

**RAISING THE BAR: THE CASE TO MODERNIZE
VERMONT BAR ADMISSION**

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INTRODUCTION

Dread, resignation, anxiety, stress, futility, powerlessness. For third-year law students, the bar exam is more than just another hurdle to clear on the way to becoming a practicing attorney. It culminates years of law school and ten weeks of intensive study. A legal outsider might think such a comprehensive exam, covering everything from excited utterances to false imprisonment,¹ would align with real-world legal practice. Yet, the mechanical test is incompatible with a profession where lawyers rely on strong interpersonal and communication skills to resolve ambiguous situations. The legal outsider might also think such a consequential licensing exam would use an evidence-based approach to ensure minimum competence and protect the public. However, the bar exam does not. Instead, test takers face a redundant, dehumanizing exercise that is rooted in elitism and turns on one's wealth.

In response to the bar exam's deficiencies, this Article urges Vermont to reform its Rules of Admission to adopt one or more "diploma-plus" pathways to bar admission. Part I of this Article explores the bar exam's racist, classist origins, the gatekeeping function the test continues to play, and how the bar exam inadequately measures attorney competence. Part I also addresses Vermont's demographic challenges and dire shortage of rural public interest attorneys. Part II describes Wisconsin and New Hampshire's approaches to bar admission through diploma privilege and an experiential program. This Part also explores the work of Oregon and several other states seeking to reform bar admission. Part III proposes three "diploma-plus" alternatives for Vermont. Part III also addresses the constitutional and practical considerations of alternative bar admission pathways. Finally, this Article advocates for Vermont to join the national movement and modernize its bar admission process. In doing so, Vermont will confront the bar exam's racist, classist origins and effects, address the state's challenges with retaining young attorneys, increase diversity in the legal profession, and more accurately assess attorney competence.

1. NAT'L CONF. OF BAR EXAM'RS, MBE SUBJECT MATTER OUTLINE (2020), https://www.ncbex.org/sites/default/files/2023-01/MBE_Subject_Matter_Outline.pdf.

I. BAR ADMISSION, THE BAR EXAM, AND VERMONT'S CURRENT PRACTICES

Bar admission across the country—including in Vermont—largely relies on a single metric: whether an applicant passes the bar exam. Like many “neutral” modern American institutions, bar admission arose from elitist origins, and the system perpetuates systemic racism and classism today. Moreover, the bar admission process exacerbates access to justice issues and does not ensure attorney competency. Any single facet of this problem should be troubling enough for the legal community to overhaul bar admission with an evidence-based, equity-oriented system. Still, the legal community has taken no such measures.

A. Bar Admission Largely Relies on the Bar Exam

Bar admission follows standard practices across the country, and states implement those practices on a state-by-state basis—including bar exam administration. States may require specific standards for bar admission, “such as good moral character [and] proficiency in [the] law.”² Any requirement imposed on applicants “must have a rational connection with the applicant’s fitness or capacity to practice law.”³ State constitutions grant plenary power to a state’s highest court to set bar admission requirements and admit bar applicants.⁴ Bar admission requirements generally assess an applicant’s residence, education, legal competency, and character.⁵

The Uniform Bar Examination is a test developed and distributed by the National Conference of Bar Examiners.⁶ The exam tests legal subjects broadly, rather than focusing on state-specific law. As of 2024, 41 states adopted all three components of the Uniform Bar Examination.⁷ The remaining states continue to offer locally developed bar exams, most of

2. *Schwabe v. Bd. of Bar Exam’rs*, 353 U.S. 232, 239 (1957) (citations omitted) (holding that states can require bar admission standards and that any standard must rationally relate to “applicant’s fitness or capacity to practice law”).

3. *Id.* (citations omitted).

4. *See* 7 AM. JUR. 2D *Attorneys at Law* § 13 (2024); *e.g.*, VT. CONST. ch. II, § 30 (“The Supreme Court shall have . . . disciplinary authority concerning all judicial officers and attorneys at law in the State.”).

5. 7 AM. JUR., *supra* note 4, § 13.

6. *Uniform Bar Examination*, NCBE, <https://www.ncbex.org/exams/ube> (last visited Apr. 21, 2024).

7. *Id.*

which include at least one Uniform Bar Examination component.⁸ Each state sets its own passing score, ranging from 260 to 272.⁹ Vermont, New Hampshire, Massachusetts, and Maine set their passing scores at 270.¹⁰

The exam's three components include the Multistate Essay Examination, two Multistate Performance Test tasks, and the multiple-choice Multistate Bar Examination.¹¹ The essay portion asks test takers to write six essays in three hours.¹² Next, the performance test consists of two 90-minute tasks in which test takers apply fictional case law and statutes to a set of facts to produce documents such as an office memo or a client letter.¹³ Finally, the multiple-choice portion requires test takers to complete 200 multiple-choice problems over two 3-hour periods.¹⁴ All three components are closed-book, requiring test takers to memorize legal rules and apply them across the essay and multiple-choice portions.¹⁵ In total, the Uniform Bar Examination spans two 6-hour days.¹⁶

Almost all states require the Multistate Professional Responsibility Examination in addition to the bar exam.¹⁷ Like the bar exam, the Multistate Professional Responsibility Examination is developed by and sold to states by the National Conference of Bar Examiners.¹⁸ The test consists of 60 multiple-choice questions, which test takers have two hours to complete.¹⁹ The Multistate Professional Responsibility Examination tests students' understanding of professional conduct rules.²⁰ It covers areas such as lawyer-

8. *Id.*; see also *Multistate Bar Examination*, NCBE, <https://www.ncbex.org/exams/mbe> (last visited Apr. 21, 2024) (showing that most states—excluding Louisiana—administer the Uniform Bar Examination's multiple-choice component).

9. See *UBE Minimum Scores*, NCBE, <https://www.ncbex.org/exams/ube/score-portedability/minimum-scores> (last visited Apr. 21, 2024); see also *About the UBE*, NCBE, <https://www.ncbex.org/exams/ube/about-ube> (last visited Apr. 21, 2024); *Bar Exam Results by Jurisdiction: February 2024 Bar Exam*, NCBE, <https://www.ncbex.org/statistics-research/bar-exam-results-jurisdiction> (last updated Apr. 19, 2024).

10. *UBE Minimum Scores*, *supra* note 9.

11. *Uniform Bar Examination*, *supra* note 6.

12. *Multistate Essay Examination*, NCBE, <https://www.ncbex.org/exams/mee> (last visited Apr. 21, 2024).

13. *Multistate Performance Test*, NCBE, <https://www.ncbex.org/exams/mpt> (last visited Apr. 21, 2024).

14. *Preparing for the MBE*, NCBE, <https://www.ncbex.org/exams/mbe/preparing> (last visited Apr. 21, 2024).

15. *MBE Test Day Policies*, NCBE, <https://www.ncbex.org/exams/mbe/test-day-policies> (last visited Apr. 21, 2024).

16. *Uniform Bar Examination*, *supra* note 6.

17. See *Multistate Professional Responsibility Examination*, NCBE, <https://www.ncbex.org/exams/mpre> (last visited Apr. 21, 2024).

18. See *id.*

19. *Id.*

20. *Id.*

client confidentiality, conflicts of interest, malpractice, safekeeping of client funds, and judicial conduct.²¹ Students can take the Multistate Professional Responsibility Examination during law school or after graduation.

All states investigate applicants' character and fitness to practice law as part of the bar admission process.²² Applicants provide detailed information about their education, work experience, and any disciplinary sanctions ranging from traffic violations to academic misconduct to criminal convictions.²³ Many states also ask about the applicant's financial history and whether they have a history of substance abuse.²⁴ As long as applicants are honest, the incident was not severe, and applicants demonstrate an effort to prevent repeat problems, reviewers generally admit applicants.²⁵ On the other hand, when applicants lie, do not accept responsibility for their actions, or the event was severe, reviewers may deny them bar admission.²⁶

Vermont adheres to standard bar admission practices. The Vermont Rules of Admission, promulgated by the Vermont Supreme Court, govern the process.²⁷ The Rules' stated purposes are serving the public interest and maintaining the Vermont bar's integrity.²⁸ All Vermont applicants must sit for and pass the Uniform Bar Examination.²⁹ In addition to the bar exam, applicants must pass the Multistate Professional Responsibility Examination.³⁰ Finally, applicants must also undergo character and fitness review to determine whether they have good "moral character and fitness" to practice law.³¹ Although nearly all applicants are law school graduates, Vermont's Law Office Study Program provides an alternative option for legal education. After completing the apprenticeship-style experience and four years of supervised study, Law Office Study Program participants can sit for the bar exam.³²

21. See NAT'L CONF. OF BAR EXAM'RS, MPRE SUBJECT MATTER OUTLINE (2013), https://www.ncbex.org/sites/default/files/2023-01/MPRE_Subject_Matter_Outline.pdf.

22. NAT'L CONF. OF BAR EXAM'RS & AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS viii (2021) [hereinafter COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf.

23. *Id.*

24. *Id.*

25. Mary Lynn Dunnewold, *The Other Bar Hurdle: The Character and Fitness Requirement*, ABA (Dec. 1, 2013), <https://abaforlawstudents.com/2013/12/01/bar-hurdle-character-fitness-requirement>.

26. *Id.*

27. VT. SUP. CT. R. ADMISSION 1.

28. *Id.*

29. VT. SUP. CT. R. ADMISSION 9(b).

30. VT. SUP. CT. R. ADMISSION 11.

31. VT. SUP. CT. R. ADMISSION 1.

32. VT. SUP. CT. R. ADMISSION 7.

B. Modern Bar Admission Emerged from a Racist, Classist History

From colonial times until the early 20th century, most aspiring lawyers qualified for bar admission by completing apprenticeships instead of law school.³³ By 1860, nearly all states required an oral bar exam, and the exam was generally a casual affair.³⁴ After the Civil War, the legal community raised bar admission standards by establishing formal bar-examining committees, using written tests instead of oral exams, and formalizing apprenticeship and law school requirements.³⁵ Sixteen states opted for diploma privilege as a path to bar admission if students passed law school exams.³⁶ Other states prohibited diploma privilege, and a rift emerged about the best way to raise bar admission standards.³⁷ The legal community tasked the newly formed American Bar Association (ABA) to resolve this conflict and raise standards.³⁸

Options for legal education expanded dramatically in the early 20th century, which meant more students from nontraditional backgrounds could pursue legal careers. Full-time programs at prominent universities maintained their mission to provide an elite, theory-based education to a select group of mostly white Protestant men.³⁹ Meanwhile, part-time and night schools proliferated.⁴⁰ These schools were less expensive, focused on practical knowledge, and open to immigrants who worked during the day.⁴¹ Many part-time students sought a legal career because it would allow them to advance socially and economically in an increasingly competitive and specialized society.⁴² As traditional university-affiliated law schools became more elite and intellectual, part-time law schools flourished to serve the students left behind.⁴³

While the growth of part-time law schools expanded access for immigrant and poor white men, women and aspiring lawyers of color did not have many pathways to become lawyers.⁴⁴ However, it was not for lack of

33. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 3, 24 (1983).

34. *Id.* at 25.

35. *Id.*

36. *Id.* at 27 n.57.

37. *Id.* at 27.

38. *Id.*

39. *See id.* at 73–74.

40. *See id.* at 74–75. The modern-day law schools now part of George Washington, New York, and Georgetown Universities all started as part-time or night programs. *Id.*

41. *Id.*

42. *Id.* at 75.

43. *See id.* at 79.

44. *Id.* at 81.

motivation and tenacity. During the Reconstruction era—and up until Reconstruction failed in 1877—some Black attorneys joined the profession.⁴⁵ Several became legislators and judges.⁴⁶ John Mercer Langston, one of the first Black lawyers in the country, helped start Howard Law School.⁴⁷ When Charlotte Ray graduated from Howard in 1872, she was the first Black woman to graduate from law school and went on to join the D.C. bar.⁴⁸ Elsewhere, more women fought to join the bar. In Illinois, Myra Bradwell met the requirements for bar admission, but the state denied her application.⁴⁹ In 1872, the United States Supreme Court upheld Illinois's decision under the Privileges and Immunities Clause of the Constitution.⁵⁰ Three justices concurred based on their beliefs that women were unfit to be lawyers because of their “timidity and delicacy” and because “[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.”⁵¹

Bolstered by the women's suffrage movement, regressive attitudes about gender started to give way. Women gained traction over the next few decades, gaining admission to many law schools and, in 1918, to the ABA.⁵² However, aspiring lawyers of color, harmed by Jim Crow laws and ongoing social ostracism, did not enjoy similar rising fortunes.⁵³ In 1912, the ABA accidentally admitted three Black lawyers.⁵⁴ When it realized its mistake, the organization reinforced that its settled practice was to accept only white male members.⁵⁵ Not until 1956 did the ABA remove a question about race from the membership application and consider applicants of color on the same terms as white applicants.⁵⁶

Throughout the early 20th century, the ABA engaged in a systematic effort to standardize the bar and maintain an elite cadre of lawyers.⁵⁷ The

45. Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. C.R. L.J. 51, 70 (2007).

46. *Id.* at 71–72.

47. *Id.* at 72. Howard was one of the earliest law schools to accept women, including Emma Gillet, an 1880 graduate who founded the co-ed Washington Law School. STEVENS, *supra* note 33, at 83, 90 n.79.

48. Aiyetoro, *supra* note 45, at 71 n.117.

49. *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 130–31 (1872).

50. *Id.* at 139.

51. *Id.* at 141 (Bradley, J., concurring).

52. STEVENS, *supra* note 33, at 84.

53. *Id.* at 81–82.

54. Aiyetoro, *supra* note 45, at 72.

55. *Id.*

56. *Id.* at 78.

57. STEVENS, *supra* note 33, at 92.

organization used tools such as the bar exam and membership for law schools to achieve its goal of “improving” the profession.⁵⁸ The membership organization set standards that excluded part-time schools.⁵⁹ Meanwhile, the ABA pushed states to require the bar exam, which eroded the post-Civil War diploma-privilege tradition.⁶⁰ However, the desire for “professionalism” was mixed up with racist motivations.⁶¹ Influential legal players held motives for their policy changes beyond increasing racial purity—such as maintaining an ethical, well-educated bar and a cultural interest in institutionalization.⁶² However, those same leaders held nativist views, knew of the discriminatory impacts of their actions, and continued to alienate poor, immigrant, and non-white law students.

Through the 1920s, law school accreditation standards emerged,⁶³ which the legal community ultimately employed to limit “overcrowding” in the profession.⁶⁴ Accreditation standards included a three-year curriculum (four years for part-time programs), a condition that schools accept only college-educated applicants, a minimum number of full-time faculty, and a certain number of library books.⁶⁵ In 1930, the ABA created the National Conference of Bar Examiners to support its efforts to standardize legal education and bar admissions.⁶⁶

As the Depression wore on, the legal community continued to fear “overcrowding,” citing concerns that too many lawyers would result in incompetent practice.⁶⁷ Yet, what those in power were really worried about was that an influx of lawyers during a time of low demand for legal services would cause increased competition, decreased costs to clients, and decreased revenues to established lawyers.⁶⁸ Demand persisted for legal services, though practitioners saw lower profits.⁶⁹ Competition was high among a broad pool of legal practitioners who provided different types of services at

58. *Id.* at 97–98.

59. *Id.* at 97.

60. *Id.* at 98–99.

61. *Id.* at 101. Although the European immigrants of the early 1900s would be considered white today, at the time “whiteness” was narrowly construed to include only people of Anglo-Saxon heritage and Protestant religious beliefs. Thus, racism is an appropriate term to describe anti-immigrant efforts. *Xenophobia: Closing the Door*, THE PLURALISM PROJECT: HARVARD UNIV., <https://pluralism.org/xenophobia-closing-the-door> (last visited Apr. 21, 2024).

62. STEVENS, *supra* note 33, at 100.

63. *Id.* at 173.

64. *Id.* at 178.

65. *Id.* at 179.

66. *Id.* at 177.

67. *Id.* at 178.

68. *Id.* at 178–79.

69. *Id.*

various price points.⁷⁰ To discourage unauthorized competition, the ABA urged states to prosecute unlicensed law practitioners.⁷¹ The organization also recommended that states require bar applicants to have attended an accredited law school—not an unaccredited part-time or night school.⁷²

Through the 1930s, accreditation and bar admission standards proliferated.⁷³ By the decade's end, the ABA "cheerfully noted" the decrease in law students.⁷⁴ Three of the four law schools that primarily served Black students closed during this period because of the costs of accreditation, discriminatory enforcement of accreditation requirements, and the pressures of the Depression.⁷⁵ Only Howard survived—but barely, as the school had to raise its admission standards and tuition to gain accreditation, shutting out much of its applicant pool.⁷⁶ By the end of World War II, a homogenous group of law schools trained students to enter a homogenized profession.⁷⁷ The ABA and other influential legal players continued to raise accreditation and bar admission standards, asserting that these measures were necessary to protect the public.⁷⁸ Meanwhile, southern bar admission officials engaged in discriminatory behavior to thwart the success of Black law students and bar applicants.⁷⁹

During the post-war era, poor bar exam passage rates prevented Black graduates from joining the profession.⁸⁰ As a result of the exam's disparate impact, Black bar applicants brought a series of Title VII challenges against bar examiners in the 1970s.⁸¹ At the time, Title VII of the 1964 Civil Rights Act⁸² prevented employment requirements that created a disparate impact on

70. *See id.* at 189 n.70.

71. *Id.* at 178.

72. *Id.*

73. *Id.* at 177–80.

74. *Id.* at 180.

75. *See* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 112–13 (2003) (explaining that Freylinghuysen closed in 1927, Virginia Union closed in 1928, and Simmons closed in 1932).

76. *Id.* at 113.

77. STEVENS, *supra* note 33, at 198–99.

78. *Id.* at 192, 197.

79. *See, e.g.*, Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 173 (2022) (describing how Florida and South Carolina abolished diploma privilege in 1949 and 1950 respectively, just as the first Black law schools were established in those states).

80. *See, e.g.*, Tyler v. Vickery, 517 F.2d 1089, 1092 (5th Cir. 1975) (discussing 0% bar passage rate amongst Black test takers in Georgia in July 1972 and 50% bar passage in 1973).

81. *See* Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 937–38 (2020) (describing four Title VII cases from the 1970s).

82. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a), (c) (1964).

a protected class (like Black employees) unless the requirement was closely job-related.⁸³ However, plaintiffs failed in the 1970s cases due to several setbacks. First, *Washington v. Davis* raised the Title VII standard such that it applied only where a plaintiff proved discriminatory intent—which is a much higher burden than proving only disparate impact.⁸⁴ Then, two U.S. Courts of Appeals held that even if plaintiffs could show the bar examiners acted with a discriminatory purpose, the bar examiner-bar applicant relationship did not qualify as a Title VII employer-employee relationship.⁸⁵ Thus, bar applicants lost the ability to challenge the bar exam under Title VII.

Law schools remained largely unresponsive to the civil rights and antipoverty movements of the 1960s and 1970s, and schools made little progress in diversifying their student bodies.⁸⁶ Jewish students experienced the most success, making up the majority of students at some elite law schools.⁸⁷ In 2016, law schools reached an equity milestone when for the first time, the majority of the students were women.⁸⁸ Today, although the racial composition of law schools more closely reflects the racial diversity of the United States, Black, Latine, and Native American students remain underrepresented.⁸⁹

C. The Bar Exam Perpetuates Systemic Racism Today

While student demographics have improved, bar admission practices—including the bar exam—continue to serve a gatekeeping function that privileges wealthy, white bar applicants. In 2021, 85% of white law school graduates passed the bar exam on their first try, whereas only 61% of Black graduates did.⁹⁰ This recent data is not an anomaly. Rather, it reflects the long-term disparity in bar passage rates⁹¹ and demonstrates how systemic

83. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

84. 426 U.S. 229, 238–39 (1976).

85. *Tyler*, 517 F.2d at 1095–96; *Woodard v. Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1345 (4th Cir. 1979).

86. STEVENS, *supra* note 33, at 234.

87. *Id.* at 246.

88. Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html>.

89. Susan L. Krinsky, *Incoming Class of 2022: A Major Advance in Diversity, More Work to Do*, LSAC (Dec. 20, 2022), <https://www.lsac.org/blog/incoming-class-2022-major-advance-diversity-more-work-to-do>.

90. AM. BAR ASS'N, SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf.

91. The ABA started collecting bar passage data by race only with the Class of 2018. *Statistics*, ABA, https://www.americanbar.org/groups/legal_education/resources/statistics (last visited Apr. 21,

racism intersects with bar admission. Two broad theories—one economic, one social—explain how systemic racism creates the bar passage gap between white and minority test takers.⁹² To the extent that these theories identify fault, it is with the American educational and legal systems and *not* with individual test takers themselves. These theories also do not allege that bar exam content is biased, although exam content may be a compounding problem.⁹³ The first theory is economic: As long as the racial wealth gap persists, the bar exam will continue to privilege white test takers over minority test takers.⁹⁴ The relationship between wealth and bar exam success is well established and addressed in the next Part of this Article.⁹⁵

The second theory considers the social and psychological factors of systemic racism. Specifically, implicit bias in law school and the pressure of the bar exam may evoke “stereotype threat” that hinders students of color from performing at their full potential.⁹⁶ “Stereotype threat” is a psychological phenomenon created when environmental cues—often precipitated by others’ implicit biases—consciously or subconsciously change someone’s “self-concept.”⁹⁷ When that person is part of a group that society stereotypes as low performing at a particular activity, stereotype threat dramatically reduces their performance at that activity.⁹⁸ Stereotype threat can impact the highest achievers in a group and is not limited to people of color or other minority groups.⁹⁹ When anyone—including members of a

2024) (showing that oldest data is for Class of 2018, in *2020-2021 Bar Passage Data*). However, the racial disparity in bar passage is well documented in law review articles and case law. *See, e.g.*, Edward F. Bell, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A. J. 1215, 1217 (1971) (discussing disparate bar passage rates in many states in the mid-1900s).

92. Stereotype threat plagues all kinds of standardized testing. Arusha Gordon, *Don’t Remind Me: Stereotype Threat in High-Stakes Testing*, 48 U. BALT. L. REV. 387, 387–88 (2019).

93. *See* Sarah J. Schendel, *Listen!: Amplifying the Experiences of Black Law School Graduates in 2020*, 100 NEB. L. REV. 73, 84–85 (2021) (quoting graduates dealing with the cognitive dissonance of seeing police brutality in their communities while studying law “that was never meant to protect you” and “that I knew didn’t apply to my people in real life”); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 392 (2002).

94. *See* discussion of the classist impact of the bar exam *infra* Part I.D.

95. *See infra* Part I.D.

96. *See* Deborah Jones Merritt et al., *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. (July 20, 2021), <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies> (citation omitted).

97. *Id.*; “Self-concept” describes a person’s perception of themselves within their world and can impact their academic achievement. Bernadette M. Gadzella & James David Williamson, *Study Skills, Self-Concept, and Academic Achievement*, 54 PSYCH. RPTS. 923, 923 (1984).

98. Gadzella & Williamson, *supra* note 97, at 927.

99. Merritt et al., *supra* note 96. For instance, one study found White men performed worse on math tests after being reminded of the stereotype that Asian people are better than white people at math. *Id.*; *see also* Gordon, *supra* note 92, at 389–90 (providing examples of how stereotype threat impacts various identities).

dominant group—believes their character traits depend on their racial or gender identity, they are less able to fulfill their potential when pursuing stereotypically “non-traditional” activities.

Scholars have long observed stereotype threat in law school,¹⁰⁰ and it also bears on the bar exam. A 2021 study of over 5,000 bar exam takers supports the hypothesis that the bar exam triggers stereotype threat in test takers of color.¹⁰¹ The study controlled for many factors, including income, employment during bar prep, use of a commercial course, and law school selectivity.¹⁰² Even so, test takers of color were significantly more likely to fail than white test takers.¹⁰³ The study also found a graduate’s satisfaction with their law school experience significantly correlates with their likelihood of passing the bar exam.¹⁰⁴ On top of law school’s challenges for anyone, students of color experience an adverse and often hostile environment.¹⁰⁵

The bar exam exemplifies the compounding nature of systemic racism.¹⁰⁶ Centuries of systemic racism in America have resulted in massive wealth inequality and stereotype threat in legal education. Like racism, wealth inequality and stereotype threat are structural problems that need structural solutions—not just case-by-case interventions or an individualistic “bootstrap” approach. Wealth inequality and stereotype threat undermine test takers of color and increase the likelihood that they will fail the bar exam. When law students of color cannot pass the exam and cannot enter the legal profession, that exclusion exacerbates wealth inequality. Then, the exclusion creates more false narratives and biases, which leads to new stereotype threat.

100. See, e.g., Russell A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1, 40–43 (2016) (explaining how law school creates and perpetuates stereotype threat).

101. See E-mail from Deborah Jones Merritt, Professor, Ohio State Univ. Moritz Coll. of L., to author (Jan. 2, 2023, 08:10 EST) (on file with author) (interpreting statistical analysis in ACCESSLEX INST., ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 81 (2021), https://www.accesslex.org/sites/default/files/2021-05/NYBOLE_2021_050521_0.pdf).

102. ACCESSLEX INST., *supra* note 101, at 2.

103. E-mail from Deborah Jones Merritt, *supra* note 101.

104. ACCESSLEX INST., *supra* note 101, at 31.

105. Cecil J. Hunt, II, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 774 (1996); Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 508–10 (2019). Additional factors contributing to an adverse and hostile environment include the financial stress of student loan debt, lack of support for students who are also caretakers, classroom microaggressions such as curricula that is silent on race, and lack of faculty diversity. Schendel, *supra* note 93, at 103–08; Letter from the Vermont L. Sch. Env’t Just. Soc’y et al., to the Vermont L. Sch. Diversity Comm. (Jan. 31, 2022) (on file with author).

106. The National Conference of Bar Examiners acknowledges that socioeconomic factors create unequal opportunity for test takers of color. See Suzanne K. Richards, *Letter from the Chair*, BAR EXAM’R, Summer 2022, at 1, 2. Instead of interrogating the bar exam’s role in perpetuating unequal opportunity, the organization proposes programs “provide financial and other support” to students of color so that race is “less of a factor.” *Id.*

The ABA accreditation standard requiring law schools to maintain high bar passage rates perpetuates academic racism.¹⁰⁷ To stay accredited, schools must ensure that 75% of graduates who take the bar exam pass within two years of graduating.¹⁰⁸ Generally speaking, the effects of systemic racism on bar passage mean that the more minority students a school has, the lower the school's bar passage rate, and the greater the threat of losing accreditation.¹⁰⁹ It follows that some of the schools most threatened by the ABA standard would be those with the highest proportions of students of color, such as historically Black law schools.¹¹⁰ As long as the ABA ties accreditation to bar passage, law schools—and particularly schools whose bar passage rates hover close to 75%—will need to consider predicted bar passage as an admissions criterion. Schools that seek to diversify their student body *and* maintain an acceptable bar passage rate are left with few viable options to achieve both goals.

D. The Bar Exam Perpetuates Systemic Classism Today

The ten-week period between law school graduation and the July bar exam is expensive. Research shows the crucial factor determining “bar passage is extensive time dedicated to bar exam preparation.”¹¹¹ Graduates who study more than 40 hours per week before the bar exam are much more likely to pass than test takers who study for fewer than 40 hours a week.¹¹² Those who attempt to work and study simultaneously do markedly worse on the exam.¹¹³ So, graduates who want the best chance of success must delay

107. See Shepherd, *supra* note 75, at 104.

108. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024, Standard 316, at 27 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf.

109. Compare *id.* (setting accreditation standard at 75% bar passage within two years), with AM. BAR ASS'N, *supra* note 90 (showing that only 81% of Black test takers pass within two years compared to 87% of Hispanic test takers and 94% of White test takers).

110. See Shepherd, *supra* note 75, at 124. Six ABA-accredited historically black law schools exist in the United States: Florida A&M University College of Law, University of the District of Columbia School of Law, Howard University School of Law, North Carolina Central University School of Law, Southern University Law Center, and Texas Southern University. See *id.* (discussing five of these schools); see also *About Us*, FAMU, <https://law.famu.edu/about-us/index.php> (last visited Apr. 21, 2024) (discussing Florida A&M's more recent accreditation).

111. ACCESSLEX INST., *supra* note 101, at 11.

112. *Id.*

113. *Id.* at 15; see generally Logan Cornett & Zachariah DeMeola, *The Bar Exam Does More Harm than Good*, UNIV. OF DENVER: IAALS (Aug. 2, 2021), <https://iaals.du.edu/blog/bar-exam-does-more-harm-good> (discussing how test takers with fewer financial resources are disadvantaged when taking the bar exam).

employment to study for the exam. While putting in between 400 and 600 hours of bar prep, graduates must continue covering living expenses such as housing, transportation, food, medical costs, and childcare. Vermont Law School suggests its graduates budget \$3,500 to cover living expenses while studying.¹¹⁴

In addition to living-related costs, graduates must budget for prep courses and bar application costs. Courses from established test prep companies are optional in theory but required in practice—and expensive, starting at \$1,799.¹¹⁵ High-end packages with additional supplements and personal tutoring can cost as much as \$4,500.¹¹⁶ On top of bar prep costs, states charge a fee to apply for bar admission and take the bar exam. Vermont’s \$300 cost is among the lowest nationwide; some states charge \$1,000 or more.¹¹⁷

The cost of traveling to the bar exam test site burdens some test takers more than others. States generally hold bar exams in population centers,¹¹⁸ meaning rural test takers must pay for travel, lodging, and meals. Test takers who care for children or other family members may need to hire substitute caregivers. Students with disability accommodations can receive up to 100% additional time for the exam.¹¹⁹ As a result, those test takers face proportionately higher costs for lodging, meals, caregiving, and other travel-related expenses.

114. Jessica Durkis-Stokes, Acad. Success Program, Vermont L. Sch., Preliminary Bar Workshop #1: What is the Bar? (2022).

115. *Vermont Bar Review Course*, KAPLAN, <https://www.kaptest.com/bar-exam/courses/vermont-bar-review> (last visited Apr. 21, 2024); *Course Pricing*, THEMIS BAR REV., <https://www.themisbar.com/pricing> (last visited Apr. 21, 2024); *BARBRI Bar Review*, BARBRI, <https://www.barbri.com/bar-review-course/bar-review-course-details> (last visited Apr. 21, 2024).

116. *Vermont Bar Review Course*, *supra* note 115 (describing \$3,999 “Bar Review Convenience Package”); *BARBRI Bar Review*, *supra* note 115 (describing \$4,199 “Ultimate Pass” course).

117. OFF. OF THE CT. ADM’R, VT. SUP. CT., ADMIN. DIRECTIVE NO. PG-6, FEES FOR BAR ADMISSIONS AND ATTORNEY LICENSING (2020). New Hampshire charges \$725 plus a \$52.50 laptop fee, New York charges \$250 plus a \$100 laptop fee, and Massachusetts charges \$815 plus a \$175 laptop fee. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 22, at 34–35. Arkansas, Florida, South Carolina, and Virginia all charge \$1000 or more, plus laptop fees. *Id.*

118. For example, Vermont often holds its exam in Burlington. *Admission to the Vermont Bar*, VT. JUDICIARY, <https://www.vermontjudiciary.org/attorneys/admission-vermont-bar> (last visited Apr. 21, 2024). Burlington is Vermont’s largest city and over an hour from the area near Vermont Law School where most test takers live. Driving Directions from South Royalton, VT to Burlington, VT., GOOGLE MAPS, <https://maps.app.goo.gl/yudWb8f4iLp1BvL1A>; *see also Vermont Cities by Population*, VT. DEMOGRAPHICS, https://www.vermont-demographics.com/cities_by_population (last visited Apr. 21, 2024).

119. *See* Amanda M. Foster, *Reasonable Accommodations on the Bar Exam: Leveling the Playing Field or Providing an Unfair Advantage?*, 48 VAL. U. L. REV. 661, 675, 684, 690 (2014) (explaining New York Board of Bar Examiners policy that provides up to four days for the exam and examples of test takers who received 100% extra time).

After the bar exam, some graduates start jobs before receiving results by working under supervision.¹²⁰ However, many graduates cannot apply for or start work until they receive proof of bar passage.¹²¹ July bar takers typically receive their results in September, October, or November.¹²² Once results come out, graduates without work lined up still need to apply for jobs, which takes weeks or months. Graduates will spend, at minimum, at least ten weeks out of work, and at most, six months if they need a passing score before applying for jobs.

Given the costs associated with the bar exam, it is no surprise that graduates with more financial resources do better on the test.¹²³ Higher household income correlates with higher first-time bar passage rates.¹²⁴ Likewise, the more financial support a law student received from their family and friends during law school, the more likely they were to pass the bar exam.¹²⁵ However, many test takers cannot access household income or family resources. Plus, student loan funds are not available post-graduation, and the cost of bar exam preparation is not factored into cost-of-living calculations for a student's final year.¹²⁶

Graduates juggle bar preparation costs on top of significant student loan burdens.¹²⁷ The average law graduate owes \$120,000 in student loans (including undergraduate and other pre-law school loans).¹²⁸ In addition to traditional student loans, about a third of graduates take out private "bar loans" to handle bar exam costs.¹²⁹ Only private lenders offer bar loans, sometimes with strict underwriting criteria that preclude access for graduates with poor credit.¹³⁰ To avoid taking out a bar loan, many law schools encourage students to save money from their student loans starting in their

120. For example, in Vermont, law school graduates awaiting bar exam results can work as legal interns and appear in court under attorney supervision. VT. SUP. CT. R. ADMISSION 21(b)(2).

121. See Megan Parker, *An Open Letter from a Future Lawyer Now Studying for the Bar Exam*, ABA (Apr. 28, 2023), https://www.americanbar.org/groups/law_students/resources/student-lawyer/bar-admissions-and-exam/an-open-letter-from-a-future-lawyer-now-studying-for-the-bar-exam.

122. *Bar Exam Results by Jurisdiction*, NCBE, <https://www.ncbex.org/statistics-and-research/bar-exam-results> (last updated Apr. 17, 2024).

123. ACCESSLEX INST., *supra* note 101, at 38.

124. *Id.*

125. *Id.*

126. AM. BAR ASS'N & ACCESSLEX INST., *STUDENT DEBT: THE HOLISTIC IMPACT ON TODAY'S YOUNG LAWYER* 34 (2021), https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2021-student-loan-survey.pdf.

127. AM. BAR ASS'N, *ABA PROFILE OF THE LEGAL PROFESSION* 51 (2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>.

128. *Id.*

129. AM. BAR ASS'N & ACCESSLEX INST., *supra* note 126, at 34.

130. *Id.*

first year of school.¹³¹ Thus, students without outside financial resources who are unable to save loan funds are all but required to take out a high-interest bar loan. Moreover, the pressure of student loans falls unevenly across graduates of different races, with Black borrowers more likely to carry more debt than graduates of any other race.¹³² Nearly one in five Black borrowers graduate with over \$200,000 in law school debt alone—not including undergraduate debt or bar loans.¹³³ The more debt a graduate has, the less likely they are to pass the bar exam.¹³⁴

Vermont stakeholders recognize the financial challenges of taking the bar exam ten weeks after graduation. Accordingly, Vermont allows students to take the bar exam while still in school.¹³⁵ Early bar takers benefit from graduating with bar admission but may lose the opportunity to do experiential work in their last semester.¹³⁶ In addition to the early bar option, Vermont Law School offers in-house bar preparation classes and a commercial bar prep course included in the cost of tuition.¹³⁷ While helpful, these offerings are only a partial fix to the bar exam's deeply classist effects. Between the costs of bar preparation, the need to take time away from work, and the effect of student loan debt on test takers, bar passage becomes a proxy for wealth. In a country with a stark and increasing racial wealth gap,¹³⁸ any wealth-dependent exercise—such as the bar exam—widens existing inequities and perpetuates systemic classism.

131. ACCESSLEX INST., *supra* note 101, at 50.

132. AM.AM. BAR ASS'N & ACCESSLEX INST., *supra* note 126, at 5.

133. Melanie Hanon, *Average Law School Debt*, EDUC. DATA INITIATIVE, <https://educationdata.org/average-law-school-debt> (last updated June 15, 2023).

134. ACCESSLEX INST., *supra* note 101, at 39. The study controlled for academic merit and other variables that may complicate the relationship between debt and bar passage. *Id.* at 39–40. For instance, students with lower debt are often academic high achievers with large scholarships. *Id.*

135. VT. JOINT COMM'N ON THE FUTURE OF LEGAL SERVS., FINAL REPORTS & RECOMMENDATIONS OF THE FIRST YEAR STUDY COMMITTEES 31–32 (2015), [https://www.vtbar.org/UserFiles/files/Commission/Commission%20Report%20-%20First % 2 0 Year%20Study.pdf](https://www.vtbar.org/UserFiles/files/Commission/Commission%20Report%20-%20First%20Year%20Study.pdf) [<https://perma.cc/YV53-FSN3>].

136. See *supra* text accompanying notes 113–22 (discussing the time and cost graduates incur while waiting for bar exam results needed to start work); see also Interview with Beth McCormack, Dean, Vt. L. Sch., in South Royalton, Vt. (Sept. 19, 2022).

137. Richard Sala, Professor, Vermont L. Sch., July Education for the Bar (JEB) February Early Bar (FEB) Info Session (2022); E-mail from Rod Smolla, President, Vermont L. & Graduate Sch., to school community (Apr. 5, 2023, 10:50 EST) (on file with author).

138. Aditya Aladangady & Akila Forde, *Wealth Inequality and the Racial Wealth Gap*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Oct. 22, 2021), <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.html>.

E. The Bar Exam Exacerbates Access to Justice Issues

Bar admission requirements keep the bar small and enable high prices for legal services.¹³⁹ Like other professional licensing regimes, bar admission operates with the goal of consumer protection.¹⁴⁰ However, excessive bar admission requirements may harm consumers by limiting competition within the profession¹⁴¹: Reducing the supply of legal services increases the cost of those services.¹⁴² In this way, bar admission—and the bar exam—may protect members of the profession more than members of the public.¹⁴³

The high cost of services and the limited supply of lawyers impacts clients unequally. Wealthy clients in the market for specialized lawyers generally have no problem finding help. Meanwhile, the civil and criminal justice systems effectively exclude average Americans.¹⁴⁴ The legal system violates criminal defendants' constitutional rights when public defenders are too overburdened and underpaid to mount an effective defense.¹⁴⁵ As one critic put it: "There is far too much law for those who can afford it and far too little for those who cannot."¹⁴⁶

Vermont's legal system does not provide equitable access to justice. Although civil litigants do not have a constitutional right to counsel, Vermont strives to provide free or low-cost advice and representation on critical

139. See Shepherd, *supra* note 75, at 147 (discussing effect of law school accreditation on access to and affordability of legal services).

140. THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (stating "occupational licensing plays an important role in protecting consumers" and "[c]onsumers are likely most familiar with licensing requirements for professionals like dentists, lawyers, and physicians").

141. DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR ADVANCEMENT OF AM. LEGAL SYS., BUILDING A BETTER BAR 5 (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf.

142. Benjamin Hoom Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 441 (2001).

143. Benjamin H. Barton, *Economists on Deregulation of the American Legal Profession: Praise and Critique*, 2012 MICH. ST. L. REV. 493, 494 & n.7 (2012) (first citing Benjamin Hoom Barton, *supra* note 142, 436–63 (2001); and then citing BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 140–59 (2011)).

144. Lawrence M. Friedman, *Access to Justice: Some Comments*, 73 FORDHAM L. REV. 927, 927 (2004).

145. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); Friedman, *supra* note 144, at 928.

146. Barton, *supra* note 142, at 441 n.42 (quoting Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983)). The same imbalance exists in Vermont: "Depending on whom we talk to, there are either too few attorneys in Vermont or too many attorneys inaccessible to most Vermonters for various reasons." VT. JOINT COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 135, at 44.

matters.¹⁴⁷ Still, thousands of Vermonters go unrepresented in serious civil proceedings.¹⁴⁸ Mirroring the plight of civil litigants, some Vermont criminal defendants face consequential litigation without adequate legal help because of lawyer shortages in rural areas.¹⁴⁹ Public defender positions can linger for weeks without applicants and remain unfilled for months in Vermont's most rural counties.¹⁵⁰ The public defenders who do work in these areas are overburdened, with some Northeast Kingdom public defenders handling hundreds of cases at a time.¹⁵¹ Under such a workload, even the most competent and best-intentioned lawyers could not dedicate the time and resources necessary for a criminal case. As a result, some Vermont defendants receive low-quality or delayed representation.¹⁵² Thus, Vermont's attorney shortage¹⁵³ and the high cost of existing attorneys create unnecessary barriers for Vermonters seeking counsel.

147. VT. ACCESS TO JUST. COAL., RENEWING VERMONT'S COMMITMENT TO ACCESS TO JUSTICE 1 (2020), <https://legislature.vermont.gov/Documents/2020/WorkGroups/House%20Appropriations/FY%202021%20State%20Budget/M.%20Advocate%20Hearings/W~Daniel%20Richardson%20-%20VT%20Access%20to%20Justice%20Coalition~FY21%20Budget%20-%20Advocate%20Hearings~2-20-2020.pdf>.

148. *Id.* at 2. In one year, the need included about 1,500 tenants facing eviction, 4,000 customers facing credit card collections, and 1,300 spouses seeking a divorce. *Id.*

149. See Justin Trombly, *Northeast Kingdom Defenders Worry Hiring Problems Harm Clients' Rights*, VTDIGGER (Sept. 8, 2019), <https://vtdigger.org/2019/09/08/northeast-kingdom-defenders-worry-hiring-problems-harm-clients-rights>.

150. Kyle Stucker, *'Calling This a Crisis Is Not an Understatement': Public Defenders Face Challenges*, PROVIDENCE J. (Sept. 29, 2021), <https://www.providencejournal.com/story/news/2021/09/29/new-england-public-defenders-worried-clients-not-getting-effective-representation-covid-19-backlog/5842430001>.

151. Trombly, *supra* note 149.

152. See, e.g., *id.* (describing how client's plans to expand nonprofit were delayed when lawyer allegedly failed to address misdemeanor charge); Justin Trombly, *NEK Judge Throws Out Drug Conviction, Rules Public Defenders Failed*, VTDIGGER (July 26, 2021), <https://vtdigger.org/2021/07/26/nek-judge-throws-out-drug-conviction-rules-public-defenders-failed> (describing how court vacated client's conviction for ineffective assistance of counsel).

153. See discussion of Vermont's attorney demographics *infra* Part I.G.

F. The Bar Exam Does Not Measure Competence or “Protect the Public”

The National Conference of Bar Examiners’ organizational vision includes fostering a “competent” legal profession.¹⁵⁴ Yet, for the test’s entire existence, the legal community has debated whether the bar exam accurately measures competence.¹⁵⁵ Neither the National Conference of Bar Examiners nor other entities ever provided “an agreed-upon, evidence-based definition of minimum competence.”¹⁵⁶

In 2020, the Institute for the Advancement of the American Legal System issued the first evidence-based definition of minimum competence in *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*.¹⁵⁷ The report’s “building blocks” are the abilities to: (1) “act professionally and in accordance with the rules of professional conduct”; (2) understand “legal processes and sources of law”; (3) understand “threshold concepts in many subjects”; (4) “interpret legal materials”; (5) “interact effectively with clients”; (6) “identify legal issues”; (7) “conduct research”; (8) “communicate as a lawyer”; (9) understand the “‘big picture’ of client matters”; (10) “manage a law-related workload responsibly”; (11) “cope with the stresses of legal practice”; and (12) “pursue self-directed learning.”¹⁵⁸ Under this new definition of minimum competence, law schools and bar exams should use multiple-choice questions “sparingly, if at all,” and minimize written assessments.¹⁵⁹ Additionally, when examiners use written tests, the tests should be performance tests instead of traditional essays and should not be time pressured.¹⁶⁰

The Uniform Bar Examination’s multiple-choice and essay format directly conflicts with the report’s recommendations for measuring minimum competence. Only the performance test—which makes up just one-quarter of the bar exam—passes muster. Even then, the performance test is highly time-pressured, which clashes with the recommendation to avoid assessments where time is the limiting factor. Of the 12 building blocks, the bar exam

154. *About NCBE*, NCBE, <https://www.ncbex.org/about> (last visited Apr. 21, 2024).

155. See, e.g., Leon Green, *Why Bar Examinations?*, 33 ILL. L. REV. 908, 909, 911 (1939) (describing bar exam administration as a “fatuous process” and stating that “there is not a single similarity between the bar examination process and what a lawyer is called upon to do in his practice, unless it be to give a curbstone opinion”).

156. MERRITT & CORNETT, *supra* note 141, at 3. The 1992 ABA MacCrate report came close when it proposed ten skills necessary for competent lawyering. TASK FORCE ON L. SCH. AND THE PROFESSION, AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 135–221 (1992).

157. MERRITT & CORNETT, *supra* note 141, at 3.

158. *Id.*

159. *Id.* at 4.

160. *Id.*

only measures a test taker's ability in two areas: understanding threshold concepts and identifying legal issues. The multiple-choice and essay portions of the exam assess a test taker's memorization skills just as much as their legal knowledge and analysis. However, memorization is not part of competent legal practice.¹⁶¹ Competent lawyers double-check their assumptions, do legal research, and talk to colleagues—even on run-of-the-mill cases. The bar exam falls short when measured against the legal community's first and only evidence-based definition of minimum competence.

Turning to the bar exam's goal of "protecting the public" from incompetent lawyers, malpractice data provides a good proxy for whether the test reaches this goal.¹⁶² The ABA sorts malpractice claims into 22 types of error.¹⁶³ Of the 22 types, the bar exam protects against only one kind of error: "Failure to Know/Properly Apply [the] Law."¹⁶⁴ Even then, this error is probably more a product of deficient legal research than lacking legal knowledge. While "Failure to Know/Properly Apply [the] Law" was the most common error, it accounts for only a small portion—about 16%—of all malpractice claims.¹⁶⁵ Meanwhile, administrative errors (e.g., "Failure to Calendar Properly") comprise almost 20% of claims, client-relations problems (e.g., "Failure to Follow Clients Instructions") comprise almost 17% of claims, and intentional wrongs (e.g., "Malicious Prosecution") comprise almost 12% of claims.¹⁶⁶ The malpractice data suggests that while bar admission requirements should maintain some focus on legal knowledge and application, there should be more emphasis on applicants' management abilities, communication skills, and understanding of legal ethics.

Even if one accepts the bar exam industry's proposition that the test correlates with competence, it remains too redundant and superfluous to justify its burden on test takers. The bar exam does not test new material or concepts that law schools have not already tested students on. Rather, the test has become an obligatory rite of passage that "functions more as an exit examination, a law school comprehensive, than as a professional entrance

161. *Id.* at 72.

162. *See About NCBE*, *supra* note 154 (stating that part of National Conference of Bar Examiners' mission is "for the benefit and protection of the public"); Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 168 (2022) (questioning whether the bar exam accurately "predict[s] misconduct years into the future").

163. *See* ROBERT A. GOTTFRIED & JESSICA RUDIN MACGREGOR, AM. BAR ASS'N, PROFILE OF LEGAL MALPRACTICE CLAIMS 2016-2019, at 22 (2020).

164. *Id.*

165. *Id.*

166. *See id.*

examination.”¹⁶⁷ A national study found that law school grades correlate strongly with bar exam passage, suggesting that law school grades measure the same test-taking skills and legal knowledge that the bar exam does.¹⁶⁸ Vermont-specific data aligns with this finding. According to Vermont Law School administration, about 75% of students with a first-year GPA above 2.6 end up passing the bar exam, whereas only about 10% of students with a first-year GPA under 2.6 end up passing.¹⁶⁹

G. Vermont Stakeholders Considered Bar Admission Reform Several Times

In 1994, Maine, New Hampshire, and Vermont convened the Tri-State Task Force on Bar Admissions to “enhance[] competence by improving the [regional] bar admission process.”¹⁷⁰ After three years of work, the Tri-State Task Force agreed to implement a required “transitional education program” across all three states.¹⁷¹ The program would provide practical instruction in skills such as “factual investigation, negotiation, counseling, organization and management,” and “drafting.”¹⁷² However, the Tri-State Task Force never implemented the program.¹⁷³ Vermont and New Hampshire reconvened to discuss reciprocal bar admission, and in 2003, implemented rules that allowed attorneys to gain admission without taking the other state’s bar exam.¹⁷⁴ Maine later implemented the same rule, bringing to fruition the Tri-State Task Force’s goal to improve regional bar admission.¹⁷⁵

The next major Vermont bar admission reform came in 2016 when the state adopted the entire Uniform Bar Examination.¹⁷⁶ Vermont’s adoption aligned with the national trend to adopt the exam to promote consistency

167. Hunt, *supra* note 105, at 767 (quoting Erica Moeser, *At the Gap: Bar Admissions Issues That Are Relevant to the MacCrate Discussion*, in THE MACCRATE REPORT 83, 84 (Conference Proceedings, Minneapolis, St. Paul, Minn., Sept. 30–Oct. 2, 1993)).

168. *Id.*

169. Interview with Beth McCormack, *supra* note 136.

170. Linda Stewart Dalianis, *Admission to the Bar in Northern New England: An Unprecedented—But Modest Proposal*, BAR EXAM’R, May 1998, at 33, 34.

171. *Id.* at 34–35.

172. *Id.* at 35.

173. See Hon. Linda Stewart Dalianis & Hulett H. Askew, *Three States Add or Revise Motion Admission Rules: New Hampshire and Vermont Establish Reciprocity and Georgia Resurrects “Comity” Admission*, BAR EXAM’R, Feb. 2003 at 16, 16 (discussing how program implementation stalled due to lack of funding for a “feasibility study”).

174. See *id.* at 17–18.

175. See *Reciprocal Admission*, BD. OF OVERSEERS OF THE BAR STATE OF ME., https://www.mebaroverseers.org/attorney_services/continuing_education/reciprocal_admission.html (last visited Apr. 21, 2024).

176. See Order Abrogating and Replacing the Rules of Admission to the Bar of the Vermont Supreme Court, VT Orders 2016-8 (2016); see also VT. SUP. CT. R. ADMISSION 9.

between states and facilitate multijurisdictional practice.¹⁷⁷ At the same time that Vermont adopted the Uniform Bar Examination, the state also added the “early bar” option for law students to take the exam before graduation.¹⁷⁸ Finally, the new rules eliminated the three-month clerkship requirement.¹⁷⁹ The 2016 revisions, including these three changes, represent Vermont’s most substantial bar admission reform to date.

In February 2020, the Vermont Law School administration asked the Vermont Supreme Court to decrease Vermont’s minimum passing Uniform Bar Examination score.¹⁸⁰ The Vermont Law School administration sought to “increase diversity in the Vermont bar, increase state bar passage rates, improve access to legal representation in rural areas of the state, and better account for the inherent uncertainty in scoring.”¹⁸¹ The memo cites New York data to support the proposition that most non-white takers will fail the bar exam if the passing score remains at 270, whereas most non-white takers would pass if the Court lowered the passing score to 260 or 266.¹⁸² The justices, uninterested in lowering the passing score, wanted to stay aligned with New Hampshire’s passing score of 270.¹⁸³ COVID-19 effectively discontinued the discussion in March 2020, as both Vermont Law School and the Court pivoted to address the pandemic.¹⁸⁴

In July 2020, Vermont Law School graduates and administration petitioned the state and Court to reconsider the bar exam in light of COVID-19.¹⁸⁵ The school proposed that in place of the exam, the state should grant emergency diploma privilege to all first-time applicants who graduated from Vermont Law School or completed the Law Office Study Program.¹⁸⁶ Vermont did not join the other states that granted emergency diploma privilege, and graduates sat in October 2020 for the rescheduled bar exam.¹⁸⁷

177. See *Uniform Bar Examination*, *supra* note 6.

178. See discussion of the “early bar” option *supra* Part I.D.

179. Compare VT. SUP. CT. R. ADMISSION 6(h)(i)(1) (amended 2022), with VT. SUP. CT. R. ADMISSION 9.

180. Memorandum from Vermont L. Sch. Admin. to the Vermont Sup. Ct. 1 (Feb. 24, 2020) (on file with author).

181. *Id.*

182. See *id.* at 2–3.

183. Interview with Beth McCormack, *supra* note 136.

184. *Id.*

185. See Letter from Vermont L. Sch. Admin. to C.J. Reiber (July 1, 2020) (on file with author); Letter from three Vermont L. Sch. graduates to Governor Scott, legislators, and Att’y Gen. Donovan (July 28, 2020) (on file with author).

186. Letter from Vt. L. Sch. Admin., *supra* note 185; see also Letter from three Vermont L. Sch. Graduates, *supra* note 185.

187. Press Release, Vermont Bd. of Bar Exam’rs, Vermont Judiciary, October 2020 Bar Exam Results, (Nov. 16, 2020), <https://www.vermontjudiciary.org/sites/default/files/documents/Bar%20Exam%20Results%20October%202020.pdf>.

Although past conversations about bar admission reform have not gained traction, stakeholders may be ready to revisit the topic.

One urgent reason to revisit bar admission reform is that Vermont faces troubling demographic challenges. First, Vermont and its lawyers are aging. Vermont has the third-highest median age in the country¹⁸⁸ and “is aging faster than other states.”¹⁸⁹ Half of Vermont’s lawyers are over 55.¹⁹⁰ Many retiring lawyers operated general practices in rural areas and served the legal needs of everyday Vermonters.¹⁹¹ However, those lawyers are not finding young graduates to take over their businesses.¹⁹² In addition, Vermont is one of the least racially diverse states in the country,¹⁹³ and its lawyers are likely even less diverse than Vermont’s population. Vermont’s attorney licensing office does not collect data about diversity amongst the state’s lawyers.¹⁹⁴ Assuming that lawyers of color are as underrepresented in Vermont as they are nationally,¹⁹⁵ there may be as few as 11 Black lawyers, 15 Hispanic or Latine lawyers, and 3 Native American lawyers out of Vermont’s 2,198 total

188. *Median Age in 2022*, STATSAMERICA, https://www.statsamerica.org/sip/rank_list.aspx?rank_label=pop46&ct=S09 (last visited Apr. 21, 2024).

189. VT. DEP’T OF HEALTH, VERMONT STATE HEALTH ASSESSMENT 8 (2018), <https://www.healthvermont.gov/sites/default/files/documents/pdf/VT%20State%20Health%20Assessment%202018%20Full%20Report.pdf>.

190. See VT. BAR ASS’N, 2020 VBA MEMBERS BY AGE (2020) (on file with author) (showing that 1,060 out of 2,112 members, or 50.2%, are over 55). Provided to author by Lisa Maxfield, Associate Executive Director of the Vermont Bar Association.

191. VT. JOINT COMM’N ON THE FUTURE OF LEGAL SERVS., *supra* note 135, at 45.

192. *Id.*; see, e.g., M.D. Drysdale, *Where Have All the Lawyers Gone?*, HERALD (Aug. 13, 2015), <https://www.ourherald.com/articles/where-have-all-the-lawyers-gone> (highlighting the dearth of young lawyers to fill in vacancies left by aging attorneys).

193. See Wilson Ring, *Census: Minority Population Growing in VT, 2nd Whitest State*, AP (Aug. 12, 2021), <https://apnews.com/article/race-and-ethnicity-census-2020-vermont-721d8201122a857b4565b4a37bd77d24>. About 94% of Vermont residents identify as White, 1.5% as Black, 0.4% as Native American, 2.1% as Asian, and 2.3% as Hispanic or Latine. *QuickFacts Vermont*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/VT> (last visited Apr. 21, 2024).

194. E-mail from Andrew Strauss, Licensing Couns., State of Vermont Off. of Att’y Licensing, to author (Jan. 20, 2023, 09:08 EST) (on file with author). The Vermont Bar Association started a voluntary initiative for new members to indicate their race and ethnicity, but that data remains limited. Telephone Interview with Lisa Maxfield, Assistant Exec. Dir., Vermont Bar Ass’n (Mar. 17, 2023).

195. See *ABA Survey Finds 1.3M Lawyers in the U.S.*, ABA (June 20, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/aba-lawyers-survey>. Nationally, Black (4.5% of lawyers and 13.4% of population), Hispanic or Latine (5.8% of lawyers and 18.5% of population), and Native American lawyers (0.5% of lawyers and 1.3% of population) remain underrepresented. *Id.* The share of Asian American lawyers is about the same as the general population (5.5% of lawyers and 5.9% of population), and white lawyers are dramatically overrepresented (81% of lawyers but only 60% of population). *Id.*

lawyers.¹⁹⁶ The Vermont state government¹⁹⁷ and the Vermont Bar Association¹⁹⁸ promote diversity and inclusion as core Vermont values. However, the overwhelming whiteness of Vermont's legal community suggests that stakeholders should consider a more active approach to creating a diverse and inclusive lawyer workforce.

II. ALTERNATIVE BAR ADMISSION PRACTICES IN OTHER STATES

Two states provide alternative, non-exam pathways for bar admission. First, Wisconsin allows admission by diploma privilege: If a student graduates from an in-state law school, they gain admission with no bar exam requirement.¹⁹⁹ Second, New Hampshire's Daniel Webster Scholar Honors Program (the Program) adds experiential learning to the law school curriculum and eliminates the traditional bar exam.²⁰⁰ The other 48 states require applicants to take the bar exam. However, Oregon is developing two alternative pathways for bar admission.²⁰¹ Additionally, several other states are researching bar admission reforms but have not finalized any measures.²⁰²

A. Wisconsin Allows Bar Admission by Diploma Privilege

Wisconsin allows bar admission by diploma privilege for graduates of its two in-state accredited law schools.²⁰³ In the 19th century, Wisconsin bar admission—as was standard throughout the country—consisted of an oral exam before a judge.²⁰⁴ The exams varied widely, as did judges' standards.²⁰⁵

196. Results were estimated by first determining the national rates at which lawyers are under- and overrepresented by race. Then, those rates were applied across Vermont's 2,198 lawyers. This analysis assumed that Vermont's lawyers would otherwise reflect Vermont's racial composition if not for the national effect of under- and overrepresentation. AM. BAR ASS'N, *supra* note 127, at 26 (providing data used to calculate national rates at which lawyers are under- and overrepresented by race); *id.* at 24 (providing data that Vermont has 2,198 lawyers); *QuickFacts Vermont*, *supra* note 193 (providing Vermont demographic data by race).

197. *Vermonters Lean In*, THINKVT, <https://thinkvermont.com/diversity-inclusion> (last visited Apr. 21, 2024) (stating "Vermont takes pride in being a leader of positive change").

198. *Our Mission*, VBA, <https://www.vtbar.org> (last visited Apr. 21, 2024) (showing goal of "an inclusive legal profession").

199. WIS. SUP. CT. R. 40.03.

200. N.H. SUP. CT. R. 42(XII).

201. *Licensure Pathway Development Committee*, OR. STATE BAR, <https://lpdc.osbar.org> (last visited Apr. 21, 2024).

202. See discussion on reforms in additional states *infra* Part II.C.

203. WIS. SUP. CT. R. 40.03.

204. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 645 (2000).

205. See *id.* at 646.

In response, Wisconsin established diploma privilege to improve the quality of legal practice through a standard curriculum and objective examinations.²⁰⁶ Wisconsin's diploma privilege is not a "reform" measure. Instead, while other states adopted the bar exam throughout the 20th century, Wisconsin never moved away from diploma privilege.²⁰⁷

Wisconsin manages diploma privilege by imposing curricular requirements. First, bar applicants must have completed 84 credits in law school.²⁰⁸ Students must take 30 credits in ten mandatory classes.²⁰⁹ Another 30 credits can come from prescribed subject areas, and students may allocate the last 24 credits as they wish.²¹⁰ Law schools must report to the Wisconsin Supreme Court about the subject matter content of their classes.²¹¹ Through these requirements, the state maintains quality control over the curriculum of its law schools—and over its diploma privilege.

Diploma privilege can lead to harder-working students and faculty than those at a school that teaches to the bar exam.²¹² Without a bar exam standing between their students and bar admission, faculty take on more responsibility to maintain the standards of the state's bar.²¹³ Consequently, faculty may be more likely to fail students when necessary and less likely to inflate grades.²¹⁴ In addition, diploma privilege can improve teaching quality. Where many faculty reuse syllabi as they teach to a static bar exam, diploma privilege may motivate faculty to revise syllabi with updated content, new delivery methods, and practical skills.²¹⁵

Three characteristics of Wisconsin make diploma privilege a good fit for bar admission. First, Wisconsin is a small state with a small bar.²¹⁶ As a result, bar admission stakeholders know and trust each other, which may not be possible in a large state.²¹⁷ Second, the bar, judiciary, legislature, and law schools enjoy close relationships with each other.²¹⁸ These relationships ensure law school offerings reflect local legal needs and developments.²¹⁹

206. *See id.*

207. *Id.*

208. WIS. SUP. CT. R. 40.03(1).

209. *Id.* R. 40.03(2)(b).

210. *Id.* R. 40.03(2)(a).

211. *Id.* R. 40.03(2)(c).

212. *See Moran, supra* note 204, at 651.

213. *See id.* (suggesting tongue-in-cheek that professors in bar exam states "can just model the bar exam and the students and the public be damned").

214. *See id.*

215. *See id.*

216. *Id.* at 655.

217. *Id.*

218. *Id.*

219. *Id.*

Third, Wisconsin's law schools receive strong support from the public and the bar.²²⁰ Strong support is essential because a successful diploma privilege program requires a certain level of trust that law schools are adequately preparing students for practice.²²¹

A common question about Wisconsin's diploma privilege is whether eliminating the bar exam leads to more lawyer misconduct. It does not. No study has found that bar performance independently affects misconduct.²²² If the bar exam does protect against misconduct and most Wisconsin lawyers gained bar admission via diploma privilege,²²³ Wisconsin would theoretically have above-average misconduct rates. Yet, the number of complaints citizens filed against Wisconsin lawyers is almost exactly the national average.²²⁴ Further, the number of charges regulators file against Wisconsin lawyers is about half of the national average.²²⁵ The data also suggests that Wisconsin lawyers who gained admission by diploma privilege commit misconduct at the same rate as those who took the bar exam. Among the Wisconsin bar, about 63% of attorneys gained admission by diploma privilege,²²⁶ and those diploma-privilege lawyers account for 62% of misconduct cases.²²⁷ In general, the Wisconsin data quashes the myth that diploma privilege creates any danger to the public.

B. New Hampshire Allows Bar Admission Via an Experiential Program

New Hampshire allows bar admission through the Program at the University of New Hampshire Franklin Pierce School of Law.²²⁸ Inspired by Tri-State Task Force discussions, New Hampshire Supreme Court Justice Linda Stewart Dalianis sought to improve legal education in the state.²²⁹ She convened the New Hampshire Supreme Court, Board of Bar Examiners, and law school faculty to develop a two-year experiential, competency-based program.²³⁰ After two years of planning, the first class of

220. *Id.*

221. *Id.*

222. Markovic, *supra* note 162, at 178–79.

223. *See id.* at 191.

224. *See id.* at 183, 185 (showing annual range from 4.2 complaints per 100 attorneys in Delaware to 17.8 in Arizona).

225. *See id.* at 187 (showing annual range from 0.10 charges per 100 attorneys in Oklahoma to 0.70 in Idaho).

226. *Id.* at 191.

227. *Id.*

228. N.H. SUP. CT. R. 42(IV)(a)(3)(D).

229. John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. FOR L. & SOC. CHANGE 101, 116 (2009).

230. *Id.*

Daniel Webster Scholars started in 2006 and graduated in 2008.²³¹ Since then, the Program has been an undisputed success. Graduates are more confident and competent than traditional students, which allows them to jump into practice post-graduation.²³²

Students apply to the Program during the second semester of their 1L year through a holistic admissions process.²³³ Generally, the Program considers applicants' academic, professional, and interpersonal abilities and seeks students who will succeed in an intensive and interrelational setting.²³⁴ The Program balances class composition based on students' identities, personal experiences, and desire to remain in New Hampshire after graduation.²³⁵ Finally, the Program considers whether applicants are likely to maintain a 3.0 GPA and obtain at least a B- in required courses.²³⁶ Based on these criteria, the Program strives for a diverse, high-achieving class of 24 students each year.²³⁷

After completing the standard 1L curriculum, Daniel Webster Scholars must fulfill three categories of curricular requirements in their 2L and 3L years.²³⁸ First, Daniel Webster Scholars must take school-mandated upper-level classes, such as Professional Responsibility.²³⁹ The second group of classes are those recommended for general students but required for Daniel Webster Scholars, including a clinic and bar-tested subjects such as Evidence.²⁴⁰ Finally, Daniel Webster Scholars take six program-specific courses: Pretrial Advocacy, Trial Advocacy, Alternative Dispute Resolution, Business Transactions, a miniseries that includes Family Law and Conflict of Laws, and a capstone class that focuses on advanced problem solving and client counseling.²⁴¹ Outside of this required course load, students have 13 credits for elective classes.²⁴²

Where traditional law school classes and bar admission depend exclusively on exams, the Program relies on formative and reflective

231. *Id.* at 116–17.

232. See ALLI GERKMAN & ELENA HARMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS 13 (2015), https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf.

233. See *Daniel Webster Scholar Honors Program*, UNIV. OF N.H.: FRANKLIN PIERCE SCH. OF L., <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> (last visited Apr. 21, 2024).

234. See *id.*

235. *Id.*

236. *Id.*

237. GERKMAN & HARMAN, *supra* note 232, at 5.

238. *Daniel Webster Scholar Honors Program*, *supra* note 233.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

assessments.²⁴³ Formative assessments—such as comments from a judge volunteering with a Trial Practice class—give Daniel Webster Scholars frequent, constructive feedback on their progress.²⁴⁴ Reflective assessments require students to evaluate their performance, make a plan to improve upon weaknesses, and apply their learning to the next exercise.²⁴⁵ At the end of each course, professors use summative assessments to review students' performance.²⁴⁶

Throughout the Program, students compile portfolios that include legal writing, exams, peer evaluations, professor evaluations, and videos.²⁴⁷ At graduation, the New Hampshire Board of Bar Examiners reviews each student's portfolio and determines whether to admit that student to the bar.²⁴⁸ The Program, which the founder described as a “two-year bar exam,”²⁴⁹ is more rigorous than the two-day bar exam and better prepares students for the workforce. Formative and reflective assessments not only provide a better learning opportunity in school, but also more closely mirror real-world professional development.

C. Many Additional States Are Considering Permanent Bar Admission Reform

The COVID-19 pandemic catalyzed a national wave of interest in bar admission reform. During this time, states faced the impossible task of safely administering the July 2020 bar exam mid-pandemic and pre-vaccine.²⁵⁰ As the pandemic spread, it highlighted preexisting inequities across the United States—including those associated with the bar exam.²⁵¹ In response, stakeholders ranging from recent graduates²⁵² to legal education scholars²⁵³ brought renewed urgency and creativity to the bar admission problem.

243. GERKMAN & HARMAN, *supra* note 232, at 10.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 11.

248. *Id.* at 10.

249. Garvey & Zinkin, *supra* note 229, at 103, 122.

250. Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action 1* (Ohio State Pub. L. Working Paper, Paper No. 537, 2020), <https://scholars.law.unlv.edu/facpub/1284>.

251. Pilar Margarita Hernández Escontrías, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, SLATE (July 23, 2020), <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html>.

252. *See, e.g.*, Letter from three Vermont L. Sch. graduates, *supra* note 185 (proposing emergency diploma privilege for Vermont).

253. *See, e.g.*, Angelos et al., *supra* note 250, at 3–6 (proposing six options for bar admission during the pandemic).

Ultimately, Washington, Oregon, Utah, Louisiana, and the District of Columbia implemented an emergency diploma-privilege option.²⁵⁴ Most other states delayed the July 2020 exam, and many offered a remote test-taking option.²⁵⁵

In Oregon, emergency diploma privilege spurred the state supreme court to investigate alternative pathways for bar admission.²⁵⁶ In January 2022, the Court approved two new pathways: the Oregon Experiential Pathway and the Supervised Practice Pathway.²⁵⁷ The pathways are “alternatives to” and do not eliminate the bar exam.²⁵⁸ The Oregon Experiential Pathway will be a two-year program combining traditional and skills-based courses.²⁵⁹ At graduation, the Board of Bar Examiners will evaluate an “Exam Alternative Portfolio” and approve students for bar admission.²⁶⁰ Supervised Practice Pathway participants will finish a traditional law school curriculum and then complete between 1000 and 1500 hours of work within a year of graduation.²⁶¹ Like the experiential participants, Supervised Practice participants will present an Exam Alternative Portfolio to the Board of Bar Examiners; instead of school work, the portfolio would consist of work product.²⁶² The Court approved the Supervised Practice Pathway starting in May 2024.²⁶³ A committee continues to develop the Experiential Pathway’s framework for Court approval.²⁶⁴

At least six additional state supreme courts are studying bar admission alternatives:

- The New York Working Group on the Future of the Bar Examination is assessing the bar exam’s efficacy and exploring innovative licensure options.²⁶⁵ Although not

254. *July 2020 Bar Exam Jurisdiction Information*, NCBE, <https://www.ncbex.org/july-2020-bar-exam-jurisdiction-information> (last updated Sept. 24, 2020).

255. *See id.*

256. Letter from Martha L. Waters, C.J., Oregon Sup. Ct., to the Oregon Bd. of Bar Exam’rs (Sept. 14, 2020), <https://taskforces.osbar.org/files/2021/02/CJLetterReAdmissionsBBXTaskForces.pdf>.

257. *Licensure Pathway Development Committee*, *supra* note 201.

258. Memorandum from Joan Perini-Abbott, Alts. to the Bar Exam Task Force Chair, to the Oregon State Bd. of Bar Exam’rs 2 (June 18, 2021) [hereinafter Oregon Memorandum], <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf>.

259. *Id.* at 6, 12–13.

260. *Id.* at 2, 12–13.

261. *Id.* at 14.

262. *Id.* at 23.

263. *Licensure Pathway Development Committee*, *supra* note 201.

264. *Id.*

265. Press Release, New York Cts., Announcement: Membership of the Working Group on the Future of the Bar Examination (Aug. 11, 2020), <https://www.nycourts.gov/ctappS/news/PressRel/BarExamLegalEdUpdate.pdf>.

under the New York judiciary's purview, the New York State Bar Association recommends the state adopt two new bar admission pathways.²⁶⁶ One pathway would require a New York-focused curriculum and the other would require a supervised practice period.²⁶⁷

- Minnesota's Board of Law Examiners working groups recommend adding experiential and supervised practice pathways.²⁶⁸
- Utah's Supreme Court committee proposed an alternative pathway with courses based on *Building a Better Bar* recommendations and a supervised practice component.²⁶⁹
- Washington's Bar Licensure Task Force is reviewing the bar exam's efficacy and analyzing alternative paths to bar admission.²⁷⁰
- Georgia's Lawyer Competency Task Force suggested a "Georgia Scholar" program based on New Hampshire's Daniel Webster Scholar Honors Program.²⁷¹
- California's Blue Ribbon Commission is reviewing the bar exam and assessing alternative licensure paths.²⁷² The Commission has not agreed on whether it should

266. N.Y. STATE BAR ASS'N, THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION 13 (2021), <https://nysba.org/app/uploads/2021/03/Task-Force-on-the-New-York-Bar-Examination-FINAL-approved-June-12-2021.pdf>.

267. *Id.*

268. *Competency Study—2021 to 2023*, MINN. STATE BD. OF L. EXAM'RS, <https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023> (last visited Apr. 21, 2024).

269. Marilyn Cavicchia, *In Wake of COVID-19, Several Jurisdictions Explore Other Ways to License New Lawyers*, ABA: BAR LEADER (Nov. 1, 2022), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2022-23/fallissue/in-wake-of-covid-19-several-jurisdictions-explore-other-ways-to-license-new-lawyers.

270. *Washington Bar Licensure Task Force*, WASH. CTS., https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.LicensureTaskForce (last visited Apr. 21, 2024).

271. PRELIMINARY REPORT OF THE GEORGIA LAWYER COMPETENCY TASK FORCE 2-18 (2022), <https://www.gasupreme.us/wp-content/uploads/2022/12/FINAL-LCTF-Preliminary-Report.pdf>.

272. *Blue Ribbon Commission on the Future of the Bar Exam*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Blue-Ribbon-Commission> (last visited Apr. 21, 2024).

explore non-exam alternatives and has not taken any action toward a recommendation.²⁷³

These task forces are still in the study phase or have reports in progress with no officially adopted recommendations. Yet, the task forces' mere existence shows national sentiment is turning toward modernizing bar admission.

III. A PROPOSAL FOR VERMONT

Vermont should build on Wisconsin and New Hampshire's experience, the Oregon proposal, and the work of other states' task forces by adopting one or more "diploma-plus" bar admission pathways. Vermont's proposal should ensure all new bar admission rules satisfy the Dormant Commerce Clause and facilitate applicants' admission on motion to other state bars. Even if Vermont forgoes reform measures, the state adopting the NextGen bar exam is a step in the right direction.

A. Vermont Should Adopt One or More Diploma-Plus Pathways for Bar Admission

As states across the country recognize the shortcomings of the bar exam and find merit in alternative bar admission practices, Vermont should join the reform movement—sooner rather than later. Three diploma-plus pathways offer balanced options for applicants to gain bar admission via (1) a GPA requirement, (2) an experiential program, or (3) a supervised practice program. This Part assesses each pathway's merits and potential challenges but does not recommend one pathway over the others. Each proposed diploma-plus pathway could exist alone, or all three could coexist and serve different applicant populations. The pathways can coexist alongside the traditional admission process via the bar exam—they do not eliminate the option to gain admission by exam. Following the process that other states have taken, the Vermont Supreme Court should convene a task force to examine bar admission alternatives. Then, with task force recommendations, the Vermont Supreme Court should revise Vermont's Rules of Admission to adopt one or more alternative pathways to bar admission.²⁷⁴

273. Cheryl Miller, *Attempts to Create a Non-Exam Path to Law Licensure in California Stall Again*, LAW.COM: THE RECORDER (Oct. 13, 2022), <https://www.law.com/therecorder/2022/10/13/attempts-to-create-a-non-exam-path-to-law-licensure-in-california-stall-again>.

274. See VT. CONST. ch. 2, §§ 30, 37 (delegating rulemaking authority to the Vermont Supreme Court).

1. Diploma-Plus-GPA Pathway

The diploma-plus-GPA pathway builds on the strength and simplicity of Wisconsin's diploma privilege while mitigating concerns about the quality of just-passing law school graduates. As a relatively similar state to Wisconsin, Vermont meets the conditions for a successful site for diploma privilege. Vermont is a small state, with the second smallest population²⁷⁵ and the fourth smallest bar²⁷⁶ in the country. Moreover, Vermont only has one law school: Vermont Law School.²⁷⁷

The bar, judiciary, legislature, and law school have close working relationships; indeed, many of Vermont's attorneys are alumni of Vermont Law School, as are three of the state's five supreme court justices.²⁷⁸ Vermont Law School maintains formal and informal relationships with practicing lawyers and the judiciary, including the state's supreme court justices.²⁷⁹ These parties communicate regularly in support of Vermont Law School activities. Many members of the bar, judiciary, and legislature have participated with the school in some capacity, including as professors, guest speakers, judges for oral arguments, and internship supervisors.²⁸⁰ Vermont Law School draws aspiring lawyers to the state, many of whom work during school for public service clinics or internships and establish a career and life in Vermont after graduation.²⁸¹

Although Vermont has a small bar and strong working relationships between Vermont Law School and its stakeholders, straight diploma privilege—like Wisconsin's—may not be a straightforward proposition for Vermont. Significantly, the Vermont Law School administration would not be comfortable with diploma privilege if Vermont granted it based on the school's current graduation requirements.²⁸² Students must pass all required

275. AM. BAR ASS'N, *supra* note 127, at 24.

276. *Id.*

277. See *List of ABA-Approved Law Schools in Alphabetical Order*, ABA, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order (last visited Apr. 21, 2024).

278. See *Supreme Court*, VT. JUDICIARY, <https://www.vermontjudiciary.org/supreme-court> (last visited Apr. 21, 2024) (listing law school affiliation on each justice's biographical page).

279. See, e.g., *Vermont Law and Graduate School and Members of the Vermont Judiciary Address and Respond to Racial Disparities in Vermont's Legal System*, VT. L. & GRADUATE SCH. (Jan. 12, 2023), <https://www.vermontlaw.edu/news-and-events/newsroom/press-release/vermont-law-and-graduate-school-and-members-the-vermont>.

280. See, e.g., Lauren Wustenber, *Inside Appellate Advocacy at VLS*, VT. L. & GRADUATE SCH.:BLOG (Dec. 8, 2020), <https://www.vermontlaw.edu/blog/inside-appellate-advocacy>.

281. See VT. JOINT COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 135, at 21. About 20% of Vermont Law School graduates stay in Vermont every year. *Id.*

282. Interview with Beth McCormack, *supra* note 136.

classes with a D or above²⁸³ and have a 2.30 overall GPA to graduate,²⁸⁴ which would be the most significant quality control measure within a diploma privilege program.

The Vermont Law School administration has two issues with a scenario where a 2.30 GPA requirement would allow a student to gain bar admission under a straight diploma privilege program. First, the school would need to “crack down” on grade inflation in upper-level elective classes to ensure quality at the 2.30 GPA level.²⁸⁵ Where a school policy prevents grade inflation in first-year and other required courses by mandating a B curve,²⁸⁶ grade inflation in upper-level elective classes is a thorny problem with few easy solutions. Required curves for elective classes can interfere with professors’ academic freedom and cannot appropriately account for a class section made up entirely of high-achieving students.²⁸⁷ According to Vermont Law School administration, the school cannot confidently vouch for the quality of a 2.30 GPA without more rigorous grading in elective classes.²⁸⁸

The administration is also concerned that students may not be ready for legal practice when they barely graduate above the 2.30 cutoff with no extenuating explanations for their low grades.²⁸⁹ Other hard-working and highly competent students may graduate with lower GPAs that reflect mental and physical illness, disability, language barriers, or family responsibilities. The administration’s concerns do not apply to those students. Instead, the concern is about students whose low GPA reflects their “lack of diligence and effort, problems with issue spotting, or lack of interest in and enthusiasm” for the law.²⁹⁰ The bar exam may not adequately measure competence, but it does measure diligence. In this way, the bar exam offers just-passing students a second chance to prove their capabilities in these areas. In response to these concerns, the Board of Bar Examiners should work with Vermont Law School to set the GPA requirement at a level that guarantees minimum competence.

283. VT. L. & GRADUATE SCH., STUDENT HANDBOOK 34 (2022).

284. *Id.* at 38. A 2.30 GPA is roughly a C+. *Id.* at 34.

285. Interview with Beth McCormack, *supra* note 136.

286. VT. L. & GRADUATE SCH., *supra* note 283, at 35.

287. For instance, Vermont Law School’s Advanced Appellate Advocacy class is an invitation-only class comprised of top students in their required (and curved) Appellate Advocacy sections. It would not make sense to give some Advanced Appellate Advocacy students Cs solely for the purpose of a curve if the whole class was actually completing A and B-level work. Interview with Beth McCormack, *supra* note 136.

288. *Id.*

289. *Id.*

290. *Id.*

Beyond Vermont Law School's concerns, the Vermont judiciary may resist a proposal for diploma privilege—and such a proposal's attendant comparisons to Wisconsin. The judiciary may point to the fact that incoming Wisconsin law students, on average, have “better” academic profiles than incoming Vermont law students.²⁹¹ LSAT scores and undergraduate GPAs are arguably more ineffective than the bar exam at predicting attorney competence.²⁹² Nonetheless, the Vermont judiciary may use these statistics to suggest that Wisconsin's students arrive at school with more potential—and therefore leave as more capable practitioners—than Vermont students. In addition, the Vermont Supreme Court's inaction on the two most recent reform proposals—to lower the passing score and grant emergency diploma privilege during COVID-19—suggests that the judiciary takes a conservative approach to bar admission reform.

Critics of a diploma-plus-GPA pathway may also be concerned that the rigor of a Vermont Law School education would decrease without the bar exam as a means of quality control. However, American Bar Association (ABA) accreditation (subject to its own critiques)²⁹³ is a better tool than the bar exam through which the legal community can hold law schools to high standards.²⁹⁴ The bar exam is redundant for quality control in an age where 85% of bar applicants—including Vermont Law School graduates—graduated from an ABA-accredited law school.²⁹⁵ In addition, Vermont Law School would still need to maintain a bar-focused curriculum because most students would seek bar admission in states requiring the bar exam.²⁹⁶ Finally, Vermont could require a specific course of study for diploma privilege, as Wisconsin does.²⁹⁷ The *Building a Better Bar* report offers a

291. See AM. BAR ASS'N, ABA LAW SCHOOL DATA: JD APPLICANT AND ENROLLEE DATA, FALL 2021 (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2021/2021-fall-fyclass-applicant-and-enrollee.xlsx. In 2021, the University of Wisconsin Law School's first-year class had a median LSAT score of 164 and average undergraduate GPA of 3.65. *Id.* Marquette University Law School's class had a median LSAT score of 155 and average undergraduate GPA of 3.56. *Id.* Vermont Law School's first-year class had a median LSAT score of 154 and average undergraduate GPA of 3.40. *Id.*

292. Matt Spencer, *The LSAT and Its Lack of Relevance to Lawyering*, LEGAL MGMT., Feb. 2023, at 20, 21; *ABA Panel Moves to Make Law School Admission Tests Optional*, ABA (Nov. 28, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/11/law-school-admission-tests-optional>.

293. See Shepherd, *supra* note 75, at 104.

294. 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. RESV. L. REV. 1191, 1212 (1995).

295. AM. BAR ASS'N, *supra* note 127, at 48.

296. See VT. JOINT COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 135, at 21. 80% of graduates move out of state. *Id.*

297. WIS. SUP. CT. R. 40.03(2)(a)–(b).

helpful curricular framework for a diploma-based licensing system.²⁹⁸ A diploma-plus-GPA pathway does not absolve students of the requirements to learn foundational subjects. Instead, it allows students to engage in doctrinal classes from a more critical and nuanced perspective than the bar exam's focus on memorization and right-or-wrong currently allows.

2. Diploma-Plus-Experiential Program

The second diploma-plus pathway is an experiential program based on New Hampshire's Daniel Webster Scholar Honors Program (the Program). Aware of the shortcomings of traditional legal education, Vermont stakeholders have expressed interest in a similar program to New Hampshire's. Vermont lawyers find it difficult and expensive to train new hires and want graduates to be more "practice ready."²⁹⁹ Vermont Law School faculty and administration also want to set up an experiential program to better serve students and future employers.³⁰⁰ Finally, Vermont's Joint Commission on the Future of Legal Services arrived at the same conclusion: Vermont must consider experiential learning as an alternative path to licensure.³⁰¹

Beyond the preexisting interest amongst stakeholders, Vermont's characteristics—specifically, its similarities to New Hampshire—make the state ideally situated to implement an experiential-program pathway. Vermont and New Hampshire both have relatively small populations,³⁰² relatively small bars,³⁰³ and only one law school.³⁰⁴ These characteristics all supported establishing the Program. Like New Hampshire, Vermont can leverage its close relationships amongst the judiciary, bar, and law school to

298. See MERRITT & CORNETT, *supra* note 141, at 81. Vermont Law School's required courses align with many of the recommendations. Compare VT. L. & GRADUATE SCH., *supra* note 279, at 38 (requiring Professional Responsibility, traditional doctrinal subjects, Legislation and Regulation, and several legal research and writing classes), with MERRITT & CORNETT, *supra* note 141, at 81 (suggesting requirements for those subject areas in a diploma-centered licensing system). The school would need to add requirements for negotiation, administrative law, and alternative dispute resolution classes and create new course offerings on client communications, state law, and the lawyer's role as a public citizen. See MERRITT & CORNETT, *supra*, at 81.

299. VT. JOINT COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 135, at 32.

300. Interview with Jessica Durkis-Stokes, Professor, Vt. L. Sch., in South Royalton, Vt. (Sept. 1, 2022); Interview with Beth McCormack, *supra* note 136.

301. VT. JOINT COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 135, at 32.

302. Compare *QuickFacts Vermont*, *supra* note 193 (showing that Vermont's population is about 647,000), with *QuickFacts New Hampshire*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/NH> (last visited Apr. 21, 2024) (showing that New Hampshire's population is about 1,400,000).

303. AM. BAR ASS'N, *supra* note 127, at 24 (showing that Vermont has 2,198 lawyers to New Hampshire's 3,495 lawyers).

304. See *List of ABA-Approved Law Schools in Alphabetical Order*, *supra* note 277.

implement experiential learning opportunities. In addition, the Vermont Supreme Court and Board of Bar Examiners can most efficiently implement and administer an experiential program in a state with only one law school. Developing a program in a state with more than one law school would be feasible but would inevitably raise questions about consistency and fairness between multiple schools. With preexisting interest amongst stakeholders and the benefits of having only one law school in a small state, Vermont is an ideal location to implement an experiential program.

One critique of an experiential program is its success comes less from its innovative pedagogy than from selecting high-achieving students—who are already on track to establish their “competency” via the bar exam—and offering them special skills.³⁰⁵ Whether or not this assertion is true should not hold Vermont back from offering an experiential option to students who want to be practice-ready—whether or not interested students are traditionally “high achieving.” In fact, the data suggests that the experiential nature of the program plays a more significant role in crafting competency than students’ preexisting disposition for achievement.³⁰⁶ In 2015, researchers compared Daniel Webster Scholars alumni with practicing lawyers who gained admission by the bar exam.³⁰⁷ On multiple measures of attorney competence, Daniel Webster Scholars alumni outperformed other lawyers—even when the researchers controlled for class rank and LSAT score between the two groups.³⁰⁸

This data suggests that although an experiential program may propel high-achieving students to even higher levels of competency, it can also help low- and moderate-achieving law students achieve a baseline level of competence. The key to this broad impact would be a selection process based on interests in experiential learning, public service, and staying in Vermont that allows average-achieving students the chance to join the program. Through a holistic selection process that considers factors beyond 1L grades, an experiential program can enable talented students to aim high *and* shift the standard for competency across a broader spectrum of law students.

The Program founders³⁰⁹ and the *Building a Better Bar* report³¹⁰ provide several recommendations for implementing an experiential-program pathway. The initial working group that develops the program should include the members of the New Hampshire Supreme Court, the New Hampshire

305. See GERKMAN & HARMAN, *supra* note 232, at 16.

306. See *id.* at 21–22.

307. *Id.*

308. *Id.*

309. Garvey & Zinkin, *supra* note 229, at 127.

310. MERRITT & CORNETT, *supra* note 141, at 80.

Board of Bar Examiners, and the New Hampshire Bar, plus law school administration, faculty, staff, and students.³¹¹ Once assembled, that group should undertake the following steps:

- Draft a mission statement and goals for students to reach before graduation.³¹² To shape student goals, New Hampshire relied on the reports available at the time (e.g., the MacCrate Report).³¹³ Today, the *Building a Better Bar's* 12 building blocks are the best starting point to craft student goals.³¹⁴
- Review the current curriculum; identify sequencing requirements and additional classes needed to reach the goals.³¹⁵ Consider required courses in client interaction, negotiation, and the lawyer's role as a public citizen.³¹⁶
- Design an assessment structure. Consider a legal research assessment and two 3-hour closed-universe performance tests.³¹⁷
- Identify community resources, including existing clinics, externships, moot courts, and potential volunteers.³¹⁸ Consider requiring six credits of closely supervised clinical work and another six credits of experiential work.³¹⁹
- Create an easy application for 1Ls, including interviews, writing samples, and references from 1L professors.³²⁰ Have a selection committee that includes 1L professors.³²¹ Limit initial enrollment; New Hampshire found 15 students to start worked well.³²²

311. See Garvey & Zinkin, *supra* note 229, at 127.

312. See *id.*

313. See *id.*

314. See MERRITT & CORNETT, *supra* note 141, at 3.

315. See Garvey & Zinkin, *supra* note 229, at 127.

316. See MERRITT & CORNETT, *supra* note 141, at 80.

317. See *id.*

318. See Garvey & Zinkin, *supra* note 229, at 127.

319. See MERRITT & CORNETT, *supra* note 141, at 80.

320. See Garvey & Zinkin, *supra* note 229, at 128.

321. See *id.*

322. See *id.*

As a Daniel Webster Scholar Honors Program founder said about designing an experiential program, “You are only limited by your imagination and enthusiasm”³²³ With the benefit of New Hampshire’s experience, strong ties to the legal community, and a tradition of innovative education at Vermont Law School, Vermont is well-suited to adopt an experiential-program pathway for bar admission.

3. Diploma-Plus Supervised Practice

A supervised-practice pathway allows bar applicants to establish competence by completing a certain period of paid, supervised work. Other professions, such as the medical field, rely heavily on the apprenticeship model, as did the legal profession before the standardization of law schools.³²⁴ Apprenticeship is popular because it is a necessary bridge between school and independent practice.³²⁵ Vermont has many resources to draw on to implement a supervised-practice pathway—most notably, Oregon’s supervised-practice proposal.³²⁶ Beyond Oregon’s proposal, the pathway can also draw from Vermont’s Registered Apprenticeship program,³²⁷ Vermont’s previous clerkship requirement,³²⁸ and the Canadian articling system.³²⁹ In addition, the New York State Bar Association’s 2002 proposal for a Public Service Alternative Bar Examination offers another compelling model.³³⁰

When Vermont develops the supervised-practice pathway, its overarching decision-making criteria should always focus on ensuring minimum competence. For instance, when considering the number of hours required for a supervised-practice period, the decision makers must not jump to the lower-risk choice to require 2000 hours over only 1000 hours. Instead, the group must carefully consider minimum competency and require only the necessary number of hours to reach that standard. In addition to drawing on

323. *Id.* at 127.

324. See discussion of the history of legal education *supra* Part I.B.

325. See Curcio, *supra* note 93, at 401.

326. See generally *Licensure Pathway Development Committee*, *supra* note 201.

327. *Vermont Registered Apprenticeship Program*, STATE OF VT. DEP’T OF LAB., <https://labor.vermont.gov/workforce-development/apprenticeship> (last visited Apr. 21, 2024).

328. VT. SUP. CT. R. ADMISSION 6(a)(3)(i)(1) (2014) (amended 2022).

329. *Articling Candidates*, L. SOC’Y OF ONT., <https://lso.ca/becoming-licensed/lawyer-licensing-process/articling-candidates> (last visited Apr. 21, 2024).

330. See generally THE COMM. ON LEGAL EDUC. & ADMISSION TO THE BAR OF THE ASS’N OF THE BAR OF THE CITY OF N.Y. & THE COMM. ON LEGAL EDUC. & ADMISSION TO THE BAR OF THE N.Y. STATE BAR ASS’N, PUBLIC SERVICE ALTERNATIVE BAR EXAMINATION (2002), <https://archive.nysba.org/WorkArea/DownloadAsset.aspx?id=26667> (explaining how the proposal offers admission to the New York State Bar through a public service work program as an alternative to taking the bar exam).

resources from other programs, the 12 building blocks of the *Building a Better Bar* report provide the best evidence-based framework to grapple with what “competency” looks like in a supervised-practice situation.³³¹

With the focus on competency, Vermont will have many decisions about a supervised-practice pathway. Two obvious logistical considerations include the length of the supervised practice period and how long after law school graduation the applicant can take to complete the supervised practice.³³² Vermont may also want to develop a checklist of required tasks for the bar applicant, perhaps based on what the state currently uses in its attorney mentorship program.³³³ This checklist ensures applicants working in a small, specialized practice meet other lawyers, learn about different topics, and become familiar with the state. Vermont should also consider assessment mechanisms for supervised-practice applicants. At a minimum, applicants should compile a portfolio of work product to present to the Board of Bar Examiners.³³⁴ For more formal assessments, Vermont could require a standardized legal research exercise and closed-universe performance tests.³³⁵ Finally, Vermont must also consider how the state monitors bar applicants and enforces these requirements.³³⁶

Despite the practicality and time-tested nature of apprenticeship models, some concerns persist. First, a supervised-practice pathway may be unfair to applicants who come to Vermont without connections to the state’s legal community. This burden may fall unevenly on lower-income applicants and applicants of color. While the state may not be able to run a full-fledged matchmaking service, other entities could help. The Vermont Bar Association already runs an incubator project³³⁷ and has an extensive network of service-minded members who could supervise bar applicants. Vermont Law School’s externship program could also tap into its network of vetted

331. See MERRITT & CORNETT, *supra* note 141, at 3.

332. Oregon plans to require 1000 to 1500 hours within one year of law school graduation. Oregon Memorandum, *supra* note 258, at 21.

333. See generally ATT’Y LICENSING OFF., OFF. OF THE STATE CT. ADM’R, VT. SUP. CT., MENTORSHIP PROGRAM LIST AND CERTIFICATION OF ATTENDING APPROVED ACTIVITIES (2016).

334. Oregon plans to require a portfolio of “non-privileged written work product.” Oregon Memorandum, *supra* note 258, at 23.

335. See MERRITT & CORNETT, *supra* note 141, at 80 (suggesting assessments to use in experiential licensing framework).

336. See Curcio, *supra* note 93, at 404–05 (outlining enforcement function based on Canadian articling system).

337. Kim Velk, *Starting Your Own Law Practice? Apply to Join the VBA/VLS Solo Lawyer Incubator Project*, VBA (Apr. 25, 2022), <https://www.vtbar.org/starting-your-own-law-practice-apply-to-join-the-vba-vls-solo-lawyer-incubator-project>.

past supervisors.³³⁸ Second, Vermont must ensure high-quality supervision. Relying on lawyers who have already proven their supervisory capabilities as Vermont Bar Association mentors and Vermont Law School externship supervisors provides a start. The program could also require specific supervisor qualifications, such as a certain number of years of practice and a clean disciplinary record.³³⁹ With a thoughtfully constructed program that prioritizes equity, a supervised-practice pathway can provide diverse applicants with meaningful work experience.

B. Vermont Can Craft Rules that Satisfy the Dormant Commerce Clause

An overarching consideration of any diploma-plus proposal is to ensure it does not run afoul of the Dormant Commerce Clause.³⁴⁰ The Dormant Commerce Clause effectively prohibits state laws that explicitly prefer in-state parties and discriminate against out-of-state parties because those laws burden interstate commerce in violation of the Commerce Clause.³⁴¹ Where state laws do not explicitly discriminate against out-of-state parties, but incidentally burden interstate commerce, courts apply the *Pike* balancing test to ensure the law's local benefit outweighs its burden.³⁴² For example, a challenge could occur when a state law allows graduates of only in-state law schools to access a diploma-privilege option.³⁴³

Out-of-state bar applicants claimed Wisconsin's diploma-privilege rule—limited to in-state law schools—violated the Dormant Commerce

338. See *J.D. Externships*, VT. L. & GRADUATE SCH., <https://www.vermontlaw.edu/academics/clinics-and-externships/jd-externships> (last visited Apr. 21, 2024).

339. See Oregon Memorandum, *supra* note 258, at 19-20 (outlining Oregon's proposed supervisor requirements); see also *Preceptor Duties and Requirements*, DEL. CTS., <https://courts.delaware.gov/bbe/preceptor.aspx> (last visited Apr. 21, 2024) (providing forms and requirements for preceptors in Delaware's required clerkship program).

340. The Dormant Commerce Clause is derived from the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); see also *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949) ("Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.").

341. See *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986). Technically, courts apply strict scrutiny in cases with overtly discriminatory state laws, see *Maine v. Taylor*, 477 U.S. 131, 140 (1986), but only once has the Supreme Court upheld such a law. See *id.* at 152 (Stevens, J., dissenting).

342. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Courts consider whether the State's interest is "legitimate" and if so, the law will be upheld unless its burden on interstate commerce clearly outweighs its local benefits. *Id.*

343. See *Wiesmueller v. Kosobucki*, 571 F.3d 699, 701 (7th Cir. 2009).

Clause.³⁴⁴ The Seventh Circuit concluded that Wisconsin’s diploma privilege did not explicitly discriminate and had only “indirect effects on interstate commerce”³⁴⁵ The court also noted that diploma privilege for in-state public law schools—like the University of Wisconsin—does not raise problems because of the market participant exception to the Dormant Commerce Clause.³⁴⁶ The United States Supreme Court has not addressed which tier of review to apply to a Dormant Commerce Clause challenge against diploma privilege. However, the Seventh Circuit suggested that the lower standard of review (the *Pike* test) would most likely apply.³⁴⁷

The most straightforward route for Vermont to avoid Dormant Commerce Clause challenges would be for all three diploma-plus options to extend to graduates of any ABA-accredited law school.³⁴⁸ That measure alone would prevent Dormant Commerce Clause challenges. To accept out-of-state graduates via the diploma-plus-GPA pathway, Vermont could offer a standard-setting exercise to out-of-state schools. Schools would need to pay for this service. During the exercise, the state would determine the appropriate GPA cutoff school-by-school to ensure minimum competence. Likewise, for the experiential-program pathway, Vermont could set up an approval process for out-of-state schools that want to run a Vermont-focused experiential program.³⁴⁹ For all three pathways, the state could require bar applicants to take specialty Vermont-focused classes during their time in law school. Ultimately, if out-of-state law schools choose to offer Vermont-specific courses, undergo the GPA standard-setting exercise, or run a Vermont-focused experiential program, all three measures will increase the qualified talent pool coming to the state.

If Vermont enacted an in-state-only diploma privilege—that is, only Vermont Law School graduates could pursue a diploma-plus pathway—it would have to craft the rule to withstand the strict scrutiny standard for

344. *Id.*

345. *Id.* at 703.

346. *Id.* at 706–07. Diploma privilege applied to in-state private law schools—like Marquette University—remains subject to scrutiny. *Id.*

347. *See id.* at 703. *But see* Claudia Angelos et al., *Diploma Privilege and the Constitution*, 73 SMU L. REV. F. 168, 181 (2020) (suggesting that contrary to Seventh Circuit suggestion, courts may apply higher, strict-scrutiny review to a Dormant Commerce Clause challenge). The test’s outcome—whether the benefits of Wisconsin’s in-state diploma privilege outweigh any burden on interstate commerce—remains unaddressed, although at least one author has asserted that Wisconsin’s diploma privilege would not survive. *See* Daniel B. Nora, *On Wisconsin: The Viability of Diploma Privilege Regulations Under Dormant Commerce Clause Review*, 37 J. Coll. & U. L. 447, 486–87 (2011).

348. *Cf.* WIS. SUP. CT. R. 40.03 (limiting diploma privilege to graduates of “a law school in this state that is fully, not provisionally, approved by the American bar association”).

349. *See* Oregon Memorandum, *supra* note 258, at 6 (using approval process to ensure program constitutionality).

overtly discriminatory laws.³⁵⁰ Although the Seventh Circuit concluded that Wisconsin's law had only an indirect effect and was not so explicitly discriminatory as to trigger strict scrutiny, that decision would only inform—and not control—a Vermont court's decision.³⁵¹ Consequently, the diploma-plus pathways would need to serve an important state purpose that the state cannot achieve by nondiscriminatory means.³⁵² Under such a challenge, Vermont must show that Vermont Law School offers “substantial opportunities” for its students to show their “competence” in Vermont law (the important state purpose) and that law schools outside of Vermont do not offer those opportunities.³⁵³ Such opportunities could include:

- Clinical work specifically on Vermont issues and representing Vermont residents.³⁵⁴
- Externship work in Vermont under the supervision of a Vermont lawyer.³⁵⁵
- Courses on Vermont law³⁵⁶ or doctrinal courses that incorporate Vermont law.³⁵⁷
- Evaluation by or interaction with Vermont lawyers and judges.³⁵⁸

Consistent with the Seventh Circuit's ruling, Vermont would likely prevail on a Dormant Commerce Clause challenge where the diploma-privilege curriculum substantially emphasizes Vermont law as opposed to generic national legal instruction.

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

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

352. See *Maine*, 477 U.S. at 140.

353. Angelos et al., *supra* note 347, at 182.

354. See *id.*

355. See *id.*

356. See *id.* at 183.

357. See *id.*

358. See *id.* at 182.

C. Vermont Can Craft Rules that Facilitate Admission on Motion in Other States

Another consideration for implementing diploma-plus pathways is ensuring they facilitate admission on motion for applicants who later seek bar admission in other states. Admission on motion is a process where practicing lawyers can apply to get licensed in another state without taking that state's bar exam.³⁵⁹ The 42 states that allow admission on motion consider similar criteria, such as years of practice, type of practice, and whether the applicant attended an ABA-accredited law school.³⁶⁰ The minimum length of practice for admission on motion is generally three or five years,³⁶¹ which prevents graduates from choosing a relaxed jurisdiction for initial admission before transferring to a more stringent jurisdiction.

Of the 42 states that allow admission on motion, 30 states admit lawyers who gained bar admission by diploma privilege.³⁶² Nearby states who admit diploma-privilege lawyers include Maine, Massachusetts, Connecticut, and New York—but New Hampshire does not.³⁶³ Each of Vermont's diploma-plus pathways will count as diploma privilege or a bar exam (albeit an untraditional one). That distinction determines whether "pathway lawyers" can use their credentials in the 12 states requiring a bar exam for motion admission, thus affecting those lawyers' prospects for mobility. Pathway lawyers may want to expand their Vermont practice to one of those 12 states, or they may want to make a personal move.

Each pathway falls into one category or the other when it comes to the distinction between the bar exam and diploma privilege. The diploma-plus-GPA pathway is clearly a form of diploma privilege. Although the GPA requirement adds a level of rigor beyond straight diploma privilege, it has no added assessment components that could constitute a bar exam. On the other hand, the experiential-program pathway counts as a bar exam. That pathway includes both a "two-year bar exam"³⁶⁴ with constant assessment *and* the student's final portfolio presentation to the Board of Bar Examiners. Finally, the supervised-practice pathway could be a bar exam, although the distinction here is fuzzier than the other two pathways. Applicants would

359. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 22, at 44.

360. *See id.* at 44–45. California, Delaware, Florida, Hawaii, Louisiana, Nevada, Rhode Island, and South Carolina do not allow admission on motion. *Id.* at 44.

361. *Id.* at 44–45.

362. *Id.* at 47. Alabama, Alaska, Arizona, Georgia, Idaho, Kansas, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, and Utah do not admit lawyers who gained bar admission by diploma privilege. *Id.*

363. *Id.*

364. Garvey & Zinkin, *supra* note 229, at 122 n.64.

present their work-product portfolio presentation to the Board of Bar Examiners, which could work similarly to the very first oral bar exams.³⁶⁵ If a portfolio presentation wasn't enough assessment to count as a "bar exam," the Board of Bar Examiners could add assessments such as standardized legal research exercises and closed-universe performance tests. Although not all pathway participants will be concerned about admission on motion, designing the pathways with this consideration in mind maximizes participants' future opportunities.

D. After Adopting the NextGen Bar Exam, Vermont Should Continue Reform Efforts

Despite the overwhelming and commonsense arguments for bar admission reform, Vermont may choose to maintain the status quo by dismissing the diploma-plus pathways and requiring the bar exam for all applicants. In early 2024, Vermont adopted the NextGen Bar Exam—a new exam developed by the National Council of Bar Examiners—and plans to implement it in July 2027.³⁶⁶ The new exam dispenses with the distinctions between the multiple-choice, essay, and performance test components.³⁶⁷ Instead, the integrated exam mixes eight subject areas and seven skills across various question formats.³⁶⁸ The exam will no longer test Trusts and Estates, Conflict of Laws, and Secured Transactions.³⁶⁹ Instead, the test will assess more "performance" oriented skills, such as interviewing and negotiation, by giving test takers scenarios and having them craft a response or answer multiple-choice questions.³⁷⁰

The NextGen bar exam's revised format and content improve upon the current bar exam, but old problems persist, and new issues arise. First—and most importantly—the revised test does not grapple with its role in perpetuating the racism, classism, and ableism that pervades standardized

365. See discussion of bar exam history *supra* Part I.B.

366.

Admission to the Vermont Bar, VT. JUDICIARY, <https://www.vermontjudiciary.org/attorneys/admission-vermont-bar> (last visited Apr. 21, 2024); *About the NextGen Bar Exam*, NEXTGEN, <https://nextgenbarexam.ncbex.org> (last visited Apr. 21, 2024).

367. NAT'L CONF. OF BAR EXAM'RS, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 3 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf>.

368. *Id.* at 4.

369. Press Release, Nat'l Conf. of Bar Exam'rs, Some Subjects to Be Removed from MEE in 2026 (July 17, 2023), <https://www.ncbex.org/news-resources/some-subjects-be-removed-mee-2026>; see also *FAQs About Recommendations*, NEXTGEN, <https://nextgenbarexam.ncbex.org/faqs> (last visited Apr. 21, 2024).

370. NAT'L CONF. OF BAR EXAM'RS, *supra* note 367, at 4.

testing.³⁷¹ Second, the NextGen exam will continue to be closed book,³⁷² maintaining its focus on memorization. Third, although the exam's attempt to shift its focus from memorization to skills is laudable, assessing skills accurately in a standardized testing format may be challenging.³⁷³ Generally, bar exam reform is an improvement but *not* a solution to the structural issues of the bar exam and bar admission. Any revised bar exam will replicate the problems of the current bar exam, albeit to a lesser degree.³⁷⁴ Accordingly, while the National Conference of Bar Examiners focuses narrowly on bar *exam* reform, the legal community must think more broadly about bar *admission* reform.

CONCLUSION

Legal education is changing fast. Law schools may no longer use race as a factor in admissions decisions.³⁷⁵ Some schools no longer require the LSAT, turning to test-optional admissions or the new JD-Next assessment.³⁷⁶ The U.S. News rankings have started to lose power.³⁷⁷ Schools will revamp their curricula to prepare for the NextGen bar exam.³⁷⁸ Meanwhile, rising awareness of the bar exam's elitist origin and gatekeeping effect spurs the bar admission reform movement. Practitioners, law schools, and the judiciary seek to implement permanent reform measures in many states. Vermont faces a stark choice. The state can continue with business as usual; alternatively, the legal community can seize the opportunity to forge new solutions. By reforming bar admission with diploma-plus pathways, Vermont can simultaneously eliminate discriminatory bar admission practices *and* serve the public with a competent attorney workforce that more accurately reflects the diversity of our communities.

371. Karen Sloan, '*A Dream Come True Instead of a Nightmare*': Will the Bar Exam Revamp Go Far Enough?, LAW.COM (Jan. 12, 2021), <https://www.law.com/2021/01/12/a-dream-come-true-instead-of-a-nightmare-will-the-bar-exam-revamp-go-far-enough>.

372. *FAQs About Recommendations*, *supra* note 369.

373. Sloan, *supra* note 371.

374. Hansen, *supra* note 294, at 1228.

375. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175–76 (2023).

376. Karen Sloan, *Law Schools Embrace LSAT Alternatives After Affirmative Action Ban*, REUTERS (Dec. 13, 2023), <https://www.reuters.com/legal/government/law-schools-embrace-lsat-alternatives-after-affirmative-action-ban-2023-12-13>.

377. Logan Cornett, *Law Schools Pull Out of U.S. News Rankings, Citing Harm to Legal Education*, UNIV. OF DENVER: IAALS (Dec. 7, 2022), <https://iaals.du.edu/blog/law-schools-pull-out-us-news-rankings-citing-harm-legal-education>.

378. See discussion of the NextGen bar *supra* Part III.D.