labor law, criminal justice, domestic violence, and civil rights. The need for lawyers to address these issues is great but the prospect of licensing new lawyers is challenging due to the serious health consequences of administering the bar examination during the pandemic.

State Supreme Courts are actively considering alternative paths to licensure. One such alternative is the diploma privilege, a path to licensure currently used only in Wisconsin. Wisconsin's privilege, limited to graduates of its two in-state schools, has triggered constitutional challenges never fully resolved by the lower courts. As states consider emergency diploma privileges to address the pandemic, they will face these unresolved constitutional issues.

This Article explores those constitutional challenges and concludes that a diploma privilege limited to graduates of in-state schools raises serious Dormant Commerce Clause questions that will require the state to tie the privilege to the particular competencies in-state students develop and avenues they have to demonstrate those competencies to the state's practicing bar over three years. Meeting that standard will be particularly difficult if a state adopts an in-state

* The Collaboratory is a group of eleven scholars who have studied and written about the bar exam and licensing for many years. In a policy paper published on March 23, 2020, we pooled our knowledge to offer suggestions for how jurisdictions might continue licensing new lawyers in the face of the COVID-19 pandemic. See Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (The Ohio State Univ. Moritz Coll. of Law Legal Studies, Working Paper No. 537, 2020), <https://dx.doi.org/10.2139/ssrn.3559060> [<https://perma.cc/5NWZ-JST4>]. The members of the Collaboratory are: Claudia Angelos (New York University); Sara Berman (AccessLex Institute); Mary Lu Bilek (City University of New York); Carol L. Chomsky (University of Minnesota); Andrea Anne Curcio (Georgia State University); Marsha Griggs (Washburn University); Joan W. Howarth (University of Nevada, Las Vegas); Eileen R. Kaufman (Touro College); Deborah Jones Merritt (Ohio State University); Patricia Salkin (Touro College); and Judith W. Wegner (University of North Carolina). The authors have contributed to this Article as individual scholars and not as representatives of their respective institutions.

privilege on an emergency basis. States should consider other options, including privileges that do not prefer in-state schools. The analysis is important both for states considering emergency measures and for those that might restructure their licensing after the pandemic.

INTRODUCTION

Legal education, like every other facet of life, has been upended by the COVID-19 pandemic. With no forewarning, law schools quickly converted their courses to remote instruction, adopted new grading policies, canceled or postponed commencement ceremonies, and debated furloughs and layoffs for staff who could not work remotely. First- and second-year law students face the cancellation of some summer jobs and internships as legal employers adjust to the same public health challenges. Graduating law school students face an especially serious disruption as jurisdiction after jurisdiction cancels the July administration of the bar exam¹ and students face their own individual and family health challenges, leaving them wondering when and how they will be able to be licensed as attorneys. Their jobs and careers may depend on when the graduates receive their licenses. Judges, bar associations, and bar examiners are weighing a variety of options to meet this crisis of uncertainty facing graduating law students.

Meanwhile, the pandemic and accompanying shutdowns are unleashing a tsunami of legal claims.² Low- and middle-income individuals, who already struggle to obtain representation, will need particular help.³ Newly admitted

1. As of May 18, 2020, Alaska, California, Connecticut, Delaware, the District of Columbia, Georgia, Guam, Hawaii, Illinois, Maine, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Utah, Vermont, and the Virgin Islands had canceled the July exam. *July 2020 Bar Exam: Jurisdiction Information*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> (last updated May 22, 2020, 1:22 PM) [<https://perma.cc/CY8P-KVL9>]. On May 5, the National Conference of Bar Examiners announced that “there will most likely be a sufficient number of July examinees to administer the bar exam” in July, so as of that date, it planned to make exam materials (MBE, MEE, and MPT) available to those jurisdictions that choose to administer a July exam. *NCBE COVID-19 Updates*, NAT'L CONF. B. EXAMINERS (May 5, 2020, 10:55 AM), <http://www.ncbex.org/ncbe-covid-19-updates/> [<https://perma.cc/JLR4-TTFJ>]. It also announced its plans to offer two more administrations—on September 9–10, 2020, and on September 30–October 1. *Past NCBE COVID-19 Updates*, NAT'L CONF. B. EXAMINERS (Apr. 3, 2020), <http://www.ncbex.org/ncbe-covid-19-updates/past-updates/> [<https://perma.cc/7HY3-AV6Y>]. Maine, Massachusetts, Missouri, New York, North Dakota, and Oregon have indicated that they lack (or will lack) sufficient seats to accommodate all test takers in a bar examination administered in small settings. *July 2020 Bar Exam: Jurisdiction Information*, *supra*.

2. Shayna Jacobs, *771 Lawsuits – and Counting: Wave of Virus Litigation Hits Businesses Across the U.S.*, WASH. POST (May 1, 2020, 4:51 PM), https://www.washingtonpost.com/world/national-security/771-lawsuits-and-counting-wave-of-virus-litigation-hits-businesses-across-the-us/2020/05/01/6f7c015c-89c3-11ea-9dfd-990f9dcc71fc_story.html [<https://perma.cc/4LUG-BKZ8>].

3. Recognizing that fact, the American Bar Association (ABA) has created a Coronavirus (COVID-19) task force. *The ABA Coronavirus (COVID-19) Task Force*, A.B.A., <https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem/> [<https://perma.cc/7XM3-2EZ9>]. The New York State Bar Association announced a pro bono network to connect volunteer attorneys with those needing assistance, with an initial focus on navigating the unemployment insurance benefits and application process. See *COVID-19 Pro Bono Network*, N.Y. ST. B. ASS'N, <https://nysba.org/covidvolunteer/> [<https://perma.cc/5QLC-AYWQ>].

lawyers disproportionately serve those needs through positions in government, nonprofits, and small law firms.⁴ To address those needs, it is essential to keep the gates to our profession open.

One of many proposed licensing options to address the disruptions is the “diploma privilege.” A pure diploma privilege would make graduation from an ABA-accredited law school sufficient evidence of competence to practice law, with no requirement that the graduate take a bar examination.⁵ A more restricted diploma privilege would add a requirement that the graduate have studied a specified set of core subject areas, completed a clinical program, or satisfied other educational prerequisites to qualify for the privilege. A “diploma-plus privilege” would entail post-graduation requirements such as a specified number of hours of supervised practice, completion of a state-specific set of tutorials, or a Bridge the Gap program of the sort available currently in a number of jurisdictions.⁶

Only one state (Wisconsin) currently has a diploma privilege pre-dating the pandemic, but thirty-two states and the District of Columbia have at some time in their histories embraced some version of the privilege.⁷ Some states granted a universal diploma privilege in which the state admitted anyone who had a diploma from any U.S. law school; others limited the privilege to graduates of any school within the state or only graduates of the state’s public law schools.⁸ Utah recently created an emergency diploma-plus privilege in response to the COVID-19 pandemic applicable to first-time exam-takers from schools with a specified bar pass rate.⁹ Advocates around the country have urged other states to consider

4. See CLASS OF 2018 NATIONAL SUMMARY REPORT, NAT’L ASS’N FOR L. PLACEMENT (2019), https://www.nalp.org/uploads/NationalSummaryReport_Classof2018_FINAL.pdf [<https://perma.cc/3UFH-6X83>] (showing that almost half of bar-required jobs taken by recent graduates fall in these three categories).

5. Under proposals for a diploma privilege, character and fitness review would remain unchanged.

6. For examples of Bridge the Gap programs, see the programs in New York, West Virginia, and Pennsylvania. *Bridge the Gap Program*, W. VA. ST. B., <https://www.wyounlawyers.com/members/bridge-the-gap/> (last updated Mar. 20, 2019) [<https://perma.cc/N8KW-WXW8>]; *Bridge the Gap*, PA. CONTINUING LEGAL EDUC., <https://www.pacle.org/providers/bridge-the-gap> [<https://perma.cc/T3TV-JFCX>]; *Bridging the Gap*, N.Y. ST. B. ASS’N, <https://www.nysba.org/bridging-the-gap/> [<https://perma.cc/7282-Z4ZX>].

7. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You’ll Like It*, 2000 WIS. L. REV. 645, 646 (2000). Wisconsin initially allowed the privilege only for its public law school (University of Wisconsin) but later extended it to the only other law school in the state (Marquette University Law School, a private law school). See WIS. STAT. § 256.28(1) (1931). For a historical discussion of Wisconsin’s diploma privilege, see Daniel B. Nora, Note, *On Wisconsin: The Viability of Diploma Privilege Regulations under Dormant Commerce Clause Review*, 37 J.C. & U.L. 447, 473–76 (2011). For a comprehensive explanation of the Wisconsin diploma privilege, see Moran, *supra*, at 645–49.

8. Moran, *supra* note 7 at 646.

9. See *Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak*, UTAH SUP. CT. (Apr. 21, 2020), <https://www.utcourts.gov/alerts/docs/20200421%20-%20Bar%20Waiver%20Order.pdf> [<https://perma.cc/34VJ-9RAQ>]. Under that measure, first-time bar exam takers who graduate by June 2020 from an ABA-accredited law school that had a first-time bar pass rate in 2019 of at least 86% may obtain a Utah license after completing 360 hours of supervised practice. See *id.*

adopting a diploma¹⁰ or diploma-plus¹¹ privilege.

If a state elects to grant a diploma privilege only to graduates of in-state schools, as Wisconsin does now and some other states have done historically, a variety of constitutional issues arise. Does that practice violate the Equal Protection Clause, the right to travel, the Dormant Commerce Clause, or the Privileges and Immunities Clause? Some of these questions have been discussed but not definitively resolved in previous challenges to state diploma privileges.¹² In light of the cancellation of the July administration of the bar exam by a significant number of states, the growing unlikelihood of large gatherings any time in 2020,¹³ and consideration of a diploma privilege by a growing number of jurisdictions, these constitutional questions have taken on immediate significance.¹⁴

10. See Letter from Einass Abdelmoula et al., to the Task Force on the N.Y. Bar Examination, N.Y. State Bar Ass'n (Mar. 26, 2020), <https://images.law.com/contrib/content/uploads/documents/292/Law-Student-Letter-to-NYSBAR-COVID.pdf> [<https://perma.cc/S4AV-4DM4>] (letter to the New York State Bar Association Task Force on the New York Bar Examination from more than 1,000 bar applicants); Letter from Kerry Abrams, Duke Dean of the Sch. of L., et al., to Janet Difiore, Chief Judge, N.Y. Court of Appeals (May 2, 2020), <https://www.law.georgetown.edu/news/georgetown-law-joins-law-schools-asking-court-to-reconsider-ny-bar-decision/> [<https://perma.cc/NGP6-V327>] (letter to the New York Court of Appeals from the deans of twenty-one law schools); Letter from L. Song Richardson, Dean of the Univ. of Cal., Irvine, Sch. of L., et al., to Tani G. Cantil-Skayue, Chief Justice, Cal. Supreme Court, et al. (Apr. 20, 2020), <https://assets.documentcloud.org/documents/6843403/Lawdeansletter.pdf> [<https://perma.cc/GQ3Z-A2MF>] (letter to the Supreme Court of California from the dean and alumni of the University of California, Irvine).

11. For a diploma-plus proposal that includes both supervised practice and Bridge the Gap courses, see Claudia Angelos et al., *Insight: New York's Bar Exam Changes Are Misguided—Here's a Proposal*, BLOOMBERG L. (May 7, 2020, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-new-yorks-bar-exam-changes-are-misguided-heres-a-new-proposal> [<https://perma.cc/94RQ-PF6D>].

12. While Wisconsin is the only state currently providing a diploma privilege, other states have repealed diploma privileges that were the subject of litigation addressing some of these issues. See *infra* notes 21, 28 and accompanying text.

13. See generally DANIELLE ALLEN ET AL., *WHEN CAN WE GO OUT? EVALUATING POLICY PARADIGMS FOR RESPONDING TO THE COVID-19 THREAT* (Mar. 25, 2020), https://ethics.harvard.edu/files/center-for-ethics/files/whitepaper_2_-_when_can_we_go_out_3.25.20_1.pdf [<https://perma.cc/6KR3-93GA>]; SCOTT GOTTLIEB ET AL., *NATIONAL CORONAVIRUS RESPONSE: A ROAD MAP TO REOPENING* (Mar. 28, 2020), <https://www.aei.org/wp-content/uploads/2020/03/National-Coronavirus-Response-a-Road-Map-to-Recovering-2.pdf> [<https://perma.cc/Q7X3-TQXK>].

14. Some states have announced plans to grant priority to graduates of in-state schools when allocating limited seats for the bar exam, which raises related constitutional issues. New York announced that it will be unable to accommodate all candidates for its September 9–10 administration of the bar exam, and first priority will go to graduates of New York's fifteen law schools. *Notices: Application Period for the September 2020 Bar Examination*, N.Y. ST. BOARD L. EXAMINERS (Apr. 30, 2020), <https://www.nybarexam.org/> [<https://perma.cc/RD4R-6YGY>]. Others are encouraged to take the exam later or travel to other jurisdictions. *Id.* North Dakota plans to hold a July administration but limit seats to 85 or less. *Bar Exam Application*, ST. N.D. CTS., <https://www.ndcourts.gov/supreme-court/committees/board-of-law-examiners/bar-exam-application> [<https://perma.cc/B2YY-J8A9>]. North Dakota's State Board of Law Examiners created three categories of priorities: those already registered as of April 1, 2020, followed by graduates of the University of North Dakota, followed by everyone else. *Id.* Missouri has also limited seats for its July bar exam and will prioritize a combination of Missouri residents, graduates of schools in Missouri or a contiguous state, and applicants with employment connections to the state. *Information About Bar Admissions and COVID-19*, MO. BOARD L. EXAMINERS (Apr. 28, 2020), <https://www.mble.org/news.action?id=1700> [<https://perma.cc/M98W-TFY7>]. Massachusetts announced that sufficient seats may not be available when it administers the exam on September 30–

Part I of this paper considers the issues that in-state diploma privileges raise with respect to the Equal Protection Clause and the right to travel. We conclude that adopting an in-state diploma privilege is likely permissible with respect to both because the privilege need only satisfy the rational basis test. Part II analyzes the Privileges and Immunities Clause and concludes there is no violation, even though the practice of law is considered a protected privilege. The more difficult questions are discussed in Part III, which analyzes the Dormant Commerce Clause claim.

We conclude that a diploma privilege limited to graduates of in-state public law schools would raise no Dormant Commerce Clause issues because of the market participant exception to that doctrine. A privilege limited to in-state schools that encompassed private institutions, on the other hand, would raise serious issues under the Dormant Commerce Clause. If the courts focus on the privilege's facial discrimination between in-state businesses (law schools) and out-of-state ones, the state would have to demonstrate that it has a non-protectionist state interest that cannot be satisfied by nondiscriminatory means. This is a very high burden that would likely not be satisfied. If courts focus instead on the graduates of those schools, the privilege might not be seen as discriminatory and it would be judged by a more lenient balancing test. Under those circumstances, a diploma privilege would likely survive constitutional scrutiny if the adopting state fashioned its rule to serve a non-protectionist purpose and established an adequate justification for distinguishing in-state from out-of-state schools.

Paying attention to constitutional constraints is essential for any state considering adoption of a diploma privilege, but constitutional concerns need not foreclose state adoption of a diploma privilege, whether to address the licensing crisis created by the COVID-19 pandemic or to govern admission of competent attorneys after the crisis ends.¹⁵ States with only public law schools can grant diploma privileges to graduates of their schools without violating the Dormant Commerce Clause. Other states could avoid challenges by adopting privileges that apply evenhandedly to in-state and out-of-state law schools. A state could, for example, grant a diploma privilege to graduates of any law school that emphasizes the law of the state granting the privilege. In-state schools would be most likely to satisfy that requirement, but out-of-state schools (especially those located close to state lines) might also qualify. This type of privilege would not be treated as discriminatory and would, therefore, avoid the strictest scrutiny under the Dormant Commerce Clause.

If a state prefers to grant a diploma privilege solely to graduates of in-state

October 1; under those circumstances, graduates of Massachusetts law schools will get first priority. *Important Notice – Massachusetts Bar Exam, September 30-October 1, 2020*, MASS. BOARD B. EXAMINERS, <https://www.mass.gov/orgs/massachusetts-board-of-bar-examiners> [https://perma.cc/9RG6-6KZE]. While not creating diploma privileges, and therefore not the subject of this Article, these limitations raise similar constitutional issues. The rules in New York and Massachusetts almost certainly are protectionist—in violation of the Dormant Commerce Clause. The North Dakota and Missouri rules are somewhat more complicated, but also raise issues under that clause. See *infra* Part III for a discussion of Dormant Commerce Clause analysis.

15. The purpose of this paper is to analyze the constitutionality of diploma privileges. The various policy issues implicated by diploma privileges are outside the scope of this work.

schools, including at least one private school, the constitutional constraints are most severe. To defend that type of privilege, a state should build a record focused on the ways in which in-state educational experiences demonstrate minimum competence of their graduates to practice in the state. Simply preferring graduates of in-state schools could be viewed as unconstitutional protectionism; establishing a diploma privilege grounded in specific educational and experiential requirements associated with minimum competencies to practice in the state is more likely to pass muster.

I. DIPLOMA PRIVILEGE, EQUAL PROTECTION, AND THE RIGHT TO TRAVEL

A. EQUAL PROTECTION CLAUSE

The claim that a diploma privilege violates the Equal Protection Clause would be evaluated based on the rational basis test, which merely requires that the rule be rationally related to a legitimate state purpose.¹⁶ State licensing laws, like all other economic and social legislation, trigger use of that highly deferential test, sometimes referred to as the “any conceivable basis” test, which represents the lowest level of judicial scrutiny.¹⁷ Heightened scrutiny is not applicable because the policy at issue does not implicate a fundamental right and does not discriminate on the basis of a suspect or quasi-suspect classification. In a series of cases, the Supreme Court has shown considerable deference when confronted with challenges to state regulation of licensed professionals.¹⁸ Indeed, the courts have specifically held that state bar admission restrictions are subject to mere rational basis review and have shown deference when reviewing rules relating to admission practices.¹⁹

Given the deferential standard of review—being rationally related to a legitimate state purpose—a state’s adoption of the diploma privilege should easily withstand constitutional scrutiny. Ensuring high standards within the state bar has been recognized as a legitimate state purpose,²⁰ and the state could demonstrate that restricting the diploma privilege to graduates of in-state schools is rationally related to that goal by showing, even minimally, the ways in which in-state schools will prepare students for practicing law in that state better than out-of-state schools.²¹ Possible justifications are outlined in Part III, where we discuss

16. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314–15 (1975).

17. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

18. See, e.g., *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978); *Martin v. Walton*, 368 U.S. 25, 239 (1961) (per curiam); *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955); *Watson v. Maryland*, 218 U.S. 173, 177 (1910).

19. See *Nat’l Ass’n for the Advancement of Multijurisdiction Practice v. Berch*, 773 F.3d 1037, 1045 (9th Cir. 2014) (citing *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985)); *Nat’l Ass’n for the Advancement of Multijurisdiction Practice (NAAMJP) v. Castille*, 799 F.3d 216, 219–20 (3d Cir. 2015); *Kirkpatrick v. Shaw*, 70 F.3d 100, 103 (11th Cir. 1995) (per curiam); *Schumacher v. Nix*, 965 F.2d 1262, 1268 (3d Cir. 1992).

20. See, e.g., *Berch*, 773 F.3d at 1045.

21. See, e.g., *Shenfield v. Prather*, 387 F. Supp. 676, 686 (N.D. Miss. 1974) (rejecting an equal

arguments that might support the privilege under the Dormant Commerce Clause.

For these reasons, challenges to a diploma privilege asserted on equal protection grounds have not been and are unlikely to be successful.²²

B. RIGHT TO TRAVEL

For many years, the Privileges and Immunities Clause of the Fourteenth Amendment was thought to protect only rights of United States citizenship and thus conveyed no separate judicially enforceable rights for state citizens.²³ However, in 1999 in *Saenz v. Roe*, the U.S. Supreme Court held that the clause also protects the right to travel.²⁴ In that case, the state of California imposed a durational residency requirement on applicants for public assistance and limited new arrivals to collecting the amount of public assistance they had received in their states of origin.²⁵ The Court held that such a policy violated the right to travel protected by the Privileges and Immunities Clause of the Fourteenth Amendment. As outlined by the court in *Saenz*, the right to travel protects three different rights:

the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.²⁶

Unlike the statute struck down in *Saenz*, a diploma privilege does not impede interstate travel. Travelers to a new state are not being denied benefits offered longer term residents. A diploma privilege “neither establishes a classification based on residency nor erects a barrier to migration.”²⁷ Residents and nonresidents are treated the same. If they graduate from an in-state school, they

protection challenge to Mississippi’s diploma privilege); *see also* *Goetz v. Harrison*, 462 P.2d 891, 894 (Mont. 1969) (justifying Montana’s diploma privilege because the Montana Supreme Court was able to maintain a close relationship with faculty, students, and the curriculum).

22. *See Shenfield*, 387 F. Supp. at 688–89; *Huffman v. Mont. Supreme Court*, 372 F. Supp. 1175, 1183 (D. Mont. 1974); *see also* *Sestric v. Clark*, 765 F.2d 655, 663–64 (7th Cir. 1985).

23. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1872).

24. *Saenz v. Roe*, 526 U.S. 489, 510–11 (1999).

25. *Id.* at 493. Before *Saenz*, durational residency requirements were analyzed under the Equal Protection Clause. In a series of cases, the Court struck down durational residency requirements as violating a fundamental right to travel. *See, e.g.,* *Mem’l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 269 (1974) (invalidating a durational residency requirement as a condition of receiving nonemergency hospitalization or medical care at the county’s expense); *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (invalidating a one-year residency requirement for voting); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (striking down a durational residency requirement for welfare benefits), *overruled in part on other grounds* by *Edelman v. Jordan*, 415 U.S. 651 (1974). Since the diploma privilege does not discriminate based on length of in-state residence, these cases are inapposite.

26. *Saenz*, 526 U.S. at 500.

27. *See Nat’l Ass’n for the Advancement of Multijurisdiction Practice (NAAMJP) v. Castille*, 799 F.3d 216, 219 (3d Cir. 2015) (quoting *Schumacher v. Nix*, 965 F.2d 1262, 1268 (3d Cir. 1992)) (upholding Pennsylvania’s rule which limits admission of out-of-state lawyers to those from a reciprocal state).

can take advantage of the diploma privilege. If they graduate from a school in another state, they may not. Not surprisingly, federal courts have rejected challenges to a diploma privilege asserted on right to travel grounds.²⁸

II. DIPLOMA PRIVILEGE AND THE PRIVILEGES & IMMUNITIES CLAUSE OF ARTICLE IV

Article IV, Section 2 of the U.S. Constitution provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”²⁹ This clause was intended to protect only “those ‘privileges’ and ‘immunities’ bearing upon the vitality of the Nation as a single entity.”³⁰ The clause has been interpreted to prevent states from discriminating against citizens of other states only with respect to fundamental constitutional rights and important economic activities, such as the right to earn a livelihood.³¹ The right to practice law in a state has been identified as just such a protected “privilege” within the meaning of this clause.³²

In order to withstand a Privileges and Immunities challenge, the state must demonstrate not only a substantial reason for the difference in treatment for residents, but also that the discrimination against nonresidents is closely related to the state’s objective.³³ In conducting that analysis, the Court considers the availability of less restrictive means.³⁴

In *Supreme Court of New Hampshire v. Piper*, the U.S. Supreme Court held that New Hampshire could not deny admission to out-of-state applicants who had passed the New Hampshire bar exam and met all of the state’s requirements except for residency.³⁵ The Court rejected the state’s offered justifications—that nonresidents would be less likely to become familiar with local rules, to behave ethically, to be available for court proceedings, and to do pro bono work—as insubstantial.³⁶ There was little or no evidence to support the asserted justifications, and the minimal effect could easily be addressed by less restrictive

28. *Shenfield v. Prather*, 387 F. Supp. 676, 685–86 (N.D. Miss. 1974); *Huffman v. Mont. Supreme Court*, 372 F. Supp. 1175, 1182 (D. Mont. 1974). Although both of these cases were decided before *Saenz*, the analysis offered above suggests that the outcomes would not be different after *Saenz*. Since *Saenz*, federal courts have rejected right-to-travel challenges to reciprocal bar admissions standards, reinforcing the conclusion that differential bar admissions rules do not violate the right to travel under the Fourteenth Amendment Privileges and Immunities Clause. See *Castille*, 799 F.3d at 219–20; *Nat’l Ass’n for the Advancement of Multijurisdiction Practice v. Berch*, 773, F.3d 1037, 1046 (9th Cir. 2014).

29. U.S. CONST. art. IV, § 2.

30. *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978).

31. *Id.* at 385–86. The Court distinguished elk hunting (a recreational activity) from commercial shrimping, finding that the Privileges & Immunities Clause applies to the right to earn a livelihood but not to recreational activities. *Id.* at 386–88.

32. *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 66 (1988); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280–81 (1985).

33. *Friedman*, 487 U.S. at 65; *Piper*, 470 U.S. at 284.

34. *Piper*, 470 U.S. at 284.

35. *Id.* at 288. The term “resident” is used interchangeably with “citizen” for purposes of the Privileges and Immunities Clause. *Friedman*, 487 U.S. at 64.

36. *Piper*, 470 U.S. at 285.

means.³⁷ The Court further concluded that the means—denying admission to out-of-state applicants—was insufficiently related to the state’s objectives.³⁸

In *Supreme Court of Virginia v. Friedman*, the U.S. Supreme Court rejected similar arguments from the state when the Court determined that it was a violation of the Privileges and Immunities Clause to require out-of-state residents already licensed in another state to take a bar exam for admission in Virginia while allowing in-state residents licensed elsewhere to be admitted in Virginia on motion.³⁹ The Court “reaffirmed” the “well-settled principle” established in *Piper* that “one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.”⁴⁰ The question then becomes whether “substantial reasons exist for the discrimination and [whether] the degree of discrimination bears a close relation to such reasons.”⁴¹ As in *Piper*, the Court rejected Virginia’s justifications—that nonresidents would be less invested in the jurisdiction, participate less in bar activities, and perform fewer public service responsibilities—as unproven or easily attainable by means not infringing on constitutional privileges.⁴²

While the right to practice law in a state is a protected “privilege,” lower courts have found that a state does not violate the Privileges and Immunities Clause by adopting a reciprocity provision, which only permits admission by motion for nonresidents from states with reciprocal admission rules.⁴³ Thus, in *National Ass’n for the Advancement of Multijurisdiction Practice v. Berch*, the Ninth Circuit upheld Arizona’s reciprocal admission on motion (AOM) rule, finding that it did not distinguish on the basis of residency:

The AOM Rule is neutral: the State of Arizona imposes the same bar admission requirements on its own citizens as it does on citizens of other states. If a citizen of Arizona is admitted to the bar in a state that does not share reciprocity with Arizona, then the attorney is not eligible to be admitted to the Arizona Bar on motion, irrespective of the attorney’s residency or citizenship status.⁴⁴

“Even if Arizona’s AOM Rule did infringe on a right protected by the Privileges and Immunities Clause,” the court added, it was “closely related to advancing a substantial state interest.”⁴⁵ In that case, the substantial state interests included Arizona’s “considerable interest in regulating its state bar” as well as its interest in “ensuring that attorneys licensed in Arizona will be treated equally in states having

37. *Id.* at 285, 287.

38. *Id.* at 285–88.

39. *Friedman*, 487 U.S. at 70.

40. *Piper*, 470 U.S. at 280 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

41. *Friedman*, 487 U.S. at 67.

42. *Id.* at 68.

43. See *Nat’l Ass’n for the Advancement of Multijurisdiction Practice (NAAMJP) v. Castille*, 799 F.3d 216, 219–20 (3d Cir. 2015); *Nat’l Ass’n for the Advancement of Multijurisdiction Practice v. Berch*, 773 F.3d 1037, 1046 (9th Cir. 2014).

44. *Berch*, 773 F.3d at 1046.

45. *Id.* (citing *Friedman*, 487 U.S. at 65).

reciprocity with Arizona.”⁴⁶

A Privileges and Immunities claim was also rejected in a lower-court case challenging a requirement that nonresident members of the state bar maintain a physical office in the state.⁴⁷ In *Schoenefeld v. Schneiderman*, the Second Circuit held that protected privileges and immunities are burdened “only when [challenged] laws were enacted for [a] protectionist purpose.”⁴⁸ In other words, in the absence of a protectionist purpose, a Privileges and Immunities Clause claim fails.⁴⁹ Since the requirement that nonresidents maintain a physical office within the state was enacted to enable service of process, the plaintiff failed to prove a protectionist purpose, even though the “office requirement is now largely vestigial as a means of ensuring [process].”⁵⁰

What about an in-state diploma privilege? Like Arizona’s reciprocal privilege upheld in *Berch*, a diploma privilege would not distinguish among applicants based on state residency since residents of any state could take advantage of the privilege as long as they attended an in-state law school. Conversely, citizens who attended an out-of-state school would be ineligible for the privilege. The rule is neutral; it “imposes the same bar admission requirements on [a state’s] own citizens as it does on citizens of other states.”⁵¹ As required by *Piper*, citizens of all states would have the same opportunity to be licensed in the state establishing the diploma privilege. The only burden on out-of-state residents would be both speculative and indirect—in-state schools might admit proportionally more in-state residents, making it marginally more difficult for out-of-state students to attend an in-state school.⁵²

Even if a court somehow concluded that a diploma privilege problematically distinguished between residents and nonresidents, a state could justify an in-state privilege under *Piper* and *Friedman* by showing that the privilege is closely related to the advancement of a substantial state interest. Unlike the justifications offered and rejected in *Piper* and *Friedman*, the reasons for distinguishing graduates of in-state schools from those of out-of-state schools are “substantial” and the small burden generated by that distinction would “bear[] a close relation” to the reasons

46. *Id.*

47. *Schoenefeld v. Schneiderman*, 821 F.3d 273, 287 (2d Cir. 2016).

48. *Id.* at 279 (alterations in original) (quoting *McBurney v. Young*, 569 U.S. 221, 227 (2013)).

49. *Id.* at 282–83.

50. *Id.* at 282.

51. *Nat’l Ass’n for the Advancement of Multijurisdiction Practice v. Berch*, 773 F.3d 1037, 1046 (9th Cir. 2014).

52. It is far from clear that in-state schools prefer residents of their own state over nonresidents. Some schools, in fact, may favor out-of-state residents to burnish their reputations as national law schools. Public law schools have an additional economic interest in favoring nonresidents because those students pay higher tuition rates than residents. See Ilana Kowarski, *See the Price, Payoff of Law School Before Enrolling*, U.S. NEWS (Mar. 18, 2020, 8:00 AM), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/law-school-cost-starting-salary> [https://perma.cc/YQ84-4L6S]. Unless restricted by state laws requiring preferences for residents (which are rare in the context of law schools), those states’ public law schools may thus favor nonresidents, or at least not discriminate between them and residents. Applicants, of course, may find it easier to attend a law school in the state where they reside rather than travel to another state for their education. Again, however, any burden imposed by an in-state diploma privilege on nonresidents is both marginal and indirect.

for providing a diploma privilege.⁵³ The justifications that a state would likely assert would focus on ensuring that graduates are competent to practice law in the state. These justifications are explored more fully in the next section.

III. DIPLOMA PRIVILEGE AND THE DORMANT COMMERCE CLAUSE

The Commerce Clause gives Congress the affirmative power to regulate interstate commerce.⁵⁴ But it also serves as a limit on the states' power to regulate interstate commerce when Congress has not acted, that is, when Congress's power lies "dormant."⁵⁵ The Dormant Commerce Clause has been referred to as one of the "great silences" of the Constitution.⁵⁶ Its purpose is to prevent trade barriers among the states.⁵⁷ In fact, removing state trade barriers and preventing interstate economic rivalries was a principal reason for the adoption of the Constitution.⁵⁸

The governing principle of the Dormant Commerce Clause is that state and local laws that place an undue burden on interstate commerce are unconstitutional. States cannot discriminate against interstate commerce or out-of-state businesses unless there is a non-protectionist and important state purpose that cannot be achieved by nondiscriminatory means. That is a difficult test to meet, one that the Supreme Court has referred to as "a virtually *per se* rule of invalidity."⁵⁹ As Justice Marshall stated in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."⁶⁰

If, however, the state law "has only indirect effects on interstate commerce and regulates evenhandedly," the Court applies a more lenient balancing test and instead asks "whether the State's interest is legitimate" and strikes the provision only if "the burden on interstate commerce clearly exceeds the local benefits."⁶¹ While determining which category the challenged rule fits within is all-important because of the critical difference in the two tests, the Court has acknowledged that: "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the . . . balancing approach. In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity."⁶²

A diploma privilege that is limited to in-state public law schools would not have to meet either of these standards, however. An important exception to the

53. See Supreme Court of Va. v. Friedman, 487 U.S. 59, 67 (1988).

54. U.S. CONST. art. I, § 8, cl. 3.

55. See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

56. *Id.*

57. *Id.* at 539; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

58. *Du Mond*, 336 U.S. at 533.

59. Granholm v. Heald, 544 U.S. 460, 476 (2005) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

60. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

61. *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

62. *Id.*

Dormant Commerce Clause allows a state to favor its own citizens when it acts as a market participant instead of a market regulator.⁶³ “Nothing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others.”⁶⁴ States that have only public law schools within the jurisdiction, therefore, could rely upon the market participant exception⁶⁵ to confer a diploma privilege on graduates of those schools.⁶⁶ States with both public and private law schools in the jurisdiction could use the same exception if they limited the diploma privilege to graduates of their public law schools. That distinction would be politically unpopular and perhaps unwise as a matter of policy, but it is constitutionally permissible.

It seems more likely that a state adopting a diploma privilege would extend that privilege to all law schools in the state, not just public law schools, and such a diploma privilege would be subject to the Dormant Commerce Clause restrictions. The constitutionality of such a provision under the Dormant Commerce Clause was raised, though not definitively answered, in litigation challenging the Wisconsin diploma privilege,⁶⁷ which applies to graduates of its two law schools, one public (the University of Wisconsin Law School) and the other private (Marquette University Law School). Wisconsin’s rule was challenged in a class action by graduates of accredited out-of-state law schools who planned to practice in Wisconsin but who were required, under Wisconsin rules, to take and pass the bar exam.⁶⁸ They argued that Wisconsin’s diploma privilege discriminates against graduates of out-of-state schools in violation of the Dormant Commerce Clause.⁶⁹ The case was ultimately settled,⁷⁰ but a decision written by Judge Posner for the United States Court of Appeals for the Seventh Circuit discussed the merits of the claim and is instructive for any future challenges to in-state diploma privileges.⁷¹

63. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). A second major exception is that Congress can authorize the states to discriminate. *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652–53 (1981); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980). Since Congress has no role to play in state licensing of lawyers, that exception will not be explored in this paper.

64. *Hughes*, 426 U.S. at 810.

65. In *Wiesmueller v. Kosobucki*, 571 F.3d 699, 706 (7th Cir. 2009) (quoting *W.C.M. Window Co v. Bernardi*, 730 F.2d 486, 494 (7th Cir. 1984)), Judge Posner described the market participant doctrine as “emphasiz[ing] the freedom that states have under the Constitution to provide, often selectively, for the welfare of their residents.” Judge Posner found that the market participant doctrine did not apply to Wisconsin’s diploma privilege because Wisconsin offered the privilege not only to a public school (the University of Wisconsin Law School) but also to a private school (Marquette University Law School). *Id.* at 707.

66. States that have only public law schools are: Arkansas, Hawaii, Kansas, Kentucky, Maine, Maryland, Montana, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, West Virginia, and Wyoming. See *US Law Schools*, JUSTIA, <https://www.justia.com/law-schools/> (last updated Apr. 2018) [<https://perma.cc/5ZPQ-W39P>].

67. For a comprehensive explanation of the Wisconsin diploma privilege, see generally Moran, *supra* note 7.

68. *Wiesmueller*, 571 F.3d at 701.

69. *Id.*

70. *Settlement Retains Diploma Privilege*, ST. B. WIS. (Mar. 25, 2010), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=0&Issue=0&ArticleID=5824> [<https://perma.cc/NR2F-SQT3>].

71. See *Wiesmueller*, 571 F.3d 699.

Judge Posner first recognized the difficulty of distinguishing between the two tiers of the Dormant Commerce Clause analysis to determine whether a state regulation is “virtually per se invalid” or instead subject to the more generous balancing test.⁷² Indeed, he said, “the two tiers sometimes cannot always be distinguished in practice—as this case illustrates. On the one hand, the diploma privilege does favor the economic interests of Wisconsin law schools, but on the other hand, it has ‘only indirect effects on interstate commerce and regulates evenhandedly’” because the privilege applies to both in-state and out-of-state residents, as long as they attend a law school located in Wisconsin.⁷³ Moreover, Judge Posner acknowledged that “[a] state’s right to regulate admission to the practice of law in the state is unquestioned,”⁷⁴ but because this particular regulation has some effect on the interstate mobility of lawyers, “the regulation must be at least minimally reasonable,”⁷⁵ with—he noted explicitly—an emphasis on “minimally.”⁷⁶

Ultimately, Judge Posner concluded that because the suit had been dismissed for failure to state a claim, the record was insufficient (an “evidentiary vacuum”) to identify the benefits of the diploma privilege or to identify and balance those against the burdens—even minimal burdens—on interstate commerce.⁷⁷ If, as the plaintiffs claimed, the curriculum at Wisconsin schools offered no more Wisconsin law than was offered at out-of-state schools—if the Wisconsin schools merely required a well-rounded legal education similar to what was offered at every ABA-accredited law school in the country—then the diploma privilege would “create[] an arbitrary distinction.”⁷⁸ While the effect on interstate commerce of the diploma privilege might be small, requiring very little to justify it, the court held that the state had to make some showing to support distinguishing between graduates of Wisconsin’s schools and those of schools located in other states.⁷⁹ The case was remanded to give the plaintiffs a chance to develop the record.⁸⁰ After remand, the case was settled, with the plaintiff accepting \$7,500 and agreeing not to participate in further challenges to Wisconsin’s diploma privilege.⁸¹ As a result, the case did not resolve the constitutional questions, but it provides a helpful foundation to analyze the Dormant Commerce Clause claim.

As Judge Posner indicated, the onus on the state to justify its burden varies under the two levels of scrutiny, but even the more lenient level of scrutiny

72. See *id.* at 703; see also *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

73. *Wiesmueller*, 571 F.3d at 703 (quoting *Brown-Forman Distillers*, 476 U.S. at 579).

74. *Id.* at 704.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 705.

80. *Id.* at 707.

81. *Settlement Retains Diploma Privilege*, *supra* note 70. The class had previously been decertified. *Id.* The plaintiff reportedly agreed to settle because he feared that continued litigation would result in everyone having to take the bar exam, a choice that the court had acknowledged the state could make. *Id.*

requires a state to offer a non-protectionist state interest.⁸² A state purpose of ensuring competence to practice law within the state is surely a non-protectionist and legitimate state interest. The question then turns on the level of scrutiny applied to the fit between purpose and means and how well the diploma privilege serves that purpose.

Judge Posner was very quick—perhaps too quick—to conclude that Wisconsin’s diploma privilege could be judged under the state-favoring, more lenient balancing test. It is not clear that a diploma privilege limited to in-state schools is as “evenhanded[]” as Judge Posner posited.⁸³ That type of privilege, on its face, favors in-state schools (and the students who attend them) over out-of-state schools (and the individuals who attend them). Wisconsin law schools enjoy some advantage in recruiting students because those who plan to practice law in the state know that they will not have to take a bar exam—or devote time and expense to preparing for that exam—if they matriculate at one of the Wisconsin law schools. The Dormant Commerce Clause polices just this type of economic advantage awarded to in-state businesses.

If courts considering challenges to an in-state diploma privilege adopt this lens, focusing on the economic advantage given in-state law schools and the discrimination against out-of-state schools, they will apply the Dormant Commerce Clause’s higher level of scrutiny. A state defending an in-state diploma privilege would then have to demonstrate far more than “minimal reasonableness.”⁸⁴ It would have to demonstrate an important state purpose that cannot be achieved by nondiscriminatory means.⁸⁵ One of the only cases to find that strict standard satisfied is *Maine v. Taylor*, where the Supreme Court upheld a state law that prohibited the importation of live baitfish into the state.⁸⁶ While the law clearly favored in-state producers of baitfish, the Court found that there was no other way of protecting Maine’s “unique and fragile fisheries” from parasites that were common in out-of-state baitfish but not prevalent in Maine.⁸⁷

Could states supporting an in-state diploma privilege make a comparable showing? This would present a difficult and perhaps insurmountable challenge. States enjoy a well-recognized authority to regulate the practice of law, including the power to protect the public by licensing only attorneys who demonstrate their minimum competence,⁸⁸ and they need not identify a single means of establishing competence. It is common, for example, for states to license some attorneys based on passage of a bar exam while licensing others based on a period of successful practice in another jurisdiction.⁸⁹ As discussed further below, there may be

82. See *Wiesmueller*, 571 F.3d at 703.

83. *Id.*

84. *Id.* at 704.

85. *Maine v. Taylor*, 477 U.S. 131, 140 (1986).

86. *Id.* at 152.

87. *Id.* at 141.

88. See Nat’l Ass’n for the Advancement of Multijurisdiction Practice (NAAMJP) v. Castille, 799 F.3d 216, 221 (3d Cir. 2015); Nat’l Ass’n for the Advancement of Multijurisdiction Practice v. Berch, 733 F.3d 1037, 1045 (9th Cir. 2014).

89. See generally NAT’L CONFERENCE BAR EXAM’RS & AM. B. ASS’N SECTION LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 42-47

reasons for a state to conclude that students graduating from in-state schools have demonstrated minimum competence through their educational experiences in law school, supporting a diploma privilege. But that would not necessarily justify excluding out-of-state schools from making a similar showing. In *Maine v. Taylor*, there was no practical way to screen out-of-state baitfish to exclude only those carrying parasites that might infect Maine's fisheries.⁹⁰ Out-of-state law schools might more readily show that their educational experiences demonstrate competence in a manner comparable to that of in-state schools.

To meet the Dormant Commerce Clause's stricter level of scrutiny, a state would have to assemble a record showing that in-state schools provide substantial opportunities for students to demonstrate their competence that out-of-state schools lack. Those opportunities might include clinics supervised by in-state attorneys, jobs and externships in the state, classes taught and evaluated by state bar members, and frequent interaction with members of the state bar. Out-of-state schools, the state could argue, might produce graduates who are just as competent as those from in-state schools, but out-of-state schools lack comparable means of demonstrating that competence. Constant interaction among faculty, students, and bar members, in other words, creates an assurance that an in-state school's graduates are competent to practice law.

The argument is a novel one, focused on the judgment of the state court and profession that they can reasonably focus on the competence of a school's graduates rather than on the competence of an individual graduate. Deference to that judgment may be appropriate. In affirmative action cases, the Supreme Court has indicated a willingness to defer to institutions of higher learning when they make an "educational judgment that . . . diversity is essential to [their] educational mission" even while purporting to apply strict scrutiny to race-conscious decisions.⁹¹ Courts have also long deferred to educational institutions with respect to other academic judgments.⁹² Defenders of an in-state diploma privilege could urge courts to show similar deference to the ability of licensing authorities to rely on in-state law schools to establish the competence of their graduates to licensing authorities.

It would, of course, be far easier for a state to justify an in-state diploma privilege under the more generous balancing test applied by Judge Posner. Would other courts, including the Supreme Court, follow Judge Posner's lead and apply the lesser standard? The strongest arguments for that result draw upon the state's recognized authority to regulate law practice, the relatively small impact of an in-state diploma privilege on interstate commerce,⁹³ and the evenhanded operation of the privilege on both state residents and out-of-state residents.⁹⁴ If those factors

(Judith A. Gundersen & Claire J. Guback eds., 2020) (detailing requirements for admission by motion in each jurisdiction).

90. *Taylor*, 477 U.S. at 147.

91. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 310–11 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

92. See, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (university's dismissal of student from academic program).

93. See *Wiesmueller v. Kosobucki*, 571 F.3d 699, 705 (7th Cir. 2009)

94. See *id.* at 703–04; see also *Nora*, *supra* note 7, at 477–80 (arguing that strict scrutiny is

persuaded a court to apply a balancing test, the court would have to determine whether the interests promoted by the in-state diploma privilege were legitimate (rather than protectionist) and whether the burden on interstate commerce clearly exceeded those local benefits.⁹⁵

A traditional justification for in-state law diploma privileges is that in-state schools are more likely than out-of-state schools to teach students about the state's own law.⁹⁶ To defend a diploma privilege on that ground, a state could require students applying for the privilege to document that they took one or more courses focused on that state's law. Alternatively, it could require the state's law schools to certify the inclusion of state law materials in the required or common elective courses used to satisfy graduation requirements. Any such specifications could support a claim that the preference for in-state graduates was justified by their better familiarity with that state's law.

If the in-state diploma privilege does not require that the schools educate students in the state's law,⁹⁷ then the state would have to identify other reasons why graduation from an in-state school establishes a lawyer's competence in ways that graduation from an out-of-state school does not. Even though the curriculum in the state's schools may not focus on that state's law, many professors do reference state law when teaching. More important, students who attend school in the state will almost invariably obtain knowledge of and experience in legal practice in that state through clinics and externships, through part-time jobs during the academic year, and often through legal jobs during the summers between school years. The growth of experiential learning opportunities and requirements, including the ABA accreditation standard mandating that each graduate have at least six credits of experiential learning,⁹⁸ provides a basis for

inappropriate, but that the Wisconsin diploma privilege violates the Dormant Commerce Clause under the balancing test).

95. See *Wiesmueller*, 571 F.3d at 703–04.

96. See *Nora*, *supra* note 7, at 479–80.

97. As Judge Posner recognized in *Wiesmueller*, Wisconsin's current diploma privilege does not explicitly require a grounding in Wisconsin law but instead imposes general requirements that students have completed courses in a wide range of mandatory and elective subject matter "having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state." See *Wiesmueller*, 571 F.3d at 702 (quoting WIS. SUP. CT. R. 40.03(2)). Virtually all law schools in the country could satisfy those very general requirements. The subject areas listed by Wisconsin are:

Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates.

WIS. SUP. CT. R. 40.03(2)(a). The rule further requires that at least thirty of the credits be earned in a shorter list of mandatory basic law courses—"constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates." *Id.* § 40.03(2)(b).

98. See STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH., Standard 303(1)(3) at 16 (AM. BAR ASS'N 2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf

concluding that graduates from in-state law schools have learned about that state's practice, whether or not the curriculum includes instruction in that state's law. Moreover, many schools employ adjunct instructors to deliver course content, and those adjunct instructors are state-based practitioners who bring that practice experience into the classroom, whether or not the course focuses on state law.

In addition to clinics, field placements, and part-time jobs, all of which result in practice-focused learning inside the state, there are numerous important opportunities in all law schools for students to interact with judges, lawyers, and other legal professionals outside the classroom. Judges and members of the bar volunteer their time to local law schools because they understand that the transition from student to ethical attorney requires more than the formal curriculum. The multiple events in which law students interact with judges and attorneys from the jurisdiction in which the law school is located educate law students about what is expected of practitioners in that jurisdiction and how those practitioners operate as legal professionals in the state.

And the education flows in both directions. Some law professors devote significant time to state bar activities, working alongside practitioners and judges to improve legal education, practice, and the professional transition between the two. State supreme court justices and other bar leaders who regularly visit local law schools learn firsthand about those law schools, routinely meeting students, faculty, and administrators. In this way, a jurisdiction's licensing authorities can gain confidence in the competence of the graduates.⁹⁹

Based on the numerous ways in which students in a state's law schools acquire knowledge of and skills connected to state-based practice, and the extent to which judges and practitioners in the state become familiar with the students and the legal education offered by the state's schools, in-state schools have means of demonstrating a new lawyer's competence to practice in that state that out-of-state schools lack. An in-state diploma privilege does not prevent graduates of other law schools from practicing within a state; it is merely one avenue among several for demonstrating that a law school graduate possesses minimum competence to practice law. States creating an in-state privilege should be careful to document the basis for that privilege but, if they do, a court applying the Dormant Commerce Clause's balancing test should have little trouble finding that the local benefits of the in-state diploma privilege outweigh the burden on interstate commerce imposed by granting that diploma privilege.

The Supreme Court's Dormant Commerce Clause jurisprudence makes it impossible to predict with certainty what level of scrutiny that Court or lower courts would apply to in-state diploma privileges that include at least one private school. These privileges facially discriminate between in-state and out-of-state schools, creating a serious prospect that a court would apply strict scrutiny and invalidate the privilege. On the other hand, Judge Posner offers a plausible argument for applying the more lenient balancing test. If one focuses on the direct

[<https://perma.cc/U53K-LQ48>].

99. See *Huffman v. Mont. Supreme Court*, 372 F. Supp. 1175, 1183 (D. Mont. 1974) (finding diploma privilege justified because the Montana Supreme Court was able to maintain a close relationship with faculty, students, and curriculum).

recipients of the privilege (the law school graduates), rather than the law schools, any impact on interstate commerce is both indirect and evenhanded: residents of any state may matriculate at in-state law schools and enjoy the benefits of a diploma privilege. A state's power to regulate law practice, moreover, is well-recognized.¹⁰⁰

For these reasons, we urge courts to apply the balancing test to assessment of in-state diploma privileges. This will allow the court to balance the burden on interstate commerce against the rationales for the privilege. If a state offers thoughtful, evidence-based rationales for the privilege, then we believe courts would uphold in-state privileges under the balancing test. These rationales are most likely to exist when a state adopts a diploma privilege after careful reflection on the competencies it seeks for licensing and a comparison of the experience of law students in in-state schools with out-of-state ones.

Note, however, that even if a court adopts the balancing test we urge, that test is unlikely to sustain an emergency in-state diploma privilege enacted in response to the COVID-19 pandemic. Adoption of an emergency privilege allows little time to identify competencies or reflect on the differences between in-state and out-of-state schools. Rationales for the privilege, moreover, might not fit with the state's previously declared goals for licensing new lawyers. A state that administers the Uniform Bar Exam, for example, would have difficulty justifying sudden adoption of an in-state diploma privilege on the ground that in-state schools are more likely than out-of-state ones to teach its state law.¹⁰¹ States contemplating adoption of diploma privileges during the pandemic would be well advised to extend those privileges to graduates of out-of-state law schools as well.

IV. CONCLUSION

COVID-19 threatens a major disruption in the licensing of 2020 law graduates. Many jurisdictions will be unable to administer the July 2020 bar exam due to proscriptions on large gatherings and health risks to both test-takers and those staffing the bar examination. Those same jurisdictions face continued uncertainty about the prospect of administering the exam any time in 2020. State supreme courts will have to determine how to license lawyers in order to help meet the growing need for legal services generated by this crisis, while also protecting the public.

As this paper demonstrates, the Constitution places few limits on using a diploma privilege to meet those goals. Privileges extended to graduates of both in-state and out-of-state schools raise no constitutional issues. Diploma privileges limited to in-state public law schools are likewise safe. States could adopt these kinds of diploma privileges either as emergency measures responding to the COVID-19 pandemic or as more lasting approaches to licensing.

100. *E.g.*, *Wiesmueller*, 571 F.3d at 704.

101. The Uniform Bar Exam does not test the law of any state. Instead, it tests general "knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law." *Uniform Bar Examination*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/6746-HMZJ>].

A privilege extended to graduates of in-state private schools, but denied to graduates of out-of-state schools, would raise significant questions only under the Dormant Commerce Clause. Here, states face two challenges. First, there is a possibility that courts will find those distinctions facially discriminatory and apply strict scrutiny to the state's decision. A state might be able to satisfy that demanding standard with the arguments outlined here, but a successful outcome is far from assured.

Second, even if courts apply a less burdensome balancing test to in-state diploma privileges, privileges adopted after careful deliberation are more likely to survive scrutiny than emergency ones. A state could justify an ongoing in-state diploma privilege by building a strong record tying the diploma privilege to the type of competencies in-state students develop and the avenues they have to demonstrate those competencies to the state's practicing bar over three years. A state adopting an emergency diploma privilege would struggle to create that type of record.

The Constitution should not stand as a barrier when a state establishes evidence-based means for determining minimum competence for licensing its new lawyers. Courts must be wary of economic protectionism but should also be open to a variety of methods for assessing attorney competence. If a state has thoughtfully designed an in-state diploma privilege and can offer evidence of concrete differences between in-state and out-of-state law schools, we urge courts to uphold the privilege even when it is limited to in-state schools that include a private law school.