

NOTE
**TAKING BACK THE BAR: THE NEED FOR STATE
LEGISLATION DIRECTED AT ADDRESSING THE
DISPARATE IMPACT OF THE BAR EXAM AND
HOLDING THE NCBE ACCOUNTABLE**

I. INTRODUCTION

After a daunting three years of law school, the bar exam is the final gatekeeper to the legal profession and directly impacts who becomes a legal professional.¹ In the United States, the bar exam was not always the gateway to the legal profession as it is today.² The push for an exam as a gateway to the legal profession “came as a result of a growing number of people of color and immigrants desiring to practice law.”³ Historically, the bar exam has been used as a direct and intentional exclusionary tool, and it continues to exclude capable candidates.⁴

Lackluster attempts to increase racial diversity will not remedy the years of racism and exclusion that the American Bar Association (“ABA”) once openly encouraged.⁵ Additionally, attempts by minority

1. See Nicci Arete, *The Bar Exam’s Contribution to Systemic Inequalities in Access to Justice Around the World*, 30 WASH. INT’L L.J. 324, 326-27 (2021).

2. See Nora Weiss, *The Bar Exam Has Some Fundamental Problems*, STUDY BREAKS (July 26, 2022), <https://studybreaks.com/thoughts/fundamental-problems-bar-exam> [<https://perma.cc/G4PC-L2CL>] (“In essence, the bar exam was used as a gatekeeping mechanism, preventing people of color and other marginalized individuals from becoming licensed attorneys and rising the ranks within the field of law.”).

3. Oday Yousif Jr., *Commentary: The Bar Exam Is Stained with Inequality and Racism. It Needs to Be Abolished*, SAN DIEGO UNION-TRIB. (Dec. 7, 2020, 5:40 PM), <https://www.sandiegouniontribune.com/opinion/commentary/story/2020-12-07/abolishing-the-bar-exam-bias> [<https://perma.cc/ND7R-XALX>]; see also Weiss, *supra* note 2 (“As shown by this history alone, the original purpose of the bar exam was to retain the elitism and classism of the legal profession.”).

4. See Weiss, *supra* note 2.

5. See *infra* Part III.B; see also Eura Chang, Note, *Barring Entry to the Legal Profession: How the Law Condone Willful Blindness to the Bar Exam’s Racially Disparate Impacts*, 106 MINN. L. REV. 1019, 1060-61 (2021) (quoting George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 104 (2003)) (“The ABA has attempted to address the diversity issue through the creation of ‘commissions, diversity initiatives, action groups, councils, “diversity days,” and scholarships.’ However, such superficial efforts have failed to drive meaningful improvements; between 2010 and

test takers to challenge the disparate impact of the bar exam under both Title VII challenges and equal protection challenges have been unsuccessful, emphasizing the need for legislative intervention.⁶ While the National Conference of Bar Examiners (“NCBE”) has recently announced that pilot testing for the NextGen bar exam is set to begin in 2026, which is a hopeful step in the right direction for lessening the disparate impact of the exam, it remains to be seen what recommendations for the new exam will be adopted in practice.⁷ Additionally, the NCBE makes the determinations as to the disparate impact of the exam and is charged with lessening the disparate impact in the creation and implementation of the NextGen bar exam.⁸

The ABA and the NCBE have acknowledged problems with the bar exam in the past without meaningful change and, absent meaningful intervention by the states, we may be heading down the same path.⁹ Accordingly, state legislation directed at holding the NCBE accountable for the disparate impact of the bar exam and allowing these claims to be heard will put pressure on the NCBE to fix the deep-rooted problems of the exam that have persisted for decades.¹⁰ Additionally, legislation directed at shining a spotlight on these issues will push the state supreme courts to determine whether it is time to consider alternative licensing

2020, the number of lawyers of color saw a meager three percent growth. The ABA has been reluctant to tackle larger, more systemic changes within its power, such as advocating for alternatives to the bar exam or its abolishment entirely.”).

6. See *infra* Part III.A; see also Kristen Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 396-98 (2003) (discussing how “[l]itigation directed at the bar exam’s disparate impact on non-majority law graduates has been unsuccessful . . . because equal protection challenges have fared poorly” under rational basis review and Title VII challenges have failed).

7. See *Next Generation of the Bar Exam*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/about/next-generation-bar-exam> [<https://perma.cc/AF75-8M2N>] (last visited Feb. 21, 2024); Carol L. Chomsky et al., *A Merit-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883, 897-98 (2021) (noting that even with recommended improvements, “the exam will suffer from many of the same problems” it has suffered from in the past).

8. See *Diversity, Fairness, and Inclusion*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/about/diversity-fairness-and-inclusion> [<https://perma.cc/5LZ2-XRTU>] (last visited Feb. 21, 2024).

9. See Chang, *supra* note 5, at 1060 (“By avoiding disaggregated data, courts and state bar associations can dance around the reality that the most definitive factor in attorney licensure, bar passage, results in such racially disparate outcomes. Additionally, by avoiding the reality of the disparity, states can continue to offer vague promises about diversity and general plans.”); see also Hassan Kanu, *‘Exclusionary and Classist’: Why the Legal Profession Is Getting Whiter*, REUTERS (Aug. 10, 2021, 7:49 PM), <https://www.reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10> [<https://perma.cc/NQP6-KUUS>] (“A recent [ABA] study found that the legal profession in America has remained overwhelmingly white and male over the last decade and that racial diversity among lawyers has actually regressed in some respects.”).

10. See *infra* Part IV.

practices.¹¹ Contrary to popular belief, the bar exam is not the only means of ensuring minimum competency of those who are seeking to enter the profession; there are many alternative licensing practices that can help achieve a more diverse legal profession.¹²

This Note will begin by describing the bar exam's discriminatory history and its roots as an intentionally exclusionary tool to the legal profession.¹³ Part II will first examine the concept of disparate impact and the role disparate impact analysis has played in targeting practices that are facially neutral but have an adverse effect on minorities.¹⁴ It will then examine the historically rooted disparate impact of the bar exam on minorities.¹⁵ Part III will examine the failed attempts to challenge the disparate impact of the bar exam and address the need for legislative intervention in regard to the NextGen bar exam.¹⁶ Part IV will propose a legislative solution where the states will more closely examine the effects of the NextGen bar exam to ensure that targeted efforts to lessen the disparate impact are being implemented.¹⁷ It will go on to discuss that state legislation allowing disparate impact claims against the bar exam to be heard will help put pressure on the NCBE to fix the deep-rooted problems, as well as hold it accountable for the problems that have persisted for decades.¹⁸ Lastly, Part IV will examine a workable alternative pathway to lawyer licensing that can help achieve a more diverse legal profession that does not work to exclude capable candidates, and will conclude by addressing counterarguments from supporters of the exam who contend that the bar exam is necessary to ensure minimum competency for practice.¹⁹

11. See *infra* Part IV.A.; see also Leslie C. Levin, *The Politics of Bar Admission; Lessons from the Pandemic*, 50 HOFSTRA L. REV. 81, 84 (2021) ("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.").

12. See *infra* Part IV.B–C; see also Ibraheem Khalifa, *With Little Evidence to Support the Current Bar Exam's Claimed Objective, It's Time to Seriously Consider the Various Alternatives*, MICH. STATE L. REV. F. (May 3, 2022), <https://www.michiganstatelawreview.org/vol-2021-2022/2022/5/2/with-little-evidence-to-support-the-current-bar-exams-claimed-objective-its-time-to-seriously-consider-the-various-alternatives> [<https://perma.cc/TZ6B-3NCL>] (discussing viable alternatives to the bar exam, including diploma privilege, the Canadian model, and a public service alternative).

13. See *infra* Part II.

14. See *infra* Part II.A.

15. See *infra* Part II.B.

16. See *infra* Part III.

17. See *infra* Part IV.A.

18. See *infra* Part IV.A.

19. See *infra* Part IV.B.

II. THE BAR EXAM AS A GATEWAY TO THE LEGAL PROFESSION

The bar exam has not always been the gateway to the legal profession that it is today.²⁰ Other ways to enter the legal profession, including apprenticeships and oral exams, were historically used by the states to regulate new attorneys.²¹ The bar exam has become the norm only in the last century.²² The drive for an exam as a barrier to the profession “came as a result of a growing number of people of color and immigrants desiring to practice law.”²³ At this time, the members of the profession sought to find a way to stop these aspiring attorneys from joining the all-White legal profession.²⁴ The bar exam was the answer to their concerns.²⁵ Accordingly, the birth of the bar exam was based on explicit racial discrimination.²⁶ While the bar exam is no longer explicitly discriminatory, it continues to have the effect of disadvantaging minority test takers.²⁷

Subpart A will begin by analyzing the history of disparate impact analysis and its role in combating facially neutral practices that have an adverse effect on a legally protected class.²⁸ Subpart B focuses on the disparate impact the bar exam has on minorities.²⁹ Subpart C discusses who governs lawyer licensing.³⁰ Lastly, Subpart D discusses the role the

20. See Yousif, *supra* note 3.

21. See *id.*; see also Levin, *supra* note 11, at 86 (“During most of the nineteenth century, bar admission requirements were relatively undemanding. Apprenticeships were common and bar examination requirements—to the extent they existed—were not rigorous. 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. Law schools supported the diploma privilege because it attracted students at a time when a law degree was not required to practice.”).

22. See Yousif, *supra* note 3.

23. *Id.*; accord Levin, *supra* note 11, at 87 (noting that the organized efforts to raise bar admission standards “coincided with an influx of immigrant lawyers”).

24. See Yousif, *supra* note 3 (“The [ABA] itself was once a White male-only fraternity that voted to only admit ‘worthy members’ in an effort, as its membership chairman said, to keep ‘pure the Anglo-Saxon race.’”).

25. See *id.*

26. See DeShun Harris, *Do Black Lawyers Matter to the Legal Profession?: Applying An Antiracism Paradigm to Eliminate Barriers to Licensure for Future Black Lawyers*, 31 U. FLA. J.L. & PUB. POL’Y 59, 64-65 (2020) (discussing how the “bar exam’s rise to becoming a prerequisite to practice is rooted in racism” and the practices adopted to stop the influx of new minority lawyers from entering the profession including decreasing bar passage rates and tightening law school accreditation).

27. See Khalifa, *supra* note 12 (discussing the history and development of the bar exam in the United States); see also Yousif, *supra* note 3 (“While no longer explicitly racially discriminatory, the bar exam creates a de facto racist system.”).

28. See *infra* Part II.A.

29. See *infra* Part II.B.

30. See *infra* Part II.C.

NCBE plays in lawyer licensing and the future of the bar exam: the NextGen bar exam.³¹

A. The History of Disparate Impact

Disparate impact is often referred to as unintentional discrimination.³² Disparate impact analysis refers to the result of policies, practices, rules, or other systems that, though appearing neutral, have an adverse effect on individuals of a legally protected class.³³ Congress has incorporated disparate impact concepts into federal statutes and regulations, permitting the utilization of disparate impact analysis to identify unlawful discrimination.³⁴ The judiciary initially endorsed disparate impact analysis in cases that deemed voting laws which adversely affected individuals based on race, color, or ethnic origin as illegal under civil rights statutes.³⁵

The Supreme Court embraced disparate impact analysis in its seminal decision *Griggs v. Duke Power Co.*,³⁶ which struck down a practice that had a racially disparate impact that was not justified by a business necessity.³⁷ The Court unanimously established the legal precedent for disparate impact lawsuits involving racial discrimination.³⁸ There, the Court held that Title VII of the Civil Rights Act of 1964 prohibits neutral employment policies and practices that, regardless of intent, result in discrimination on the basis of a protected trait.³⁹ Accordingly, the Court

31. See *infra* Part II.D.

32. *What Are Disparate Impact and Disparate Treatment?*, SOC'Y FOR HUM. RES. MGMT., <https://www.shrm.org/topics-tools/tools/hr-answers/disperate-impact-disparate-treatment> [<https://perma.cc/8K8P-ZV83>] (last visited Feb. 21, 2024); see also Michelle P. Scott, *Disparate Impact: What It Means, How It Works, History*, INVESTOPEDIA, <https://www.investopedia.com/disperate-impact-5114526> [<https://perma.cc/E5F8-ZSF8>] (Nov. 30, 2022).

33. Scott, *supra* note 32 (“Disparate impact refers to the result of the application of a standard, requirement, test, or other screening tool used for selection that—though appearing neutral—has an adverse effect on individuals who belong to a legally protected class.”).

34. *Id.*

35. *Id.*

36. 401 U.S. 424 (1971).

37. See *id.* at 431.

38. See *id.* at 430-31; see also Editors of Encyclopedia Britannica, *Griggs v. Duke Power Co.*, BRITANNICA, <https://www.britannica.com/event/Griggs-v-Duke-Power-Co> [<https://perma.cc/68Z5-PH7X>] (last visited Feb. 21, 2024).

39. *Griggs*, 401 U.S. at 430-32. The Court in *Griggs* ruled that unless an employer can show that a policy is supported by business necessity, employer policies that, although neutral in form, work to discriminate on the basis of race or some other protected trait will be struck down. *Id.* at 431. The Court held that the employer failed to show any relationship between aptitude tests and actual job-performance ability, and thus the policy was not permitted under Title VII. *Id.*

interpreted Title VII to address the results of employment practices, not merely their motivations.⁴⁰

However, while many believed that the *Griggs* decision was rooted in the Equal Protection Clause of the Constitution, as well as the 1964 law, the 1976 Supreme Court decision *Washington v. Davis*⁴¹ rejected the view that *Griggs* was a constitutional ruling, finding it to be solely based on statute.⁴² It follows that, where the courts or Congress have not imparted disparate impact analysis, claimants who wish to bring racial discrimination claims under an equal protection analysis have a much harder time succeeding.⁴³ The Court in *Davis* also held that state action producing a racially disparate impact must have a racially discriminatory purpose to be found unconstitutional.⁴⁴ Accordingly, it is not enough for a claimant to show that a state practice produces a disparate impact on a legally protected class, but rather, the claimant also must prove that the practice was adopted because of, not merely in spite of, its adverse effects on a group of individuals.⁴⁵ Many post-*Davis* cases have proved that this is a very high threshold to overcome, and claimants bringing equal protection claims based on a disparate impact theory often fail.⁴⁶ As Part III will discuss, attempts to impart the standard of Title VII disparate impact analysis into equal protection analysis, as well as challenges under Title VII itself, have been entirely unsuccessful, requiring

40. *Id.* at 432 (“The Company’s lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”) (emphasis in original).

41. 426 U.S. 229 (1976).

42. *See id.* at 238-39; *see also* Scott, *supra* note 32.

43. *See, e.g., Davis*, 426 U.S. at 240-41; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (holding that a state-sponsored racial classification will not be held to violate the Equal Protection Clause of the Fourteenth Amendment unless a plaintiff shows that the law is motivated by a discriminatory purpose and has a discriminatory impact); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (holding that a federal criminal defendant making a selective-prosecution claim must demonstrate that the government’s prosecutorial policy was motivated by a discriminatory purpose and “that similarly situated individuals of a different race were not prosecuted”).

44. *Davis*, 426 U.S. at 239.

45. *Id.*; *see Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that to prove that a state actor violates the Equal Protection Clause by enacting legislation with a discriminatory purpose, a plaintiff must show that the decisionmaker “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”). While *Feeney* was based on gender classification rather than a racial classification, the disparate impact standard under the Equal Protection Clause remains the same. *See Feeney*, 442 U.S. at 273.

46. *See Davis*, 426 U.S. at 240; *see, e.g., Vill. of Arlington Heights*, 429 U.S. at 264-65.

challengers of the bar exam to show both a discriminatory effect and a discriminatory purpose.⁴⁷

It follows that state action which does not show a discriminatory intent will not be invalidated except in limited situations where a statute imparts the use of disparate impact.⁴⁸ Despite the *Davis* Court's constitutional rejection of the disparate impact principle, the decision essentially endorsed the statutory application of a disparate impact standard to identify governmental actions as discriminatory.⁴⁹ Disparate impact framework was adopted in other areas of the law, such as in the Fair Housing Act of 1988.⁵⁰ Additionally, the Department of Education invoked Title VI of the Civil Rights Act of 1964 and incorporated disparate impact tests into federal regulations that impact institutions receiving federal funds.⁵¹ However, efforts to expand the use of a disparate impact test have met varying levels of endorsement and resistance and are often affected by changes in political control of the federal legislative and executive branches, as well as the composition of the Supreme Court.⁵²

The debate concerning the disparate impact standard continues today and has been most recently affected by both the Trump Administration and the Biden Administration.⁵³ The Trump Administration sought to limit the use of disparate impact analysis to target discrimination, while President Biden and his administration signaled their intent to increase enforcement of antidiscrimination laws and to employ disparate impact analysis in their efforts.⁵⁴ One example of such effort is an

47. See *infra* Part III.A.I.

48. See Scott, *supra* note 32.

49. *Id.*; see *Davis*, 426 U.S. at 255 (Stevens, J., concurring).

50. Scott, *supra* note 32; see also John Paul Schnapper-Casteras, *Symposium: The Disparate-Impact Framework Remains Essential and Effective*, SCOTUSBLOG (Jan. 7, 2015, 10:08 AM), <https://www.scotusblog.com/2015/01/symposium-the-disparate-impact-framework-remains-essential-and-effective> [<https://perma.cc/K366-U9QW>] (“The Fair Housing Act and the disparate-impact framework in particular remain essential to addressing these grave problems. For four decades, the framework has proven indispensable, particularly for eradicating the de facto housing segregation that is fairly traceable to de jure policies overtly promoted by federal and state governments.”).

51. Scott, *supra* note 32.

52. *Id.*

53. *Id.*; see also Jeffrey P. Naimon & Sasha Leonhardt, *The Pendulum Always Swings Twice: Disparate Impact Under the Obama, Trump, and Biden Administrations*, AM. BAR ASS'N (May 14, 2021), https://www.americanbar.org/groups/business_law/publications/committee_newsletters/consumer/2021/202104/disperate-impact [<https://perma.cc/WM8S-7AMK>] (discussing the different approaches taken by the Obama, Trump, and Biden Administrations when it comes to imparting disparate impact analysis into the Fair Housing Act).

54. See Scott, *supra* note 32 (“As its term ended, the Trump White House issued a notice announcing its intent to publish a final regulation weakening antidiscrimination enforcement without complying with the Administrative Procedure Act requirement that it first publish the proposed

executive order that directed the Secretary of Housing and Urban Development (“HUD”) to review changes made by the Trump Administration to antidiscrimination regulations and take action to ensure that HUD enforces fair housing laws and prevents practices having an “unjustified discriminatory effect.”⁵⁵ As such, the Biden Administration has displayed its intent to increase enforcement of antidiscrimination laws and to use disparate impact analysis to do so.⁵⁶ This provides a hopeful example of the role the Biden Administration can play in employing disparate impact standards which target racial discrimination.⁵⁷

B. Disparate Impact of the Bar Exam

Diversity in the legal profession has elicited concern for decades.⁵⁸ A special task force on Minorities and Justice established by the Washington State Legislature conducted public forums in 1988 to examine instances of racial or ethnic bias in the court system.⁵⁹ The testimony elicited from the public forums allowed the task force to conclude that “minorities believe that bias pervades the entire legal system in general and hence, they do not trust the court system to resolve their disputes or

change and allow a public comment period. The change was intended to eliminate the use of the disparate impact standard to counter discrimination on the basis of race, color, or national origin under Title VI of the 1964 Civil Rights Act and to prohibit only intentional discrimination.”); *see also* Richard J. Andreano, Jr., *President Biden Issues Executive Order Directing HUD to Review Fair Housing Act Disparate Impact Rule*, BALLARD SPAHR LLP (Feb. 3, 2021), <https://www.consumerfinancemonitor.com/2021/02/03/president-biden-issues-executive-order-directing-hud-to-review-fair-housing-act-disparate-impact-rule> [https://perma.cc/DFB4-M4YF] (“Given the Biden Administration’s goal of addressing racial economic inequality, rather than move away from the use of disparate impact analysis, the [Consumer Financial Protection Bureau] under the leadership of Rohit Chopra, President Biden’s nominee for [Consumer Financial Protection Bureau] Director, can be expected to renew its use of disparate impact analysis under the ECOA and Regulation B.”).

55. Scott, *supra* note 32.

56. *Id.*

57. *See id.*

58. *See* Lorraine K. Bannai & Marie Eaton, *Fostering Diversity in the Legal Profession: A Model for Preparing Minority and Other Non-Traditional Students for Law School*, 31 U.S.F. L. REV. 821, 821 (1997) (“In recent years, law schools have struggled to recruit and graduate a more diverse student population, recognizing that greater diversity benefits both the law school community and society at large.”); *see also* Debra Cassens Weiss, *Diversity ‘Bottleneck’ and Minority Attrition Keep Firm Leadership Ranks White and Male, New ABA Survey Says*, ABA J. (Feb. 17, 2021, 12:51 PM), <https://www.abajournal.com/news/article/diversity-bottleneck-and-minority-attrition-keep-law-firm-leadership-ranks-white-and-male-aba-survey-says> [https://perma.cc/H7K8-S6RP] (“At the associate level, [W]hite lawyers constitute 70% to 92% of associates, depending on firm size and year, according to the [2020 Model Diversity] survey report. White lawyers constitute 84% to 93% of equity partners and 84% to 90% of nonequity partners.”).

59. *See* Bannai & Eaton, *supra* note 58, at 823.

administer justice even-handedly.”⁶⁰ Despite years of awareness, a disproportionate number of lawyers identify as White.⁶¹ Recently, in 2020, a report by the ABA “revealed that the number of Latinx, Black, Asian, Indigenous, and mixed-race lawyers grew only three percentage points over a decade.”⁶²

Among the multitude of reasons for the lack of diversity in the legal profession, it is widely recognized that the bar exam plays a historical and present role as gatekeeper to the profession.⁶³ While the bar exam is no longer explicitly discriminatory, the bar exam still works to discriminate against minority test takers.⁶⁴ A study overseen by the Law School Admission Council revealed that of the students who began law school in 1991, just sixty-one percent of Black law school graduates passed the bar exam on their first try, with other racial groups ranging from a seventy-four-percent first-time pass rate for Latinx candidates to an eighty-percent rate for Asian exam takers.⁶⁵ Conversely, White candidates succeeded at a much higher rate of ninety-one percent.⁶⁶

The cumulative cost of sitting for the bar exam and preparation courses can be as high as \$4,500 to \$5,000, exasperating the inequities

60. *Id.* (quoting JUSTICE CHARLES Z. SMITH, WASH. STATE MINORITY & JUST. TASK FORCE, FINAL REP. xxi (Dec. 1990)).

61. Chang, *supra* note 5, at 1024-25 (urging decisionmakers and the legal community to radically rethink lawyer licensing in order to see more than just an incremental change of diversity in the legal profession).

62. *Id.* at 1024. The author discusses how a more diverse legal profession will lead to many benefits, including better representation for clients, increased public trust in legal institutions, and equity. *Id.* at 1025-28.

63. See Arete, *supra* note 1, at 326-27 (“As the last step to licensure, the bar exam disproportionately excludes people of marginalized communities from the profession, which in turn impacts the relationship those communities have with the justice system and their access to it.”); see also Weiss, *supra* note 2 (discussing the “myriad of structural barriers that prevent people of color from attending law school and passing the state bar examination[,]” including the cost of law school and the cost of “preparing for and taking the bar exam”).

64. See Yousif, *supra* note 3; see also Claudia Angelos et al., *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 7, 2020), <https://blog.harvardlawreview.org/licensing-lawyers-in-a-pandemic-proving-competence> [<https://perma.cc/YLQ4-GSSY>] (“Test-takers who are hungry, poorly housed, working full-time, and unable to afford specialized prep courses don’t score as well as their more privileged peers. High stakes exams, from kindergarten through the bar, solidify the position of well-to-do elites.”).

65. Chang, *supra* note 5, at 1034-35; see also Yousif, *supra* note 3 (“While no longer explicitly racially discriminatory, the bar exam creates a de facto racist system. To prepare for the exam, applicants spend thousands of dollars for bar preparation courses requiring months of their time. Many cannot afford these luxuries but must endure them to enter the profession. There is no question that these egregious considerations impact mostly non-White applicants.”).

66. Chang, *supra* note 5, at 1035 (“While most states do not report passage rates by race, the disaggregated data that does exist is eye-opening. California, the only state to regularly publish a demographic breakdown of passage rates, illustrates the size of this disparity. 50.1% of white test takers passed the February 2020 bar exam on the first try. Conversely, 17.6% of Black test takers, 25.2% of Latinx test takers, and 27.7% of Asian test takers cleared the same hurdle.”).

created by the bar exam.⁶⁷ Additionally, most students who pass the bar exam are forced to treat bar preparation as a full-time job for at least ten weeks.⁶⁸ It follows that, in order to pass the bar exam, students are forced to forego working for nearly three months to study while also taking on more debt on top of the debt they had just accumulated from three years of their legal education.⁶⁹ These additional costs only work to “exacerbate privilege gaps between students and negatively impact students from lower socioeconomic backgrounds.”⁷⁰ Additionally, some individuals who can afford to take a few months off of work to prepare for the exam have an advantage over underprivileged and typically non-White applicants who cannot afford to do so.⁷¹ This confirms what many have thought for decades: the bar exam is a test of resources.⁷²

Studies have also revealed that part of the reason for the disparate impact of the bar exam lies in its high-stakes nature and time constraints.⁷³ Research demonstrates that the nature of the exam “evoke[s] stereotype threat: a phenomenon that dramatically depresses performance among individuals (especially high-achieving ones) who belong to a group that our culture stereotypes as low-performing at a particular activity.”⁷⁴ Accordingly, the nature of the exam itself works to disadvantage minority test takers.⁷⁵

67. Carson Nies, *For More Equitable Licensure, Washington State Needs Diploma Privilege, Not the Bar Exam*, 20 SEATTLE J. FOR SOC. JUST. 287, 288 (2021); see also Khalifa, *supra* note 12 (“Individuals that take the bar exam spend months preparing for it and upwards of \$3,000 on prep courses and exam fees.”).

68. Nies, *supra* note 67, at 288.

69. See *id.*

70. *Id.* at 288-89; accord Weiss, *supra* note 2.

71. Khalifa, *supra* note 12 (explaining that although the bar exam is no longer explicitly discriminatory, it continues to have an unfavorable impact on underprivileged communities).

72. Rachael Pikulski, *Analysis: Should the Bar Be Reconsidered? Lawyers Weigh In (1)*, BLOOMBERG L. (Aug. 5, 2022, 5:00 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-should-the-bar-exam-be-reconsidered-lawyers-weigh-in> [https://perma.cc/TK6Q-SHWD] (“The financial resources that must be devoted to preparing for the exam can add up very quickly. These include study courses and preparation materials, the cost of the actual exam, and traveling for the exam if needed. In fact, it can cost up to \$7,000 to cover exam fees and study courses—which is a tremendous amount for recent graduates, many of whom aren’t working and are instead studying full-time without an income for over two months.”).

73. Deborah Jones Merritt et al., *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L.: U.S. L. WEEK (July 20, 2021, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies> [https://perma.cc/A926-6J37] (“Stereotype threat affects all of us. White men, for example, perform less well on math tests when they are reminded that ‘Asians outperform Whites’ in math.”).

74. *Id.*

75. *Id.* (“Our profession, in sum, maintains an entrance exam that predictably and inexorably favors White candidates. The exam requires intensive and expensive preparation that White candidates can more likely afford. It then employs a testing format and environment known to produce stereotype threat in candidates of color.”).

In sum, as stark racial disparities in bar exam results continue to hamper diversity in the legal profession, it is imperative that state supreme courts and state bar examiners acknowledge the role the bar exam has played, and continues to play, in the lack of diversity in the legal profession.⁷⁶ In order to see meaningful change, the states must be held responsible for implementing targeted efforts.⁷⁷ Absent such efforts by the states, the bar exam will continue to exclude capable candidates and impede the advancement of diversity in the legal profession.⁷⁸

C. About Lawyer Licensing

In most states, lawyer licensing decisions such as how to proceed with the bar exam rest with the state supreme courts.⁷⁹ It follows that any modifications to lawyer licensing requirements, or the bar exam itself, necessitate action from a state's judicial branch.⁸⁰ This sets the legal profession apart from other licensed fields, such as medicine and accounting, which are governed by state statutes.⁸¹ While regulating the legal profession is just one of the numerous responsibilities of the state supreme courts, legislatures have nonetheless deferred to the courts on lawyer licensing issues.⁸² Due to the myriad responsibilities of state supreme courts, they often lack both the resources and the time to conduct their own research on issues affecting lawyer licensing.⁸³ In turn, state courts often allow the state bar examiners and the organized bar to take the lead.⁸⁴

76. See *id.* (noting that racial gaps in the legal profession are not new and similar gaps have been documented in the 1990s); see also *infra* Part III.

77. See *infra* Part III.

78. See *infra* Part III.

79. Levin, *supra* note 11, at 93.

80. Chang, *supra* note 5, at 1032; accord N.Y. COMP. CODES R. & REGS. tit. 22, § 520.1 (vesting bar admission in New York State with the Appellate Division of the Supreme Court).

81. Chang, *supra* note 5, at 1033.

82. Levin, *supra* note 11, at 93.

83. See *id.*; see also Chang, *supra* note 5, at 1033; Bobbi Jo Boyd, *Do It in the Sunshine: A Comparative Analysis of Rulemaking Procedures and Transparency Practices of Lawyer-Licensing Entities*, 70 ARK. L. REV. 609, 618 (2017) (“In many jurisdictions, the court possessing the power to regulate lawyer licensing creates subordinate entities to handle those administrative tasks.”).

84. Levin, *supra* note 11, at 93; Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 389 (2019) (“State supreme court justices facing budget pressures, access to justice crises, and other judicial administration problems sometimes prefer to delegate oversight of attorney licensing to bar examiners. In virtually every jurisdiction individual state bar examiners play a crucial role based on their knowledge, experience, and willingness to innovate.”); William Wesley Patton, *The Dangers of Delegating Attorney Licensing to Private and Non-Profit Corporations: The Inapplicability of Public Records Laws and Abdication of Government Protection During Health Crises*, 58 CAL. W. L. REV. 125, 127 (2021) (“The twentieth century has seen a rapid expansion of the delegation of traditionally governmental func-

States' highest courts appropriate vast deference to entities commonly known as the state board of bar examiners.⁸⁵ In all but one state, the administration and enforcement of licensure requirements fall to the state board of bar examiners.⁸⁶ Usually, state bar examiners are tasked with administration of the state bar examination, as well as oversight of the character and fitness inquiry.⁸⁷ In some states, bar examiners may operate within mandatory state bar organizations, but frequently, the offices or bar examiners are entities associated with the state courts.⁸⁸ In states that do not rely on the Uniform Bar Examination ("UBE"), "[t]he state supreme courts rely heavily on the state bar examiners" who are tasked with determining the content of the bar exam, how it will be administered, and how the character and fitness inquiry will be conducted.⁸⁹ However, only nine states do not rely on the UBE, leaving the NCBE with great influence over a vast number of graduate test takers.⁹⁰ The requirements to sit for the bar exam, whether the jurisdiction adopted the UBE or not, varies little from state to state.⁹¹ In all jurisdictions, applicants need to have graduated from an undergraduate institution and completed all requirements for graduation from an ABA-approved law school or a state-approved law school.⁹²

D. The NCBE and the NextGen Bar Exam

The NCBE is a nonprofit organization that develops the bar exam.⁹³ The organization is governed by a national board of trustees which

tions to private and non-profit corporations. Such a transfer of governmental power can substantially reduce the public's right to transparent and accountable government.").

85. See Chang, *supra* note 5, at 1031-32; see also Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. 1, 47-48 (2020) ("Examiners stand guard at the gateway to the legal profession like sentries with one sole role: maintenance and protection. But what or who is being protected? From the perspective of the class of 2020 bar takers, and many others, bar examiners have become much more gatekeepers of the exam and examination process than of the public and the profession.").

86. Chang, *supra* note 5, at 1045.

87. Levin, *supra* note 11, at 93.

88. *Id.* at 94.

89. *Id.* In the case of the July 2020 bar exam, it was frequently the state bar examiners who determined how the state should proceed with the July exam in the wake of the global pandemic. *Id.*

90. *UBE Jurisdictions*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions> [<https://perma.cc/9MD7-RLTF>] (last visited Feb. 21, 2024).

91. Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1202-03 (1995).

92. *Id.*

93. *National Conference of Bar Examiners: MBE, MEE, MPRE, MPT Multistate Tests*, AM. BAR ASS'N (June 26, 2018), https://www.americanbar.org/groups/legal_education/resources/bar_admissions/bartests [<https://perma.cc/MX5Z-KENX>].

consists of bar admission administrators, judges, and bar examiners.⁹⁴ Interestingly, however, the NCBE is located in Wisconsin, where the state follows diploma privilege.⁹⁵ Diploma privilege is a method that allows for lawyers to be admitted to the bar without taking a bar exam.⁹⁶ Wisconsin is currently the only state that allows diploma privilege as an alternative to the bar exam.⁹⁷ Even more interesting is the fact that NCBE President and Chief Executive Officer (“CEO”) Judith A. Gundersen attended law school in Wisconsin, where she is admitted to practice.⁹⁸ While she has never sat for the exam, she “is responsible for overseeing the development, production, and administration of the bar exam across the United States.”⁹⁹

The UBE, which is administered by a resounding forty-one states, is coordinated by the NCBE itself.¹⁰⁰ The UBE is composed of the Multistate Essay Examination (“MEE”), two Multistate Performance Test (“MPT”) tasks, and the Multistate Bar Examination (“MBE”).¹⁰¹ Even in jurisdictions that do not use the UBE, the vast majority use portions of it, such as the MBE, MEE, and even MPTs.¹⁰² So, even in a jurisdiction

94. *The National Conference of Bar Examiners Names Judith A. Gundersen as President and CEO*, NAT’L CONF. BAR EXAM’RS (Aug. 28, 2017), <https://perma.cc/AG4N-VSUQ>.

95. *See About NCBE*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/about> [<https://perma.cc/M36J-RX8M>] (last visited Feb. 21, 2024); Jessica Williams, *Abolish the Bar Exam*, CALIF. L. REV.: BLOG (Oct. 2020), <https://www.californialawreview.org/abolish-the-bar-exam> [<https://perma.cc/P768-BQ2T>].

96. Natalie Runyon, *Exploring Diploma Privilege and Alternatives for Attorney Licensure*, THOMSON REUTERS (Apr. 13, 2021), <https://www.thomsonreuters.com/en-us/posts/legal/diploma-privilege> [<https://perma.cc/5K8U-TKH7>].

97. Williams, *supra* note 95.

98. *Id.*

99. *Id.*; Griggs, *supra* note 85, at 32-33 (“The NCBE—headquartered in Madison, Wisconsin—has been led for the last 26 years by graduates of a Wisconsin law school who were admitted by diploma privilege. Current NCBE president Judith Gundersen publicly shared her journey from law school, to legal practice as a state prosecutor, then to a role in developing the bar exam that is used in most states today. A journey that did not include a state bar exam.”).

100. *See Uniform Bar Examination*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/ube> [<https://perma.cc/R9K9-9LBC>] (last visited Feb. 21, 2024); *see also UBE Jurisdictions*, *supra* note 90.

101. *Uniform Bar Examination*, *supra* note 100.

102. *Which States Administer the MPT?*, JD ADVISING, <https://jdadvising.com/which-states-administer-the-mpt> [<https://perma.cc/58JG-6TVC>] (last visited Feb. 21, 2024); *Multistate Bar Examination*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/mbe> [<https://perma.cc/G65E-SX9M>] (last visited Feb. 21, 2024); *Multistate Essay Examination*, NAT’L CONF. BAR EXAM’RS, https://www.ncbex.org/exams/mee/?_ga=2.229900572.1841804357.1667233729-1207657084.1666016968 [<https://perma.cc/S7Y5-Z4CH>] (last visited Feb. 21, 2024); Benjamin Afton Cavanaugh, *Testing Privilege: Coaching Bar Takers Towards “Minimum Competency” During the 2020 Pandemic*, 23 ST. MARY’S L. REV. ON RACE & SOC. JUST. 357, 372-73 (2020) (noting that a “majority of jurisdictions requiring bar exams administer the UBE . . . [and that] nearly every jurisdiction uses the MBE, the multiple-choice exam created back in the 1970s”).

that administers its own form of a bar exam, test takers may still be affected by the work of the NCBE.¹⁰³ It follows that the work of the NCBE in administering the bar exam has a direct effect on most of the states in the country and on most graduate test takers.¹⁰⁴ In turn, most aspiring lawyers are forced to endure the disparate effects of the bar exam.¹⁰⁵

In 2021, the NCBE announced a new bar exam: the NextGen bar exam.¹⁰⁶ The organization stated that the exam “will place more emphasis on legal skills and rely less on the memorization of doctrinal law.”¹⁰⁷ However, it is not yet clear how the NCBE will assess examinees on those legal skills.¹⁰⁸ Additionally, the exam will continue to be a one-time test after law school.¹⁰⁹

III. CHALLENGES TO THE BAR EXAM HAVE FAILED, EMPHASIZING THE NEED FOR STATE INTERVENTION

This Part acknowledges that litigation and challenges to the bar exam have been unsuccessful in the past, emphasizing the need for intervention to ensure that the disparate effects of the bar exam are being adequately addressed.¹¹⁰ Subpart A focuses on the failed attempts of litigation directed at the disparate impact of the bar exam both under Title VII challenges and under equal protection challenges.¹¹¹ Subpart B focuses on the NextGen bar exam and acknowledges the NCBE’s lack of targeted and transparent efforts in relation to the bar exam’s disparate

103. See *Multistate Bar Examination*, *supra* note 102; see also Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47, 58 (2015) (“[E]very American jurisdiction has its own standards for admission to the bar as well as its own approach to bar examinations . . . [e]ach jurisdiction, however, incorporates a significant portion of the tests created by the NCBE.”).

104. See *UBE Jurisdictions*, *supra* note 90.

105. See *id.*

106. Karen Sloan, *New Bar Exam Is on Track for 2026 Debut, Licensing Officials Say*, REUTERS (Jan. 7, 2022, 3:28 PM), <https://www.reuters.com/legal/legalindustry/new-bar-exam-is-track-2026-debut-licensing-officials-say-2022-01-07> [<https://perma.cc/3CD4-RP3L>] (“The organization plans to develop prototype questions this year and begin pilot testing what it has dubbed the ‘Next Gen Bar Exam’ in 2026.”); *NextGen Bar Exam Set to Change Attorney Licensing*, JD ADVISING, <https://jdadvising.com/nextgen-bar-exam-set-to-change-the-future-of-attorney-licensing> [<https://perma.cc/BLG3-ZNYK>] (last visited Feb. 21, 2024).

107. Sloan, *supra* note 106.

108. See *id.*

109. *Id.*

110. See *infra* Part III; see also Chang, *supra* note 5, at 1023 (“Despite these racial disparities, constitutional protections against unequal treatment present little hope for legal accountability.”); Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 934 (2020) (“The most powerful explanation for persistent weaknesses related to disparate impact and validity of attorney licensing may be bar examiners’ immunity from Title VII, which can be traced to a handful of cases from the 1970s.”).

111. See *infra* Part III.A.

impact.¹¹² It further argues that the new exam will do little to address the deep-rooted problems and continue to afford the NCBE vast deference.¹¹³

A. Litigation Directed at the Bar Exam's Disparate Impact on Minority Graduates Has Been Unsuccessful

Litigation addressing the disparate impact of the bar exam on minority test takers has failed for two reasons.¹¹⁴ First, attempts to impart the standard of Title VII disparate impact analysis into equal protection analysis, as well as challenges under Title VII itself, have been entirely unsuccessful.¹¹⁵ Second, equal protection challenges have not been successful because, according to the courts, practicing law is not deemed a fundamental right, leading to the application of rational basis review.¹¹⁶

1. Title VII Challenges Have Failed

One explanation for weaknesses related to disparate impact challenges may be bar examiners' immunity from Title VII.¹¹⁷ While Title VII cases have succeeded in lessening the disparate impact in the workplace, federal court dismissals of challenges brought in relation to the bar exam have allowed bar examiners to enjoy "decades of freedom from litigation pressure related to . . . disparate impact problems."¹¹⁸

The protections of Title VII would seem to be a plausible means for challenging the disparate results of the exam on the basis of race and ethnicity.¹¹⁹ Nevertheless, the courts have held that the Title VII principles that apply to employment tests do not extend to licensing exams.¹²⁰ The immunity from Title VII that licensing exams enjoy originated from a handful of cases from the 1970s.¹²¹ Many of these cases involved unsuccessful civil rights claims which tell the interesting story of how the bar examiners have become immune from Title VII, allowing the disparate impact of the bar exam to pervade for decades.¹²²

112. See *infra* Part III.B.

113. See *infra* Part III.B; see also Chomsky et al., *supra* note 7, at 898 ("The proposed changes are an important step in the right direction, although it remains to be seen what will be adopted in practice. Even with these improvements, the exam will suffer from many [problems].").

114. Glen, *supra* note 6, at 396.

115. *Id.* at 397-98.

116. *Id.* at 396.

117. See Howarth, *supra* note 110, at 934.

118. *Id.* at 934-35.

119. See *id.* at 937.

120. *Id.*

121. *Id.* at 934.

122. See *id.*

In *Tyler v. Vickery*,¹²³ the Fifth Circuit Court of Appeals declined to accept a *Griggs* approach of disparate impact in a challenge to the bar exam.¹²⁴ A class of Black plaintiffs who failed the bar exam challenged the constitutionality of the Georgia bar exam on due process and equal protection grounds.¹²⁵ The plaintiffs contended that “irrespective of intent, the Georgia bar examination inherently denies equal protection of the laws to [B]lack applicants because of the much greater rate at which they fail the examination.”¹²⁶ The plaintiffs suggested that the court should not view the Georgia bar exam within the traditional equal protection analysis framework, but instead should apply by analogy the standards developed by the Equal Employment Opportunity Commission (“EEOC”) for employment testing covered by Title VII.¹²⁷ The record established a significant disparate impact indicating that over fifty percent of Black applicants failed the February and July 1973 exams, while the failure rate among White applicants ranged from one-fourth to one-third.¹²⁸ Additionally, in July 1972, every one of the forty Black applicants who took the exam did not pass.¹²⁹

The court conceded that it was “undisputed that the Georgia bar examination has a greater adverse impact” on Black applicants than on Whites and that acceptance of the standard of review put forth by the plaintiffs “would inexorably compel the conclusion that the examination is unconstitutional.”¹³⁰ However, the court went on to hold that, by its terms, Title VII did not apply because the Georgia Board of Bar Examiners was “neither an ‘employer,’ an ‘employment agency,’ nor a ‘labor organization’ within the meaning of the statute.”¹³¹ Consequently, the court held that a statistical argument of disparate impact was not enough to demonstrate a constitutionally suspect racial classification under equal protection analysis.¹³²

Finding no intentional discrimination and no fundamental right, the court held there to be no legal basis for applying the compelling state interest test, and therefore the proper standard of review became the highly deferential rational basis test.¹³³ Despite the striking evidence of

123. 517 F.2d 1089 (5th Cir. 1975).

124. *Id.* at 1096.

125. *Id.* at 1092.

126. *Id.* at 1095.

127. *Id.*

128. *Id.* at 1092.

129. *Id.*

130. *Id.* at 1096.

131. *Id.*

132. *See id.* at 1099.

133. *Id.* at 1101.

disparate impact, the court held that the bar exam had a rational relationship to the state's right "to insist on a minimum standard of legal competence as a condition of licensure"¹³⁴

Less than one year later, the Fifth Circuit returned to very similar issues in *Parrish v. Board of Commissioners of Alabama State Bar*.¹³⁵ There, a class of Black plaintiffs showed evidence of disparate impact by pointing to statistics generated during litigation which revealed that the passing rate for Black test takers in the last ten bar examinations had only been thirty-two percent, while it had been seventy percent for White test takers.¹³⁶ Relying on *Tyler*, the court once again looked disparate impact in its face and found that the disparate impact analysis of Title VII had no application to state bar examiners, leaving only constitutional challenges to the Alabama bar exam.¹³⁷ As illustrated in *Tyler*, such a challenge affords the state vast deference under a rational basis test.¹³⁸ While *Parrish* did result in a partial victory for plaintiffs based on a discovery issue, the Fifth Circuit reinforced the central holding in *Tyler*, "that in the context of a state bar examination statistics alone which show a wide disparity between the success of [B]lack applicants as against [W]hite persons is not enough in and of itself to create an issue of fact to withstand a motion from summary judgment"¹³⁹

In *Richardson v. McFadden*,¹⁴⁰ four Black law school graduates who had satisfied all requirements for admission to the South Carolina Bar, but failed the bar exam, challenged the constitutionality of the South Carolina bar exam as applied generally to Black applicants.¹⁴¹ The main thrust of the plaintiffs' argument was that the exam was not job-related.¹⁴² They argued that because of the South Carolina Bar's "past history of racial discrimination" and "the disproportionate impact of the examination" on Black test takers, the bar examiners had the burden to prove that the bar exam is sufficiently job-related to satisfy Title VII.¹⁴³ While the court conceded that if it did determine that Title VII standards were applicable, it would be necessary to reverse and declare the South Carolina bar exam constitutionally invalid, the court went on

134. *Id.*

135. 533 F.2d 942 (5th Cir. 1976).

136. *Id.* at 944 ("Furthermore, in a state whose population is 25% [B]lack, the number of [B]lack lawyers is less than 1%.")

137. *Id.* at 949.

138. *Id.*

139. *Id.*

140. 540 F.2d 744 (4th Cir. 1976).

141. *Id.* at 745.

142. *Id.* at 746.

143. *Id.*

to hold that absent a showing of discriminatory purpose, it is inappropriate to adopt the more rigorous Title VII standard for the purposes of applying the Fifth and Fourteenth Amendments.¹⁴⁴

Without the ability to rely on Title VII's disparate impact theory to prove discrimination, the plaintiffs attempted to prove discriminatory purpose, relying on circumstantial evidence relating to three changes in admission practices to the state's bar: elimination of diploma privilege, which had provided automatic admission to the bar for those who graduated from the state's accredited law school; elimination of the option of "reading law"; and abolishment of reciprocity.¹⁴⁵ The plaintiffs produced evidence showing that diploma privilege was eliminated three years after a "separate but equal" law school was started at South Carolina State College; "reading law" was "coincidentally" eliminated shortly after a Black student used this method; and reciprocity was abolished not long after a Black member of the Oklahoma Bar applied under the reciprocity rule.¹⁴⁶ Despite this glaring evidence of discrimination, the court once again turned a blind eye to the evidence of historically rooted discrimination and found that the evidence was insufficient to prove intentional discrimination.¹⁴⁷ Because there were neutral reasons for all the contested changes and the state bar had always been open to Black lawyers, the court concluded "that the evidence falls short of proving (unlike the school cases) a deliberate state scheme of *de jure* discrimination."¹⁴⁸ The court once again provided vast deference to the bar examiners, holding that: "In view of the fact that all Examiners both designed their exams and assigned scores so as to indicate their judgment as to minimal competency, we cannot find the results obtained so unrelated to the State's objectives as to violate the Equal Protection Clause."¹⁴⁹ Ultimately, under a rational basis review the court found that the bar examination did not violate the Fourteenth Amendment.¹⁵⁰

In *Woodard v. Virginia Bd. of Bar Exam'rs*,¹⁵¹ the Fourth Circuit once again upheld the principle that bar examiners are not subject to Title VII.¹⁵² The plaintiff's application for admission to the Virginia Bar was denied after he failed to achieve a passing score on the bar exam.¹⁵³

144. *Id.* at 747.

145. *Id.*

146. *Id.*

147. *Id.* at 747-48.

148. *Id.* at 748 (emphasis in original).

149. *Id.* at 750.

150. *Id.*

151. 598 F.2d 1345 (4th Cir. 1979).

152. *Id.* at 1346.

153. *Id.*

After unsuccessfully filing a charge of discrimination with the EEOC, the plaintiff brought the action “to redress alleged racially discriminatory practices which deprive [B]lack applicants of an equal opportunity to become practicing attorneys at law in Virginia.”¹⁵⁴ The sole issue before the district court was “whether plaintiffs’ claim may be pursued after Title VII of the 1964 Civil Rights Act.”¹⁵⁵ There, the district court relied on *Richardson* and *Tyler* in holding that the principles of test validation developed under Title VII do not apply to professional licensing examinations.¹⁵⁶ The court distinguished between employment tests and the bar examination and concluded that “the test validation guidelines promulgated by the EEOC do not govern . . . and that the job relatedness of the Virginia bar examination will be measured under the principles enunciated in *Richardson*”¹⁵⁷ The court held that:

The employment tests utilized in the industrial setting are designed to measure an individual’s ability to perform certain limited functions or operate particular machinery. The bar examination, however, serves a much broader purpose. A licensed attorney is presumed competent to handle any of a number of substantively divergent legal problems which may face his or her clients.¹⁵⁸

In a one-page opinion, the Fourth Circuit upheld the decision of the district court, agreeing that “Title VII, by its own terms, does not apply to the bar examination.”¹⁵⁹ Citing *Tyler*, the court held that “[t]he Board of Bar Examiners is neither an ‘employer,’ an ‘employment agency,’ nor a ‘labor organization’ within the meaning of the Act.”¹⁶⁰

Since the states are ultimately left with the decision on how to proceed with attorney licensing, they should not allow attorney licensing authorities to continue to exploit the gap in Title VII created by *Tyler*, *Parrish*, *Richardson*, and *Woodard*, which has permitted bar examiners to avoid legal scrutiny related to the disparate impact of the bar exam.¹⁶¹ Rather, the states must play an active role in ensuring that the bar examiners and the NCBE are working to address the disparate impact of the

154. *Id.*; *Woodard v. Va. Bd. Bar Exam’rs*, 420 F. Supp. 211, 212 (E.D. Va. 1976).

155. *Woodard*, 420 F. Supp. at 212.

156. *Id.* at 213-14.

157. *Id.* at 214.

158. *Id.*

159. *Woodard*, 598 F.2d at 1346.

160. *Id.* (quoting *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975)).

161. See *supra* Part III.A.1; see also Robert M. Buchholz et al., *Regulation of the Legal Profession in the United States: Overview*, THOMSON REUTERS (May 31, 2021), [https://uk.practicallaw.thomsonreuters.com/2-633-6340?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/2-633-6340?transitionType=Default&contextData=(sc.Default)) [<https://perma.cc/JXZ3-VJ2V>].

exam.¹⁶² Such action by the states will ensure that the NCBE is held accountable for the disparate impact of the bar exam on minority test takers.¹⁶³

2. Equal Protection Challenges Have Fared Poorly

By refusing to impart the standards of Title VII into equal protection analysis, the courts have required plaintiffs to satisfy equal protection standards.¹⁶⁴ As evidenced by the cases above, constitutional challenges against unequal treatment on the bar exam present little hope for legal accountability.¹⁶⁵ Under basic equal protection principles, in order for a claim to be racially discriminatory and thus require a higher standard of review, it must ultimately be traced back to a racially discriminatory purpose.¹⁶⁶ The Supreme Court has therefore ruled that a “discriminatory racial purpose,” or “purpose or intent” to discriminate, is necessary to establish a constitutional claim and shift the burden of proof.¹⁶⁷ Consequently, equal protection challenges against the bar exam relating to the disparate impact of the exam have fared poorly, since according to the courts, practicing law is not a fundamental right, and thus

162. *See infra* Part IV.A.

163. *See infra* Part IV.A.

164. *See supra* Part III.A.1.

165. *See supra* Part III.A.1; *see also* Glen, *supra* note 6, at 396-97.

166. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

167. *Id.* at 239-40 (holding that the mere instance of disproportionate impact does, by itself, indicate a discriminatory purpose); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (holding that a racial classification will not be held to violate the Equal Protection Clause of the Fourteenth Amendment unless a plaintiff shows that the law is motivated by a discriminatory purpose and has a discriminatory impact); *City of Mobile v. Boden*, 446 U.S. 55, 65, 74-75 (1980) (holding that laws governing a city’s electoral process that are facially neutral and enacted without discriminatory intent do not violate the Fourteenth or Fifteenth Amendments even if those laws dilute the voting strength of African Americans in practical effect).

rational basis review applies.¹⁶⁸ Under rational basis review “the challenged licensure examination is entitled to a presumption of validity.”¹⁶⁹

As evidenced by the cases above, courts have displayed a willingness to turn a blind eye to evidence of disparate impact as a way to prove equal protection violations in claims against the bar exam.¹⁷⁰ Because courts have held that states have a “legitimate interest in regulating admission to the Bar through imposing licensing standards to insure professional competence[.]” plaintiffs have not been able to succeed on a rational basis review.¹⁷¹ For example, in *Pettit v. Gingerich*,¹⁷² the United States District Court for the District of Maryland held that despite glaring evidence of disparate impact, the plaintiffs’ equal protection challenges against the bar exam fail.¹⁷³ The court ruled “[t]hat plaintiffs allege disparate racial impact stemming from the Bar examination does not suffice to evidence suspect racial classification and thereby trigger a strict scrutiny analysis.”¹⁷⁴ Accordingly, under a rational basis review, the court held that the plaintiffs could not survive summary judgment because the bar exam is “rationally related to the state’s strong interests in the professional competence of its attorneys.”¹⁷⁵

States and the NCBE must confront the disparate impact the bar exam has on minority test takers rather than hide behind the shields the federal courts have afforded them through their interpretation of Title VII standards and equal protection analysis.¹⁷⁶ While the courts have failed to provide test takers with a meaningful way to hold the NCBE accountable for the disparate impact of the bar exam, state legislation

168. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 35-37 (1973) (holding that education is not recognized as a fundamental right under the Fourteenth Amendment and thus a state regulation impacting the right to education should be analyzed under rational basis review to determine if it bears a rational relationship to a legitimate state interest); *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982) (holding that education is not a fundamental right while stressing the importance of education both to the children themselves and to the nation more generally). Quoting *Brown v. Board of Education*, the *Plyler* Court wrote that:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

Plyler, 457 U.S. at 222-23 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

169. See *Glen*, *supra* note 6, at 396.

170. See *supra* Part III.A.1.

171. *Pettit v. Gingerich*, 427 F. Supp. 282, 290 (D. Md. 1977); see also *Delgado v. McTighe*, 522 F. Supp. 886, 896 (E.D. Pa. 1981).

172. 427 F. Supp. 282 (D. Md. 1977).

173. *Id.* at 290-94.

174. *Id.* at 293.

175. *Id.* at 294.

176. See *supra* Part III.A.

directed at holding the NCBE accountable and allowing these disparate impact claims to be heard will put pressure on the NCBE to fix the historically rooted problems of the exam that have persisted for decades.¹⁷⁷ Additionally, legislation directed at shining a spotlight on these issues will push the state supreme courts to determine whether it is time to consider alternative licensing practices.¹⁷⁸

B. The NCBE and NextGen Bar Exam's Inevitable Failure to Address the Deep-Rooted Problems

For decades, the state supreme courts, which are responsible for setting attorney licensing criteria, and the state bar examiners who enforce these requirements have refused to thoroughly assess and rectify the disparate impacts of the bar exam.¹⁷⁹ In recent years, the ABA itself has acknowledged problems with the bar exam.¹⁸⁰ Additionally, the NCBE is “a private, unregulated entity that makes millions of dollars each year from the sale of the bar exams, and bar related services and products.”¹⁸¹ Hence, one can argue that the decisions and recommendations of the NCBE may not necessarily be in the best interest of the states or the test takers.¹⁸²

Many of the criticisms of the traditional bar exam relating to the disparate impact of the exam have been linked to the format of the exam and its focus on rote memorization, which requires months of full-time studying and extensive prep courses.¹⁸³ While the NCBE finally took these critiques into consideration in 2018 by reconsidering “the content, format, and delivery” of the existing bar exam, it is not clear whether the NextGen bar exam will suffer from the same problems.¹⁸⁴ A study of the

177. See *supra* Part III.A; *infra* Part IV.

178. See *infra* Part IV.A.

179. Chang, *supra* note 5, at 1022.

180. See Arete, *supra* note 1, at 337 (“The ABA is directly involved in reforming many legal education and licensure systems. Meanwhile, just in the last few years, it has gradually acknowledged problems with the bar exam and the American system of licensure, tying bar passage requirements for law school accreditation to excluding candidates from marginalized communities from the profession.”).

181. Griggs, *supra* note 85, at 49; see *National Conference of Bar Examiners (NCBE)*, CAUSE IQ, <https://www.causeiq.com/organizations/national-conference-of-bar-examiners,362472009> [https://perma.cc/F9MT-P2N7] (last visited Feb. 21, 2024). In 2022, the NCBE earned total revenues of \$36,663,081. *National Conference of Bar Examiners (NCBE)*, *supra*. Additionally, NCBE President and CEO Judith Gundersen earned a salary of \$391,510. *Id.*

182. See Griggs, *supra* note 85, at 49 (arguing that if the “states continue to give such broad deference to the NCBE, it is impractical to expect to see any real changes to the bar exam process other than those endorsed by the NCBE”).

183. See Merritt et al., *supra* note 73.

184. See Chomsky et al., *supra* note 7, at 897-98 (“As presently envisioned, [the NextGen bar exam] will substantially reduce the number of doctrinal areas being tested; focus on foundational

bar exam's existing format has resulted in recommendations, but "it remains to be seen what recommendations will be adopted in practice."¹⁸⁵

While the NextGen bar exam is a step in the right direction, there rightfully remains many concerns.¹⁸⁶ The NCBE official website provides a "Diversity, Fairness, and Inclusion" page but only offers broad promises as to the commitment to producing a bar exam that fairly assesses all candidates.¹⁸⁷ Additionally, the NCBE itself is the entity making these conclusions and is then the entity responsible for implementing the solutions to these problems, resulting in self-certification.¹⁸⁸ The ABA and NCBE have acknowledged problems with the bar exam in the past without meaningful change, and we may be heading down the same road absent meaningful intervention.¹⁸⁹

The broad promises offered by the NCBE for the NextGen bar exam should not mitigate concerns regarding the disparate impact of the exam on minority test takers.¹⁹⁰ The NCBE continues to operate absent standards that would normally govern an administrative agency, leaving the organization free to make its own determinations.¹⁹¹ Yet, state bar examiners and other licensing entities, such as the NCBE, are often granted the same type of investigative, rulemaking, and adjudicative

concepts rather than more nuanced rules and exceptions; switch the majority of the exam to a closed-library case file format and use those materials for selected response, short answer and extended response constructed items; and build new performance test questions. These changes have the potential to greatly reduce the rule memorization that is required for taking the current exam.").

185. *See id.* at 898 ("Even with these improvements, the exam will suffer from many of the problems identified above: it will contain multiple choice questions, will remain closed book except where there is reliance on case files, and will continue to impose very constrained time limits for examinees to answer questions. In addition, it is expected to be administered only by computer, a methodology that will present severe challenges to exam-takers as they juggle multiple small display windows to both access lengthy source materials and write lengthy answers for essay questions. Moreover, the NCBE has not yet committed to study the effect (and especially the disparate impact) of time limits on test takers, a critical aspect that requires attention.").

186. *See id.*; *see also* Griggs, *supra* note 85, at 49; Khalifa, *supra* note 12 ("While the bar exam is certainly not the only reason for the prominent racial disparity in the legal profession, it does perpetuate it, which directly contradicts the NCBE's vision of a 'diverse legal profession.'").

187. *See Diversity, Fairness, and Inclusion, supra* note 8; *see also* Khalifa, *supra* note 12 ("The NCBE claims to strive for 'a competent, ethical and diverse legal profession.' Proponents of the bar exam, in accordance with the NCBE's vision, argue that it ensures minimum competency in the legal profession. However, there is little to no evidence that supports this conclusion. Neither the NCBE nor any state that administers the bar exam have provided a sound of what minimum competency entails. Without first providing a reasonable definition of minimum competency, one cannot legitimately claim that the bar exam achieves this purpose. This flawed reasoning at the very least calls for a reevaluation of the bar exam's purpose and a determination of whether it accomplishes that purpose.") (internal citations omitted).

188. *See Diversity, Fairness, and Inclusion, supra* note 8; *see also* Griggs, *supra* note 85, at 49.

189. *See Arete, supra* note 1, at 337.

190. *See Boyd, supra* note 83, at 616; *see also* Patton, *supra* note 84, at 127.

191. *See Boyd, supra* note 83, at 616.

authority as other state administrative agencies.¹⁹² Because “licensing entities are vulnerable to the same risks and concerns as any other administrative agency that possesses and exercises combined governmental powers,” lawyer licensing entities have great need for supervision and oversight.¹⁹³ Entities such as the NCBE that license lawyers have not been uniformly subject to standard rulemaking procedures or other transparency practices.¹⁹⁴ Accordingly, hope for standards that will lessen the disparate impact of the bar exam in relation to the NextGen bar exam should be seen as aspirational at best.¹⁹⁵ Based on the lack of meaningful efforts in the past and the lack of targeted efforts for the NextGen bar exam, we should not continue to allow the NCBE to hold the power absent accountability to the states.¹⁹⁶

Additionally, as it stands, the public lacks the ability to investigate and hold the NCBE accountable.¹⁹⁷ While the NCBE is “one of the few entities with the greatest influence on the structure, administration, and grading of bar examinations in the United States,” it has claimed that it is immune from public records requests.¹⁹⁸ The NCBE alleges that it is not a government entity and is thus not covered by open records laws.¹⁹⁹ Accordingly, the NCBE bars public access to records which may be necessary to adequately acknowledge the effects of the bar exam.²⁰⁰ The NCBE’s refusal to provide essential data, either voluntarily or through public records act requests, has constrained researchers and scholars in evaluating whether NCBE testing is “valid, fair, non-discriminatory, and without conflicts of interest.”²⁰¹ Without the ability to meaningfully examine the results of the bar exam and its disparate impact, the NCBE is

192. *Id.* at 615; *see* Griggs, *supra* note 85, at 49.

193. Boyd, *supra* note 83, at 615.

194. *Id.* at 616, 620-21 (“Oversight measures, which have become commonplace for other administrative agencies can sometimes be absent in the context of licensing lawyers.”).

195. *See* Griggs, *supra* note 85, at 49; *see also* Chang, *supra* note 5, at 1059.

196. *See* Boyd, *supra* note 83, at 615-16; *see also* Chang, *supra* note 5, at 1059.

197. Patton, *supra* note 84, at 131-32.

198. *Id.* at 134-35, 137.

199. *Id.* at 138-39.

200. *Id.* at 139 (“For instance, scholars could not conduct studies on the validity of the NCBE’s scaled MBE scores; neither could they study whether students taking the identical Uniform Bar Examination in different jurisdictions might receive different passing or failing grades, thus promoting test forum shopping, or whether there is any test bias against minority candidates.”).

201. *Id.*; *see* William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethical Stratification*, 29 L. & SOC. INQUIRY 547, 566-67 (2004). Kidder acknowledges the “bar examiner’s reluctance to share racial data with academics” and termed the NCBE’s own studies on the bar exam as an “insularity.” Kidder, *supra*, at 566-67. Kidder also notes that “[a]t several critical junctures, NCBE’s bar research has had a troubling tendency to minimize the disparate impact and unfairness of the bar for people of color.” *Id.* at 581-82.

left holding all the power.²⁰² This exemplifies the need for state intervention in order to hold the NCBE accountable for the effects of the bar exam.²⁰³ Absent such meaningful intervention by the states, the NCBE is left to continue its practices of minimizing the effects of the bar exam on minority test takers all the while shielding itself from accountability.²⁰⁴ It follows that the broad promises offered by the NCBE for the NextGen bar exam should not mitigate concerns regarding the disparate impact of the exam on minority test takers.²⁰⁵

IV. STATE LEGISLATION AIMED AT COMBATING THE DISPARATE IMPACT OF THE BAR EXAM

The United States lacks a uniform, nationwide structure for regulating lawyers, leaving the state supreme courts to regulate such licensure.²⁰⁶ Accordingly, problems involved with the scheme of lawyer licensing are left to the states to remedy.²⁰⁷ Because litigation directed at the disparate impact of the bar exam has been entirely unsuccessful, holding the NCBE accountable for the disparate impact of the exam must fall to state legislatures.²⁰⁸

Subpart A will address how recently adopted New York City legislation aimed at combating racial discrimination and gender discrimination in New York City healthcare institutions can guide states in adopting legislation that will help combat the disparate impact of the bar exam.²⁰⁹ It will go on to examine how this legislation can be implemented by the states in a way which will hold the NCBE and states' highest courts accountable for the disparate impacts of the bar exam which have persisted for decades.²¹⁰ It will discuss how these findings can help state supreme courts determine whether it is time to consider alternative

202. See Tamara Tabo, *When Bar Scores Plummet, Who Will Examine the Examiners?*, ABOVE L. (Nov. 7, 2014, 6:01 PM), <https://abovethelaw.com/2014/11/when-bar-scores-plummet-who-will-examine-the-examiners> [<https://perma.cc/98UP-HCVA>].

203. See *infra* Part IV.A.

204. See Kidder, *supra* note 201, at 581-82; see also Tabo, *supra* note 202. Tabo argues that “[l]aw students deserve greater transparency from the NCBE” and that we should stop taking the NCBE at its word. Tabo, *supra* note 202. While the focus of Tabo’s article is not on the disparate impact of the exam, but rather on a drastic drop in bar exam scores, it exemplifies how the NCBE has adopted a common practice of refusing to give the answers test takers and the states deserve. *Id.*

205. See Boyd, *supra* note 83, at 616; see also Patton, *supra* note 84, at 127.

206. Karis Stephen et al., *Regulating the Legal Profession*, REGUL. REV. (Feb. 5, 2022), <https://www.theregreview.org/2022/02/05/saturday-seminar-regulating-legal-profession> [<https://perma.cc/8ZXC-8QDT>].

207. *Id.*

208. See *supra* Part III; see also Stephen et al., *supra* note 206.

209. See *infra* Part IV.A.

210. See *infra* Part IV.A.

licensing practices.²¹¹ Subpart B will acknowledge an alternative course of licensure which can help lessen the disparate impact the bar exam has on attorney licensure.²¹² Lastly, Subpart C will address the argument that the bar exam, as it stands, is necessary in order to ensure minimum competence of those entering the legal profession.²¹³

A. State Legislation

State legislation allowing disparate impact claims against the bar exam to be heard will help put pressure on the NCBE to fix the deep-rooted problems as well as hold it accountable for the problems that have persisted for decades.²¹⁴ Legislation adopting the structure of New York City's 2021 legislation combating racial discrimination and gender discrimination in New York City healthcare institutions can serve as a guide for states in adopting legislation that will help combat the disparate impact of the bar exam.²¹⁵

On February 11, 2021, the New York City Council overwhelmingly passed Council Member Helen Rosenthal's legislation ("Intro 2064-2020").²¹⁶ The legislation established an advisory board to address racial and gender discrimination and harassment.²¹⁷ Additionally, the Council passed a resolution which calls for implicit bias training in medical schools across the state.²¹⁸ The legislation seeks to "shine an ongoing spotlight on the racial and gender discrimination impacting the healthcare workers, and in turn, their patients."²¹⁹

Intro 2064-2020 mandates the creation of an advisory board which will "issue annual reports and recommendations to the Mayor and City Council in order to: improve working conditions for New York City healthcare staff, residents, interns and faculty; and address workplace

211. See *infra* Part IV.A.

212. See *infra* Part IV.B.

213. See *infra* Part IV.C.

214. See Bruce Y. Lee, *New NYC Legislation to Protect Health Care Professionals from Discrimination, Harassment*, FORBES (Feb. 21, 2021, 4:15 PM), <https://www.forbes.com/sites/brucelee/2021/02/21/new-nyc-legislation-to-protect-health-care-professionals-from-discrimination-harassment/?sh=4cb5a7d93b02> [https://perma.cc/YC3N-YQS4] (arguing that yearly reports will help shine a spotlight on the issues of discrimination).

215. See *id.*

216. See *City Council Passes Legislation Combating Racial & Gender Discrimination in NYC Healthcare*, HARLEM WORLD MAG. (Feb. 12, 2021) [hereinafter *City Council Passes Legislation*], <https://www.harlemworldmagazine.com/city-council-passes-legislation-combating-racial-gender-discrimination-in-nyc-healthcare> [https://perma.cc/XGZ4-V37S]; N.Y.C. Council Int. No. 2161-A (2021).

217. *City Council Passes Legislation*, *supra* note 216.

218. *Id.*

219. *Id.*

gender and racial discrimination of all types.”²²⁰ The board will regularly monitor, report, and address any issues of gender or racial discrimination that may arise among the healthcare institutions in New York City.²²¹ Public hearings will allow professionals in the community to voice both concerns and recommendations, and testimony from such hearings will be recorded and documented.²²² Additionally, the board must meet quarterly and keep records of the proceedings, and the report will be sent to the Mayor’s council, posted to the state Department of Health website, and shared with a hospital trade association.²²³ Significantly, the board cannot be controlled by hospital and medical school leadership within New York City.²²⁴ Rather, members of the board “will have to be completely independent from health care institution leadership and really represent the people whom the board is trying to protect.”²²⁵ Accordingly, this kind of legislation provides a hopeful example of how the states can help combat racial discrimination across professional fields.²²⁶ Additionally, it demonstrates that states have shown an increased willingness to address discrimination across professional fields.²²⁷

While litigation directed at the bar exam’s disparate impact on minorities has proven to pose an insurmountable barrier to minority graduates’ challenges to the bar exam, the states have the ability to provide more rights to their citizens than the federal courts have afforded them.²²⁸ State legislation adopting the structure of the newly enacted

220. *Id.* (“The creation of an Advisory Board to study and provide guidance on how to best improve working conditions for New York City healthcare staff is an essential part of how we can create a more robust and welcoming medical community.”).

221. Lee, *supra* note 214 (“By having to produce a report every year, this will shine a spotlight on the issues of racial and misogynistic discrimination every year in perpetuity.”).

222. See N.Y.C. Council Int. No. 2161-A (2021).

223. Lee, *supra* note 214; see also *City Council Passes Legislation*, *supra* note 216 (“This Advisory Board, which is to publicly report its findings and recommendations annually, would help accomplish this by further highlighting areas needing to be addressed through policy or law. Additionally, such an Advisory Board can add pressure on executives to follow through on equity and anti-discrimination work that is already supported by involved staff who are invested in this effort.”).

224. Lee, *supra* note 214.

225. *Id.* (“That could be like putting the Cookie Monster in charge of a cookie jar defense system. The Board members won’t be CEOs of hospitals, Deans of medical schools, or someone hired by such leaders. Just because people have the word ‘equity’, ‘inclusion’, ‘unity’, or ‘help me, help you’ in their titles doesn’t guarantee that it’s necessarily their goal or motivation.”).

226. See *id.*

227. See, e.g., N.Y.C. Council Int. No. 2161-A (2021).

228. See Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in Danforth v. Minnesota*, FEDERALIST SOC’Y REV., June 2008, at 51, 51. It has long been held that the states can provide greater protection for individual rights than is available under the Supreme Court’s interpretation of the Federal Constitution. *Id.* It follows that the Federal

New York City legislation can help hold an institution like the NCBE accountable.²²⁹ Just as the New York City healthcare legislation aims to put a spotlight on the racial and gender discrimination impacting the healthcare system, similar legislation targeting the disparate impact of the bar exam can put a spotlight on the discriminatory effect the bar exam has presented for decades.²³⁰

Similar to the New York City legislation, the advisory board must consist of a multidisciplinary panel of representatives.²³¹ In order for the board to adequately represent the people whom they are trying to protect, the members will have to be completely independent from the NCBE and state bar examiners.²³² Such representatives will ensure that the advisory board is targeting the disparate impact of the bar exam without simultaneously having a personal stake in the exam.²³³ A third-party board will play a crucial role in acknowledging the effects of the exam.²³⁴ Currently, the NCBE not only makes the determinations as to the disparate impact of the exam, but it is also charged with lessening the disparate impact in the creation and implementation of the NextGen bar exam.²³⁵ This gives the NCBE the power to make these determinations as well as hold themselves accountable for implementing them.²³⁶

Additionally, the board would be required to conduct public hearings and must give public notice of the hearings to make sure anyone interested is aware of the upcoming hearing.²³⁷ During these hearings the board will hear testimony from anyone who has claims against the exam.²³⁸ This will allow for those who have been turned away by the

Constitution is seen as a floor, not a ceiling, and states may therefore impose greater protections for their citizens. *Id.*

229. See Griggs, *supra* note 85, at 49 (“As long as the states continue to give such broad deference to the NCBE, it is impractical to expect to see any real changes to the bar exam process other than those endorsed by the NCBE.”).

230. See *supra* Part II.B; see also Lee, *supra* note 214.

231. See N.Y.C. Council Int. No. 2161-A (2021); see also *supra* Part III.B.

232. See *supra* Part III.B.

233. See *supra* Part III.B.

234. See *supra* Part III.B; see also Lee, *supra* note 214.

235. See *Diversity, Fairness, and Inclusion*, *supra* note 8; Patton, *supra* note 84, at 131-32.

236. See *Diversity, Fairness, and Inclusion*, *supra* note 8; see also Patton, *supra* note 84, at 131-32 (“[T]he public lost the ability to investigate and hold the state government accountable when state supreme courts and their administrative committees delegated bar examination testing and/or character and fitness admissions to the NCBE.”).

237. See N.Y.C. Council Int. No. 2161-A (2021) (“The board shall publicly notice each hearing at least 30 days prior to it being held and shall conduct such public outreach as necessary to make relevant experts and stakeholders aware of the upcoming hearing.”).

238. See *id.*

courts to bring their claims to the board, which will be charged with documenting and issuing findings on such claims.²³⁹

It follows that, similar to the structure of the New York City legislation, the advisory board would be required to submit a report including recommendations for addressing and eliminating the inequities created by the bar exam.²⁴⁰ All testimony from the public hearings shall be recorded and documented in the reports.²⁴¹ Such reports will have to be shared with the state's highest court as well as with the public.²⁴² Having to issue such reports on its findings will further hold the NCBE accountable and help create a more robust community that allows individuals to voice their concerns to an independent board.²⁴³ Being that the NCBE has not been transparent with past efforts to reduce the disparate impact of the exam, such reports will be crucial in changing the trajectory of lawyer licensing.²⁴⁴ Ultimately, this will force the states' highest courts to acknowledge the problems with the bar exam, as well as hold them accountable for adopting alternative attorney licensing procedures if necessary.²⁴⁵

B. An Alternative for Attorney Licensure

In order to adequately address the disparate impact of the bar exam, it may be necessary for states to consider alternatives to the bar exam.²⁴⁶ Workable alternatives give the states the opportunity to retake the reins from the NCBE and adopt new, less discriminatory methods for attorney

239. See *id.*; *supra* Part III.A.

240. See N.Y.C. Council Int. No. 2161-A (2021).

241. See *id.*

242. See Patton, *supra* note 84, at 127; see also Griggs, *supra* note 85, at 46 (“Although necessary and important, the oversight measures that are fairly standard in administrative agencies are often absent in the context of licensing attorneys. Whether or not induced by crisis, important decisions regarding the licensure process must be independently evaluated, including exam mode, test security, scoring, content, format, passage thresholds, and more.”).

243. See Griggs, *supra* note 85, at 46; see also *City Council Passes Legislation*, *supra* note 216.

244. See *supra* Part III.B.

245. Griggs, *supra* note 85, at 47 (“Decisions about avenues to licensure that do not involve a bar exam, are outside the purview of examiners. New rules to establish alternative paths to licensure will have to be the responsive byproduct of a judicial decree or legislative act.”).

246. Stephanie Francis Ward, *As Some Jurisdictions Consider Bar Exam Alternatives*, *ABA Legal Ed Section Again Looks at Bar Pass Standard*, ABA J. (Aug. 19, 2022, 2:53 PM), <https://www.abajournal.com/web/article/as-some-jurisdictions-consider-bar-exam-alternatives-legal-ed-again-looks-at-bar-pass-standard> [https://perma.cc/4M5T-YCPZ]. The Oregon Supreme Court has recently approved “attorney admission through law school programs and supervised practice—in addition to the bar exam.” *Id.* Other jurisdictions such as California, Nevada, Minnesota, and Washington are also considering alternative paths to law licensure. *Id.*

licensing.²⁴⁷ The University of New Hampshire Franklin Pierce School of Law's honors program provides a viable alternative to the bar exam.²⁴⁸ Additionally, it demonstrates a commendable example of a state initiative aimed at changing the trajectory of lawyer licensing.²⁴⁹

The Daniel Webster Scholar Honors Program at the Franklin Pierce School of Law was created by “a collaborative effort of the New Hampshire Supreme Court, the New Hampshire Board of Bar Examiners, the New Hampshire Bar Association and [the University of New Hampshire] School of Law.”²⁵⁰ The program was created in an effort “to close the gap between legal education and legal practice by providing a practice-based, client-oriented education.”²⁵¹ Students who participate in

247. See Pikulski, *supra* note 72 (“The [NCBE] has started to address these types of questions and has decided to alter the current structure of the bar exam by adjusting the tested subjects, question style, and more in the coming years. However, this new testing structure may not be generally accepted by all states, and there’s likely not a one-size-fits-all approach, especially when you consider those who would rather be rid of the exam completely.”).

248. See *Daniel Webster Scholar Honors Program*, UNIV. N.H.: FRANKLIN PIERCE SCH. LAW, <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> [https://perma.cc/28FT-PC3E] (last visited Feb. 21, 2024). The program has drawn praise from judges, lawyers, and legal education scholars. *Id.* It has been featured in several national media outlets, such as the *Wall Street Journal* and *The New York Times*. *Id.*; see also Hunter Metcalf, *Daniel Webster Scholar Honors Program to Receive E. Smythe Gambrell Professionalism Award*, INST. FOR ADVANCEMENT AM. LEGAL SYS.: BLOG (July 24, 2015), <https://iaals.du.edu/blog/daniel-webster-scholar-honors-program-receive-e-smythe-gambrell-professionalism-award> [https://perma.cc/F9B5-5WFE]. The program was one of only three recipients of the E. Smythe Gambrell Professionalism Award from the ABA in 2015 which “honors excellence and innovation in professionalism programs by law schools, bar associations, professionalism commissions, and other law-related organizations.” Metcalf, *supra*.

249. Anne F. Zinkin & John Burwell Garvey, *New Hampshire’s Daniel Webster Scholar Honors Program: Placing Law School Graduates Ahead of the Curve*, BAR EXAM’R (Sept. 2015), <https://thebarexaminer.ncbex.org/article/september-2015/new-hampshires-daniel-webster-scholar-honors-program-placing-law-school-graduates-ahead-of-the-curve> [https://perma.cc/UL7W-442N]. It is noteworthy that starting in May 2024, law graduates in Oregon will also be able to become licensed without taking the bar. Karen Sloan, *No Bar Exam Required to Practice Law in Oregon Starting Next Year*, REUTERS (Nov. 7, 2023, 6:05 PM), <https://www.reuters.com/legal/government/no-bar-exam-required-practice-law-oregon-starting-next-year-2023-11-07> [https://perma.cc/V5VK-AEAS]. The Oregon Supreme Court approved an alternative licensing program—the Supervised Practice Portfolio Examination—that allows law school graduates to “spend 675 hours working under the supervision of an experienced attorney and create a portfolio of legal work that bar officials will grade as an alternative to the traditional bar exam.” *Id.* Law school graduates will still have the option to take the bar exam, but having an alternative to the bar exam is a hopeful step in the right direction. *Id.* The Oregon State Board of Bar Examiners also plans to create a second alternative licensing pathway, illustrating that there are many workable alternatives to the bar exam. *Id.*

250. Zinkin & Garvey, *supra* note 249.

251. *Id.*; see also Howarth, *supra* note 110, at 964. The purpose of the bar exam is to ensure that new lawyers are minimally competent to practice law. Howarth, *supra* note 110, at 948-49. However, in addition to acknowledging the disparate impact of the bar exam, many critics note that the current exam does not assess minimal competence required to practice law. *Id.* at 960, 964. The

the program are not required to take the traditional bar exam, but instead are evaluated for bar admission based on their performance during the two-year program.²⁵²

Through the program, students essentially complete a two-year, instead of a two-day, bar exam in which they take special courses, complete at least six credit hours of a clinic or externship, conduct three standardized client interviews, and meet annually with an assigned bar examiner who reviews their cumulative portfolio of work each semester.²⁵³

Students who successfully complete the program may be admitted to practice law in New Hampshire upon graduating law school.²⁵⁴ Additionally, they are eligible to sit for the bar exam in any jurisdiction outside the state for which they would qualify having graduated from an ABA-accredited law school.²⁵⁵ Alumni of the Daniel Webster Scholar Honors Program have been admitted to more than a dozen other bars throughout the United States.²⁵⁶

A study by the Institute for the Advancement of the American Legal System (“IAALS”) found that Daniel Webster students were better prepared to practice law than their non-Daniel Webster counterparts, and that they were outperforming their colleagues in the field who had been licensed to practice for up to two years.²⁵⁷ The IAALS study also found that participation in the Daniel Webster program was the only significant predictor of successful performance of the standardized client interview and that neither Law School Admission Test (“LSAT”) scores nor law school rank was a significant predictor.²⁵⁸ This demonstrates that “testing a broader range of competencies may improve validity and reduce persistent racial disparities of the bar exams, which suffer from disparities endemic to standardized tests, including the LSAT.”²⁵⁹

Daniel Webster program assesses minimal competence more effectively with less discriminatory impact. *See id.* at 964.

252. Zinkin & Garvey, *supra* note 249.

253. *Id.*

254. Howarth, *supra* note 110, at 964.

255. *Daniel Webster Scholar Honors Program*, *supra* note 248.

256. *Id.*

257. ALLI GERKMAN & ELENA HARMAN, AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS 18 (2015), https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf [<https://perma.cc/4MP5-VZTW>].

258. *Id.* at 20-22.

259. *See* Howarth, *supra* note 110, at 964-65.

The program continues to be a collaborative effort.²⁶⁰ It has a Supreme Court Oversight Committee, which includes two justices of the state's supreme court, the dean and associate dean of the law school, and the chair and eight members of the state's Board of Bar Examiners.²⁶¹ To ensure its effectiveness, the committee meets regularly to evaluate the program and make any necessary improvements.²⁶² Such a collaborative effort supports the proposition that the states have the ability to retake the reins from the NCBE and set the path for an alternative mode of lawyer licensure that can help lessen disparities of the bar exam that have persisted for decades.²⁶³

Accordingly, the Daniel Webster Scholar Honors Program has demonstrated an ability to produce students who are practice-ready, and it can therefore serve as a model for establishing similar pathways to licensing in other states.²⁶⁴ It follows that the New Hampshire Supreme Court, the New Hampshire Bar Association, and the New Hampshire Board of Bar Examiners have demonstrated that states have the ability to change the trajectory of lawyer licensing and can implement alternative pathways to licensure which can more accurately assess minimum competency, produce practice-ready lawyers, and lessen the disparate impact of the bar exam by circumventing disparities endemic to standardized tests such as the bar exam.²⁶⁵ The Daniel Webster Scholar Honors Program provides an encouraging example of state action that has resulted in a viable alternative to the bar exam.²⁶⁶

260. Zinkin & Garvey, *supra* note 249.

261. *Id.*

262. *Id.*

263. *See supra* Part IV.A.

264. *See* Chomsky et al., *supra* note 7, at 905 (“Employers compete to hire graduates of this program who, they report, are far better prepared to practice law than their colleagues whose licensing was based on the traditional bar exam.”).

265. *See id.*; *see also* Andrea A. Curcio et al., *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 247-48 (2014). In acknowledging the success of the Daniel Webster Scholars program and the viability of such alternatives to the bar exam, the authors concluded that “the consideration and development of such alternatives is a timely response to both the narrowness of our current testing regime and the troubling disparate impact it produces.” Curcio et al., *supra*, at 252.

266. Metcalf, *supra* note 248. It is noteworthy that the idea of an alternative to the bar exam is not unprecedented. *See Diploma Privilege*, MARQ. UNIV. L. SCH., <https://law.marquette.edu/prospective-students/diploma-privilege> [https://perma.cc/E634-NBVC] (last visited Feb. 21, 2024). Wisconsin, for example, permits graduates of ABA-accredited law schools within the state of Wisconsin to be admitted to practice without having to take a bar exam based upon the receipt of a J.D. degree and meeting the character and fitness requirement. *Id.* Additionally, graduates “remain[] eligible to sit for the bar exam in all other states.” *Id.*

C. Addressing Counterarguments

Despite the common consensus that the bar exam was created as a way to block the practice of law from communities of color and continues to disadvantage minority test takers today, many supporters of the bar exam continue to argue that it is necessary in order to ensure minimum competency for practice.²⁶⁷ However, by continuing to use the bar exam, examiners and the states administering it “are indicating an acceptance” of its discriminatory impact.²⁶⁸ Even if the supporters are correct in holding that the bar exam measures minimum competency, which has never proven to be true, it does not follow that there are no alternatives that could effectively serve as a measure of competency as well.²⁶⁹

Additionally, there is no single understanding of what “minimal competence” means, and proponents and critics of the current bar exam do not see eye-to-eye on this issue.²⁷⁰ Hence, proponents of the current bar exam may defend it as necessary to protect the integrity of the legal system, when the exam may very well be only one of many ways to ensure “minimal competence” of those seeking to enter the legal profession.²⁷¹ Alternatives to the bar exam have proved workable, and many

267. Cavanaugh, *supra* note 102, at 377.

268. *Id.* at 377-78.

269. *Id.*; see Donna Saadati-Soto et al., *Does the Bar Exam Measure Competence? The Answer: We Have No Idea.*, JURIST (Apr. 21, 2020, 10:44 PM), <https://www.jurist.org/commentary/2020/04/Saadati-Soto-Escontrias-Sarkar-bar-exam> [<https://perma.cc/36LW-U3HL>] (“There is little to no credible evidence that the bar exam is an adequate measure of lawyer competency.”); see also George B. Shepherd, *No African American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 126-27 (2003) (“Even if the ABA’s true objective were to protect consumers of legal services, the cutoffs are a failure. A long literature demonstrates that the bar exam is a seriously flawed means of protecting the public from incompetent lawyers.”); Josh Guckert, *COVID-19 Should Signal the End of the Bar Exam*, MEDIUM (Apr. 28, 2020), <https://medium.com/@joshguckert/covid-19-should-signal-the-end-of-the-bar-exam-d37251dedda0> [<https://perma.cc/A667-GY43>] (“While there is no case study on the matter (likely due to the cruelty of such an experiment), one can guarantee that a majority of newly-minted lawyers would be unable to successfully pass the exam again on the same day they received their passing scores.”).

270. Howarth & Wegner, *supra* note 84, at 399, 406 (“[N]o single understanding of minimal ‘competence’ for entry-level practitioners is shared within the universe of legal educators, accreditors, practitioners, and licensing authorities.”); Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 68 (2019) [hereinafter Griggs, *Building a Better Bar Exam*] (“In its current form, the UBE does not measure a candidate’s competency to practice law. It may measure a candidate’s competency to complete a performance task like write a memo synthesizing a given set of legal rules, but the extent to which that performance translates to practice competency has not been determined.”).

271. See Griggs, *Building a Better Bar Exam*, *supra* note 270, at 68 (“It could be the case that the appeal of the concept of increased uniformity has led us to abandon the aspects of key importance in legal education and bar exam readiness.”); Khalifa, *supra* note 12 (“Minimum competence and protecting the profession are the objectives that supporters of the bar exam say it accom-

scholars continue to produce hopeful examples of the future of attorney licensing.²⁷² If the states are to continue to accept the bar exam as the only measure of competency, their approval of the traditional system, which lies in the hands of the NCBE, comes with the price of a lack of diversity in the legal profession.²⁷³

As it stands, the bar exam continues to be a barrier to entry and continues to have a disparate impact on minorities seeking to enter the profession.²⁷⁴ Rather than continuing to allow the NCBE to hold the reins and test the “privileges and opportunities” of the test taker and the ability to “regurgitat[e] as much information as possible,” the states should be taking action for their citizens by ensuring that the method they choose for admission into the legal profession is accurate in testing “minimum competency” without unnecessarily excluding capable candidates.²⁷⁵ In order to make such an informed decision it is necessary for the states to take back the power from the NCBE and have a deeper understanding of the effects of the bar exam.²⁷⁶ Without state legislation targeting this issue, the NCBE will continue to be shielded from meaningful review, and the states will not be able to make their own determinations in regard to attorney licensing.²⁷⁷ Minimum competency is not an exact science that can only be tested through the bar exam; rather, it is something the states must actively work to achieve through meaningful improvement of a flawed system which has been proven to exclude capable candidates.²⁷⁸

plishes. However, there is little to no credible evidence that support these claims. In fact, overwhelming evidence shows that the bar exam fails to meet these objectives. . . . Thus, claiming that the bar exam attains this is a baseless assertion.”)

272. See Griggs, *Building a Better Bar Exam*, *supra* note 270, at 64, 66, 68 (asserting that the UBE fails to measure competency and proposing alternatives, such as allowing law schools the flexibility to develop and report a UBE pass rate and the option of diploma privilege); *see also supra* Part IV.B.

273. Cavanaugh, *supra* note 102, at 378.

274. *See supra* Part II.B.

275. See Kerry Abrams et al., *An Open Letter on the 2020 Bar Exam from Law Deans*, AM. BAR ASS’N FOR L. STUDENTS: STUDENT LAW. BLOG (Oct. 8, 2020), <https://abaforlawstudents.com/2020/10/08/an-open-letter-on-the-2020-bar-exam-from-law-deans> [<https://perma.cc/6Y69-4NCD>] (asserting the bar exam tests the “privilege and opportunity” of its takers instead of their competency to practice law); *see also* Guckert, *supra* note 269 (arguing that the bar exam is not a good measure of competency, as the best way to learn the legal profession has been through experience and practical training, not the ability to “regurgitat[e] as much information as possible” on a test); Howarth & Wegner, *supra* note 84, at 414.

276. *See supra* Part IV.A; *see also supra* Part III.B.

277. *See supra* Part III.B.

278. See Guckert, *supra* note 269 (“[P]erhaps we can reflect on this situation and realize that the problems they bring up have always existed, and will continue to exist so long as we allow the bar exam to control the legal profession.”); Howarth & Wegner, *supra* note 84, at 459-61 (listing

V. CONCLUSION

While litigation challenging the disparate impact of the bar exam has been unsuccessful, state legislation can help combat the disadvantages the bar exam continues to impose on minority test takers.²⁷⁹ Absent meaningful state intervention, the NCBE is left with the ability to set the standard for the NextGen bar exam based on its own findings and recommendations.²⁸⁰ State legislation adopting the structure of the recent New York City legislation combating racial and gender discrimination in healthcare institutions can help guide states in holding the NCBE accountable for the disparate impact of the bar exam.²⁸¹ Additionally, reports addressing these findings can help state supreme courts determine whether it is time to consider alternative licensing practices.²⁸² The bar exam is not the only means of ensuring minimum competency of those who are seeking to enter the legal profession; rather, there are many hopeful examples of alternative licensing practices that can help achieve a more diverse legal profession.²⁸³

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alternative strategies for demonstrating and documenting expertise, including simulations, portfolios, and component-based testing).

279. *See supra* Part IV.A.

280. *See supra* Part III.B; *see also* Patton, *supra* note 84, at 139.

281. *See supra* Part IV.A.

282. *See supra* Part IV.A–B.

283. *See supra* Part IV.B–C.

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