

# The End of Mandatory State Bars?

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*The country's thirty-one mandatory state bar associations are facing an existential threat following the U.S. Supreme Court's decision in Janus v. ACSME, 138 S. Ct. 2448 (2018). In Janus, the Court considered the constitutionality of compelling public employees to pay agency fees to a labor union. In the process, the Court effectively upended the reasoning of earlier Supreme Court precedent that enabled mandatory state bars to compel bar dues payments from objecting lawyers and expend dues to fund traditional bar functions. Mandatory state bars—which function both as regulators and as traditional bar associations—are now defending themselves against claims in several states that compelled bar dues payments violate lawyers' First Amendment rights. This Essay considers whether these compelled payments are likely to withstand constitutional scrutiny post-Janus. It focuses on the constitutional analysis outlined in Janus, with emphasis on the question of whether the states' interest in lawyer regulation and improving the quality of legal services can be achieved through alternative means that are significantly less restrictive of lawyers' associational freedom than compelled bar dues payments. To answer this question, the Essay compares the activities of the country's mandatory and voluntary state bar associations along several dimensions. The comparison reveals that states with mandatory bars are unlikely to be able to demonstrate that the states' interests cannot be achieved through significantly less restrictive means. While this result would be a loss for the legal profession, there could be benefits for the public.*

## INTRODUCTION

The country's mandatory state bars are facing an existential threat. Mandatory (or “unified”) bars—to which lawyers are required to pay dues and belong as a condition of bar licensure—are the most common form of state bar organization in the United States. These bars work to advance lawyers' interests while also performing some regulatory functions. For almost one hundred years, they have withstood attacks on their constitutionality, their spending, and their advocacy.<sup>1</sup> The United States Supreme Court has

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<sup>1</sup> They have also endured almost universal criticism from commentators. See, e.g., Ralph H. Brock, *Giving Texas Lawyers Their Dues: The State Bar's Liability Under Hudson and Keller for Political and Ideological Activities*, 28 ST. MARY'S L.J. 47, 49 n.5 (1996) (citing critical sources); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept*:

twice upheld their constitutionality, analogizing to decisions in the labor union context.<sup>2</sup> Yet the continued viability of the Supreme Court's mandatory bar cases was thrown into serious question by the Court's 2018 decision in *Janus v. AFSCME*, which held that forcing public employees to subsidize a union they chose not to join violated their free speech rights.<sup>3</sup> In *Janus*, the Court expressly overruled *Abood v. Detroit Board of Education*,<sup>4</sup> which the Court had previously relied on to conclude that mandatory bar dues could constitutionally be used to fund activities germane to the goals of a mandatory state bar.<sup>5</sup> Mandatory bars in several states are now defending themselves against renewed claims that compelled dues and membership violate lawyers' First Amendment rights.<sup>6</sup> It is only a matter of time before the Supreme Court reconsiders this issue.

In the United States, there are mandatory bars in thirty-one states and the District of Columbia.<sup>7</sup> They are often established as state agencies or as public corporations that are instrumentalities of the judiciary or the state supreme court.<sup>8</sup> These bars typically handle some regulatory functions such as admission, discipline, or other licensing requirements. In most other respects, they perform the same functions as voluntary state bars. Both mandatory and voluntary state bars socialize lawyers into the norms of the legal profession. They educate lawyers about changes in the law and support them in their work.<sup>9</sup> They provide networking opportunities that promote

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*Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 6; Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35, 37 (1994).

<sup>2</sup> See *Keller v. State Bar of Cal.*, 496 U.S. 1, 12, 17 (1990); *Lathrop v. Donohue*, 367 U.S. 820, 842–43 (1961).

<sup>3</sup> See 138 S. Ct. 2448, 2460 (2018).

<sup>4</sup> 431 U.S. 209 (1977).

<sup>5</sup> See *Keller*, 496 U.S. at 13–14.

<sup>6</sup> See Marcia Coyle, *US Supreme Court Ruling Fuels Suits Challenging Mandatory Bar Fees*, NAT'L L.J. (Feb. 14, 2019, 3:05 PM EST), <https://www.law.com/nationallawjournal/2019/02/14/us-supreme-court-ruling-fuels-suits-challenging-mandatory-bar-fees/> [<https://perma.cc/34PV-45DV>]. The Goldwater Institute has helped organize several of the recent constitutional challenges. See *The First Amendment and State Bar Associations*, GOLDWATER INST., <https://goldwaterinstitute.org/first-amendment-bar-associations/> [<https://perma.cc/W4EU-V987>] (last visited Mar. 11, 2020).

<sup>7</sup> See Laurel Terry, *The Power of Lawyer Regulators to Increase Client and Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717, 798–801 (2016). After the article was published, the status of California's state bar changed. See *infra* note 117 and accompanying text.

<sup>8</sup> See, e.g., OR. REV. STAT. § 9.010(2) (2017); *Frequently Asked Questions*, STATE BAR OF TEX., [https://www.texasbar.com/AM/Template.cfm?Section=Frequently\\_Asked\\_Questions&Template=/CM/HTMLDisplay.cfm&ContentID=42961](https://www.texasbar.com/AM/Template.cfm?Section=Frequently_Asked_Questions&Template=/CM/HTMLDisplay.cfm&ContentID=42961) [<https://perma.cc/23Q2-YQDW>] (last visited Mar. 11, 2020); *History of the Bar*, WASH. STATE BAR ASS'N (Feb. 14, 2020), <https://www.wsba.org/about-wsba/who-we-are/history-of-the-wsba> [<https://perma.cc/D4L4-GFT2>].

<sup>9</sup> See, e.g., *Become a NYSBA Member*, NYSBA, <https://www.nysba.org/members/> [<https://perma.cc/9PDX-3KVY>] (last visited Mar. 1, 2020); *For Our Members*, FLA. BAR,

professional and client development. They offer other membership benefits, including discounts for professional and personal services.<sup>10</sup> They play a significant role in the development and adoption of the law governing lawyers. They advocate for lawyers' economic interests and seek to raise the status of the profession. Both mandatory and voluntary state bars also work—to varying degrees—to support the courts and improve the administration of justice.

Although lawyers have long debated whether they should be compelled to join state bars, there have been few efforts to closely study the work of these organizations or to consider who benefits from them.<sup>11</sup> It is critical to do so now, not only for public policy reasons, but because this information is directly relevant to the question of whether compelled bar dues are likely to survive constitutional scrutiny. Part I of this Essay briefly discusses the history of state bar associations in the United States and the activities of modern state bar organizations. Part II describes some of the litigation challenging the mandatory bars and the reasons why the Supreme Court will likely reconsider the constitutionality of compelled dues payments in light of *Janus*. Part III identifies the ways in which the legal profession, the courts, and (to a lesser degree) the public, benefit from mandatory state bar organizations. It then considers the constitutional inquiry that is seemingly required by *Janus*, which asks whether states with voluntary bars are able to accomplish the same objectives as states with mandatory bars. It reveals that if the Supreme Court carefully considers the facts about state bar associations, the Court will likely conclude that the country's mandatory state bars cannot collect bar dues from objecting lawyers.

## I. STATE BAR ASSOCIATIONS: HISTORICALLY AND TODAY

### A. HISTORY

Modern bar associations did not appear in the United States until the 1870s. Elite lawyers formed exclusive bar associations such as the American Bar Association, the Association of the Bar of the City of New York, and the Chicago Bar Association to raise the status and competence of

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<https://www.floridabar.org/member/> [<https://perma.cc/65G6-DL32>] (last visited Mar. 11, 2020).

<sup>10</sup> See, e.g., *Member Benefits and Services*, PA. BAR ASS'N, <https://www.pabar.org/site/For-Lawyers/Benefits> [<https://perma.cc/Z4MK-352R>] (last visited Apr. 12, 2020); *Member Benefits and Services*, STATE BAR OF TEX., [https://www.texasbar.com/AM/Template.cfm?Section=Member\\_Benefits&Template=/memberbenefits/home.cfm](https://www.texasbar.com/AM/Template.cfm?Section=Member_Benefits&Template=/memberbenefits/home.cfm) [<https://perma.cc/34LG-NZ94>] (last visited Mar. 11, 2020).

<sup>11</sup> The most thorough effort occurred in the 1980s and focused primarily on a single state's bar. See Schneyer, *supra* note 1, at 5.

lawyers.<sup>12</sup> These voluntary bar associations quickly moved to regulate lawyers.<sup>13</sup> By the end of the nineteenth century, non-elite bar associations began to emerge on the state and local levels. In the early twentieth century, some state bar associations were little more than “paper organizations.”<sup>14</sup> Voluntary state bar memberships ranged from 10%–30% of the bar.<sup>15</sup>

Herbert Harley, a lawyer and newspaper editor, viewed low bar membership as a problem. He founded the American Judicature Society in 1913 and began a crusade to gain acceptance of the idea of an “integrated” state bar.<sup>16</sup> He envisioned a unified, self-governing body to which all lawyers would be required to pay dues and belong.<sup>17</sup> Harley argued that the chief weakness of voluntary bar associations was “numerical,” with only a fraction of lawyers belonging to state bar associations, thereby reducing their lobbying potential.<sup>18</sup> He believed that a compulsory statewide association, well financed from dues and possessing the power to discipline members, could influence state legislatures far better than a voluntary, financially weak bar organization.<sup>19</sup>

Mandatory bar proponents offered two additional arguments. First, unified bars were beneficial for lawyers’ economic self-interests.<sup>20</sup> A unified bar that handled bar admission could restrict the number of lawyers.<sup>21</sup> It could also set minimum fee schedules.<sup>22</sup> Second, a mandatory bar was good for the public. It was a means of gaining greater resources to raise the quality of the profession and filling a regulatory vacuum.<sup>23</sup> Proponents argued that a unified bar would benefit the public “through improved professional standards; more effective discipline; a unified voice of expertise on

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<sup>12</sup> See RICHARD L. ABEL, *AMERICAN LAWYERS* 44–45 (1989); TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 64–65 (1987).

<sup>13</sup> See ABEL, *supra* note 12, at 46–49, 54, 68–69; HALLIDAY, *supra* note 12, at 68, 76; MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* 18–19 (1988).

<sup>14</sup> ABEL, *supra* note 12, at 46. For example, the California Bar only had 500 members in 1920. *Id.*

<sup>15</sup> Schneyer, *supra* note 1, at 8. Some larger city bar associations did considerably better. See ABEL, *supra* note 12, at 45.

<sup>16</sup> DAYTON D. MCKEAN, *THE INTEGRATED BAR* 21, 30–31, 33 (1963). The idea came after learning about the Law Society of Upper Canada, which included all Ottawa lawyers and formulated standards for admission, discipline, and legal education. *Id.* at 33, 35; Schneyer, *supra* note 1, at 9, 18.

<sup>17</sup> MCKEAN, *supra* note 16, at 22.

<sup>18</sup> *Id.* at 39–40.

<sup>19</sup> *Id.* at 36. The rise of the mandatory state bar movement coincided with the rise of labor unions in the United States, and some of the opponents characterized mandatory bars as “closed shop[s]” of lawyers. *Id.* at 25–26.

<sup>20</sup> *Id.* at 34, 36.

<sup>21</sup> *Id.* at 34.

<sup>22</sup> Smith, *supra* note 1, at 38.

<sup>23</sup> See Schneyer, *supra* note 1, at 17–18.

legal issues; and more effective fulfilment of the public obligation of the bar, such as increasing the availability of legal services.”<sup>24</sup>

In 1921, North Dakota became the first state to create a unified bar through an act of its legislature.<sup>25</sup> Initially other states created mandatory bars through legislative action, although their constitutionality at times faced challenges.<sup>26</sup> Court orders establishing mandatory bars later supplanted the statutory method and had the advantages (for the bar) that the associations were “set up where it [was] untouchable by executive or legislative action or by popular initiative” and its funds were “in no danger of being captured” by either branch.<sup>27</sup> In addition, unless the court ordered otherwise, the bar’s money could be “spent without regard to any financial controls or reporting requirements that the state may impose upon other associations.”<sup>28</sup>

State legislatures have mostly stayed out of the business of the mandatory state bars. One exception is in California, where the legislature has exercised some oversight because the State Bar is statutorily required to submit a proposed budget for legislative approval.<sup>29</sup> Another is Texas, where the Sunset Act requires the legislature to review the State Bar’s activities every twelve years.<sup>30</sup> In most states, however, legislatures have left oversight of the mandatory state bars to state supreme courts.

## B. MODERN STATE BAR ASSOCIATIONS

### 1. Mandatory State Bars

As noted, today, more than three-fifths of all state bars are mandatory bars. They have boards that oversee their activities. In some states, the board is exclusively composed of state bar members, while in others, there are a few non-lawyer board members.<sup>31</sup> Most mandatory state bars claim,

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<sup>24</sup> Smith, *supra* note 1, at 39.

<sup>25</sup> MCKEAN, *supra* note 16, at 23.

<sup>26</sup> See, e.g., *id.* at 85.

<sup>27</sup> *Id.* at 48.

<sup>28</sup> *Id.*

<sup>29</sup> See CAL. BUS. & PROF. CODE § 6140.1 (West 2019).

<sup>30</sup> See TEX. GOV’T CODE ANN. §§ 325.001–325.015 (West 2019). Alaska’s legislature also periodically reviews the state bar’s handling of its regulatory functions pursuant to sunset legislation. See ALASKA STAT. § 44.66.050 (2019).

<sup>31</sup> Compare STATE BAR OF MICH., BYLAWS art. III, § 3 (2020), <https://www.michbar.org/generalinfo/bylaws#3/> [<https://perma.cc/4KNP-FGRP>] (all-lawyer Board) with Board of Governors, STATE BAR OF WIS., <https://www.wisbar.org/aboutus/leadership/pages/board-of-governors.aspx> [<https://perma.cc/Z95D-QENH>] (last visited Mar. 11, 2020) (three non-lawyer members on Board).

to varying degrees, to serve both the profession and the public,<sup>32</sup> although commentators have noted the incoherence of this approach.<sup>33</sup>

Mandatory bars were initially empowered to administer a broad range of regulatory functions, but many courts have since transferred some of those functions to other state entities. Consequently, the remit of mandatory state bars differs significantly from state to state. Only eight mandatory state bars retain some responsibility for both bar admission and discipline in addition to other regulatory functions, such as administering the client protection fund (“CPF”).<sup>34</sup> Sixteen other mandatory bars have some responsibility for administering either bar admission *or* lawyer discipline and other regulatory activities.<sup>35</sup> Eight mandatory bars only perform limited regulatory functions, such as administering the CPF, fee dispute arbitration, or mandatory continuing legal education (“CLE”).<sup>36</sup> The state bars employ professional staff to perform much of the regulatory work.<sup>37</sup>

Mandatory state bars have considerable power to influence the law governing lawyers. In some states, their role is baked into state law. The Oregon State Bar Board of Governors, with the approval of the state bar’s House of Delegates, has the statutory power to formulate rules of professional conduct for adoption by the Supreme Court.<sup>38</sup> The Oregon Supreme Court cannot “formulate” rule changes, but justices sometimes work with State Bar committees that draft proposed amendments.<sup>39</sup> Some other mandatory state bars also have the statutory power to formulate rules governing

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<sup>32</sup> See, e.g., *About, Values and Responsibilities*, ALA. STATE BAR, <https://www.alabar.org/about/> [<https://perma.cc/CN6Z-FDB3>] (last visited Mar. 11, 2020) (noting the State Bar “has long served as a dual advocate for the profession and the public”); *Arizona State Bar Mission, Vision and Core Values*, STATE BAR OF ARIZ., <https://azbar.org/about-us/mission-vision-core-values/> [<https://perma.cc/Q8MH-7NHJ>] (“The State Bar of Arizona exists to serve and protect the public with respect to the provision of legal services and access to justice.”).

<sup>33</sup> See, e.g., Schneyer, *supra* note 1, at 6.

<sup>34</sup> See Terry, *supra* note 7, at 798–801. For some states, the information was updated based on information available on state bar websites.

<sup>35</sup> *Id.* Their disciplinary responsibilities range from the investigation and prosecution of complaints in some jurisdictions, to the decisionmaking and imposition of sanctions in others. See, e.g., *Office of Disciplinary Counsel*, WASH. STATE BAR ASS’N (Oct. 22, 2019), <https://www.wsba.org/for-legal-professionals/professional-discipline/office-of-disciplinary-counsel> [<https://perma.cc/LSV8-25S5>]; *Roadmap of the Disciplinary Process*, N.C. STATE BAR, <https://www.ncbar.gov/lawyer-discipline/roadmap-of-the-disciplinary-process/> [<https://perma.cc/GQ4U-WXAM>] (last visited Mar. 11, 2020).

<sup>36</sup> See Terry, *supra* note 7, at 798–801.

<sup>37</sup> See, e.g., UTAH STATE BAR, 2018–2019 SUMMARY OF OPERATIONS 4 (2019), [https://www.utahbar.org/wp-content/uploads/2019/09/2018-2019\\_Annual\\_Report\\_FINAL.pdf](https://www.utahbar.org/wp-content/uploads/2019/09/2018-2019_Annual_Report_FINAL.pdf) [<https://perma.cc/49XU-JBEL>].

<sup>38</sup> OR. REV. STAT. § 9.490(1) (2018).

<sup>39</sup> See Edwin J. Peterson, *Lawyer-Client Conflicts of Interest Law: Contributions of Chief Justice Wallace P. Carson, Jr. During a Time of Dynamic Change*, 43 WILLAMETTE L. REV. 527, 528, 535–36 (2007).

lawyers, subject to the approval of their supreme courts.<sup>40</sup> In other states, proposed rule changes regularly emanate from the mandatory state bars, or state supreme courts seek the bars' input when considering such changes.<sup>41</sup> Although there do not appear to be studies indicating how often state courts adopt the mandatory bars' proposals, the courts frequently do so.<sup>42</sup>

Mandatory state bars typically self-fund, with most money coming from bar dues and associated fees, and from paid bar activities and publications.<sup>43</sup> Where the state bars handle admission to practice, fees charged to bar applicants fund the cost of that regulation.<sup>44</sup> Mandatory bar dues and associated fees (for example, CPF payments) range from a low of \$240 to a high of \$660.<sup>45</sup>

For reasons discussed in Part II, compelled dues payments to state bars raise First Amendment concerns. Consequently, these bars often avoid advocacy on issues unrelated to the regulation of the legal profession, the quality of legal services, or the administration of justice. This sometimes includes a reluctance to be seen as speaking out to defend an independent judiciary.<sup>46</sup> Some mandatory state bars will not support or oppose legis-

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<sup>40</sup> See, e.g., 2006 ALA. CODE § 34-3-43(3) (2018); N.C. GEN. STAT. §§ 84-21, 84-23(a) (2019).

<sup>41</sup> See, e.g., Leslie C. Levin, *The Politics of Lawyer Regulation: The Case of Malpractice Insurance*, 33 GEO. J. LEGAL ETHICS (forthcoming 2020); N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 LA. L. REV. 1, 7 (2000); Betsy Brandborg, *Revising the MRPC*, MONT. LAW., Mar. 2019, at 16.

<sup>42</sup> See, e.g., Heather Perry Baxter, *2006 Changes to the Florida Rules of Professional Conduct*, 31 NOVA L. REV. 1, 4 (2006) (adopting bar's rule proposals); Smith, *supra* note 41, at 8–10, 14–18 (same); *State Bar News: New CLE Rules Adopted*, MONT. LAW., Feb. 2001, at 21 (same). *But see*, e.g., Levin, *supra* note 41, at 48; Schneyer, *supra* note 1, at 19–20.

<sup>43</sup> See, e.g., ALA. STATE BAR, *supra* note 32; *About the Oregon State Bar*, OR. STATE BAR, <https://www.osbar.org/about.html> [<https://perma.cc/U2BN-SKKC>] (last visited Mar. 1, 2020).

<sup>44</sup> See, e.g., WASH. STATE BAR ASS'N, WSBA BUDGET FOR THE FISCAL YEAR ENDED SEPT. 30, 2019, at 2–3, 18 (2018), [https://www.wsba.org/docs/default-source/about-wsba/finance/fy-2019-budget-\(10-8-18\)-final.pdf?sfvrsn=a03901f1\\_0](https://www.wsba.org/docs/default-source/about-wsba/finance/fy-2019-budget-(10-8-18)-final.pdf?sfvrsn=a03901f1_0) [<https://perma.cc/ZH7C-PXQ8>].

<sup>45</sup> See *Dues and Payments*, ALASKA BAR ASS'N, <https://alaskabar.org/for-lawyers/status-information-dues/bar-dues/> [<https://perma.cc/PN5K-VQP6>] (last visited Mar. 11, 2020); *Dues FAQ*, NEB. STATE BAR ASS'N, <https://www.nebar.com/page/DuesFAQ> [<https://perma.cc/4WV7-9XQP>] (last visited Mar. 4, 2020).

<sup>46</sup> Robert J. Derocher, *Bars Support the Judiciary and Separation of Powers*, B. LEADER (Nov.–Dec. 2006), [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2006\\_07/3102/separation/](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2006_07/3102/separation/) [<https://perma.cc/96NS-M92A>] (noting Montana Bar constrained from publicly supporting ballot initiative designed to limit judicial independence); Robert J. Derocher, *Campaigning for Justice: Bars Support Judiciary, Tackle Tough Issues in Election 2012*, B. LEADER (Jan.–Feb. 2013), [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2012\\_13/january\\_february/campaigning\\_justice\\_bars\\_support\\_judiciary\\_tackle\\_tough\\_issues\\_election\\_2012/](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2012_13/january_february/campaigning_justice_bars_support_judiciary_tackle_tough_issues_election_2012/) [<https://perma.cc/T2GZ-6LUY>] [hereinafter Derocher, *Campaigning for Justice*]

lation unless it pertains to the bar's mission.<sup>47</sup> Still others will allow committees to make legislative proposals so long as those committees do not use bar dues in the process.<sup>48</sup> A few permit more advocacy when the issue is of great public interest or when the majority of the bar votes to support it.<sup>49</sup>

## 2. Voluntary State Bars

Voluntary state bars are composed of some portion of the state's licensed lawyers. The Delaware State Bar Association is on the high end, with as many as 86% of the active lawyers licensed to practice in Delaware belonging to that bar.<sup>50</sup> Almost two-thirds of the lawyers licensed to practice in Colorado and Vermont belong to their states' voluntary bars.<sup>51</sup> But in other states with voluntary state bars, such as New York, less than half of the lawyers admitted to practice there are members.<sup>52</sup> In Connecticut and

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(describing limits on Florida Bar's efforts to oppose ballot initiative affecting high court appointments).

<sup>47</sup> See, e.g., KY. BAR ASS'N, LEGISLATIVE POLICY AND PROCEDURE 1.14 (a)(1) (2019); MO. BAR, POLICY STATEMENT REGARDING LEGISLATIVE PROCEDURES (2012); OKLA. BAR ASS'N, BYLAWS art. VIII (2018), <https://www.okbar.org/bylaws/> [<https://perma.cc/B8GZ-23LR>]. Other mandatory bars will not take positions on legislation, but will provide legislatures with information or advice about their proposals. See, e.g., STATE BAR OF ARIZ., BYLAWS art. X, § 10.02; *Legislation Program*, N.H. BAR ASS'N, <https://www.nhbar.org/helpful-links-for-nh-attorneys/legislation-program/> [<https://perma.cc/KM8A-6GCC>] (last visited Mar. 4, 2020).

<sup>48</sup> See, e.g., FLA. BAR, STANDING BOARD POLICIES: OPERATIONAL POLICIES OF THE FLORIDA BAR 48–51 (2020), [https://www-media.floridabar.org/uploads/2020/02/2020\\_07-JAN-SBPs-1-31-20.pdf](https://www-media.floridabar.org/uploads/2020/02/2020_07-JAN-SBPs-1-31-20.pdf) [<https://perma.cc/8J8Q-3EVX>]; *Public Policy Resource Center*, STATE BAR OF MICH., <https://www.michbar.org/publicpolicy/Home> [<https://perma.cc/JA6G-3ACK>] (last visited Mar. 4, 2020).

<sup>49</sup> See, e.g., MONT. BAR, POLICIES OF THE BOARD OF TRUSTEES 3-102, 3-103 (2018), [https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney\\_rules\\_and\\_regulations/policies\\_of\\_the\\_board.pdf](https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/policies_of_the_board.pdf) [<https://perma.cc/65R4-AFGW>].

<sup>50</sup> See E-mail from Lisa Dolph, Clerk of Del. Supreme Court to Tanya Johnson, Reference Librarian, Univ. of Conn. Law Sch. (Oct. 10, 2019, 10:04 EDT) (on file with author); E-mail from LaTonya Tucker, Dir. of Bar Services & Membership, Del. State Bar Ass'n, to author (Oct 7, 2019, 17:09 EDT) (on file with author). The percentage is approximate because some of the lawyer-members of the state bar association may not be licensed in Delaware.

<sup>51</sup> See, e.g., *Colorado Bar Association Quick Facts & Tip Sheet*, COLO. BAR ASS'N, <https://www.cobar.org/About-the-CBA/News-Media/Quick-Facts-Tip-Sheet> [<https://perma.cc/DG4Z-2RRN>] (last visited Mar. 11, 2020) (stating that 66% of active Colorado lawyers belong to state bar). About 66% of Vermont's licensed lawyers belong to the Vermont Bar Association. See E-mail from Therese Corsones, Exec. Dir., Vt. State Bar Ass'n, to author (July 6, 2019, 13:18 EDT) (on file with author); E-mail from Andrew R. Strauss, Vt. Judiciary Office of Licensing, to author (July 8, 2019, 11:37 EDT) (on file with author).

<sup>52</sup> See E-mail from Maria Kroth, NYSBA Member Dev. Assistant, to Anne Rajotte, Head of Reference Servs., Univ. of Conn. Law Sch. (Jan. 16, 2020, 11:28 EST) (on file with author); AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY (2019),



Illinois, not even half of the lawyers with in-state addresses belong to their voluntary state bars.<sup>53</sup>

Some lawyers' willingness to join voluntary state bar associations is no doubt influenced by the cost. Lawyers in states with voluntary state bars must still pay state lawyer licensing fees ranging from approximately \$190 to \$545 annually.<sup>54</sup> These fees fund the cost of lawyer regulation (such as lawyer discipline) by state entities.<sup>55</sup> Voluntary state bar dues are additional discretionary expenditures. On the high end, the combined cost of lawyer licensing and voluntary state bar dues in a few jurisdictions exceeds \$750 annually.<sup>56</sup> Voluntary state bars compete with local, specialty, and affinity bar associations for members, and in recent years, some state bars have seen a drop in membership.<sup>57</sup>

Unlike mandatory bars, the missions of the voluntary state bars focus primarily on lawyers' interests and secondarily on improving the administration of justice. Public protection is not a stated priority.<sup>58</sup> For

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[https://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-by-state-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf) [https://perma.cc/2YTF-7ENV].

<sup>53</sup> See E-mail from Michael P. Bowler, Conn. Statewide Bar Counsel, to author (Dec. 18, 2019, 07:50 EST) (on file with author); E-mail from Towanda Sanders, Member Servs. Specialist, Conn. Bar Ass'n, to author (July 9, 2019, 09:18 EDT) (on file with author); ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2018, at 8–10 (2019), <https://www.iardc.org/AnnualReport2018.pdf> [https://perma.cc/7QKR-S4CX]; *About the ISBA*, ILL. ST. BAR ASS'N, <https://www.isba.org/about> [https://perma.cc/53GP-6WTZ] (last visited Mar. 11, 2020).

<sup>54</sup> See *Attorney Regulation, Annual Fee*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation> [https://perma.cc/SWS9-7TW2] (last visited Mar. 8, 2020) (describing annual license fees of \$544); *The Legal Profession - Attorney Registration*, NYCOURTS.GOV, <https://ww2.nycourts.gov/attorneys/registration/index.shtml> [https://perma.cc/HL4A-4XL2] (last visited Mar. 1, 2020) (indicating biannual registration fee of \$375).

<sup>55</sup> See AM. BAR ASS'N, 2017 SURVEY ON LAWYER DISCIPLINE SYSTEMS chart VII (2019), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2017sold-results.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2017sold-results.pdf) [https://perma.cc/J8XV-TRZQ]. The exception is New York, where lawyer discipline is funded by the legislature. *Id.*

<sup>56</sup> For example, combined dues and licensing fees in Illinois for lawyers admitted eleven or more years total \$765. See *Membership*, ILL. STATE BAR ASS'N, <https://www.isba.org/membership/join> [https://perma.cc/T8JS-T2NY] (last visited Mar. 11, 2020) (select "Lawyer"; then select "Yes"); *2020 Registration Fee Schedule*, ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, [https://registration.iardc.org/attyreg/Registration/Registration\\_Department/Fee\\_Schedule/Registration/regdept/2020\\_Fee\\_Schedule.aspx?hkey=1506dec5-35f5-4172-ba9f-efc27efd5c52](https://registration.iardc.org/attyreg/Registration/Registration_Department/Fee_Schedule/Registration/regdept/2020_Fee_Schedule.aspx?hkey=1506dec5-35f5-4172-ba9f-efc27efd5c52) [https://perma.cc/8NAD-HHS4].

<sup>57</sup> See, e.g., Susan Desantis, *As Baby Boomers Retire, New York Bar Associations Face Harsh Realities*, N.Y. L.J., Sept. 10, 2019, at 1.

<sup>58</sup> The exception is public protection from the unauthorized practice of law, which also benefits lawyers. See, e.g., *About the DSBA*, DEL. STATE BAR ASS'N, <https://www.dsba.org/about-the-dsba/> [https://perma.cc/TH2H-8AF8] (last visited Mar. 8,

example, the Arkansas Bar Association “represents its members’ interests, provides money-saving services, promotes the profession, and alerts members to the issues created by proposed legislation that affect their law practice.”<sup>59</sup> The California Lawyers Association is “a member-driven, mission-focused organization dedicated to the professional advancement of attorneys practicing in the state of California.”<sup>60</sup> The New Jersey State Bar Association is the “voice of New Jersey attorneys” and its mission is, in part, “[t]o serve, protect, foster and promote the personal and professional interests of its members.”<sup>61</sup> Some have political action committees that advocate for lawyers’ interests.<sup>62</sup>

Voluntary state bar associations typically have no legally prescribed role in proposing to courts regulations relating to lawyers. Nevertheless, they often have committees that work on these issues, and in some states, they initiate regulatory changes. For instance, the Pennsylvania Supreme Court generally does not initiate ethics rule changes,<sup>63</sup> but instead, the Pennsylvania Bar Association does so. Its proposals are then considered by the Supreme Court’s Disciplinary Board.<sup>64</sup> Other voluntary state bar associations will also make proposals or offer their views in response to rule changes proposed by courts or court-constituted committees.<sup>65</sup> Courts vary in their willingness to accede to the views of voluntary state bars.<sup>66</sup>

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2020) (stating that state bar works to protect the public from those engaged in the unauthorized practice of law).

<sup>59</sup> *Welcome to the Arkansas Bar Association*, ARK. BAR ASS’N, <https://www.arkbar.com/home> [<https://perma.cc/9AJ4-2QNP>] (last visited Mar. 11, 2020).

<sup>60</sup> *About CLA*, CAL. LAW. ASS’N, <https://calawyers.org/cla/about-cla/> [<https://perma.cc/6XWN-4L36>] (last visited Mar. 8, 2020).

<sup>61</sup> *About Us*, N.J. STATE BAR ASS’N, <https://tms.njsba.com/PersonifyEbusiness/AboutUs.aspx> [<https://perma.cc/3MLS-6UP4>] (last visited Mar. 4, 2020).

<sup>62</sup> *See, e.g., PABAR-PAC*, PA. BAR ASS’N, <https://www.pabar.org/site/For-Lawyers/Committees-Commissions/PABAR-PAC> [<https://perma.cc/WB52-37DR>] (last visited Mar. 1, 2020).

<sup>63</sup> *See* E-mail from Thomas Wilkinson, Jr., former chair of Pa. Bar Ass’n Legal Ethics & Professional Responsibility Comm., to author (Dec. 14, 2019, 16:08 EST) (on file with author).

<sup>64</sup> *See, e.g., Christopher Lilienthal, A Comprehensive Overhaul of the Rules of Professional Conduct*, PA. L. WEEKLY, Aug. 4, 2003, at 5; Natalie Klyashtorny, *Proposed Amendment to Rule 8.4: How Will It Impact Diversity and Inclusion*, LEGAL INTELLIGENCER (June 27, 2017), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/06/27/proposed-amendment-to-rule-8-4-how-will-it-impact-diversity-and-inclusion/> [<https://perma.cc/8HS2-443N>].

<sup>65</sup> *See, e.g., Quintin Johnstone, Connecticut Unauthorized Practice Laws and Some Options for Their Reform*, 36 CONN. L. REV. 303, 309 (2004); Levin, *supra* note 41, at 48 (describing New Jersey State Bar Association’s opposition to proposal by court-appointed committee).

<sup>66</sup> *See, e.g., Patrick M. Connors, Transition to the “New” New York Rules of Professional Conduct*, N.Y. L.J., May 18, 2009, at 3; Jay Stapleton, *Judges Vote to Allow Lawyers to Represent Medical Marijuana Growers*, CONN. L. TRIB. (June 26, 2014), <https://www.law.com/ctlawtribune/almlD/1202661028491/> [<https://perma.cc/G7CD-AQQU>].

Voluntary state bars are sometimes more willing than mandatory bars to defend judicial independence.<sup>67</sup> They are freer to advocate on issues affecting their clients and the public. They often draft and support a broad range of legislation.<sup>68</sup> For example, the Delaware State Bar Association drafts most of the state's corporate legislation.<sup>69</sup> These bars also advocate in other ways. The New York State Bar Association joined an amicus brief urging the U.S. Supreme Court to strike down restrictions on same-sex marriage.<sup>70</sup> Voluntary state bars have also urged the government to address climate change and have called for increased protections for immigrants.<sup>71</sup> Nevertheless, not all voluntary state bars engage in this sort of advocacy. Voluntary state bars may be unable to reach agreement on initiatives because their members are ideologically diverse and represent clients on both sides of an issue.<sup>72</sup> They risk losing members if they take public positions with which some members disagree.

## II. LITIGATION OVER MANDATORY STATE BARS

As Professor Theodore Schneyer observed thirty-five years ago, “lawyers have ceaselessly debated whether they should be compelled to belong to an official statewide bar organization, how such organizations should be governed, and what their activities should be.”<sup>73</sup> This remains true today. The chief objections to compelled membership are based on freedom of association and freedom of speech grounds.

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<sup>67</sup> See, e.g., Derocher, *Campaigning for Justice*, *supra* note 46 (describing actions of the voluntary Ohio and Iowa state bars); *Resolution of the New Jersey State Bar Association: Supporting the New Jersey Judiciary as a Co-Equal Branch of Government*, N.J. STATE BAR ASS'N (Mar. 17, 2016), <https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Resolutions/judiciary%20resolution%20March%202016.pdf> [<https://perma.cc/A8TD-WYBF>].

<sup>68</sup> See, e.g., *Our Legislative Program*, IOWA STATE BAR ASS'N (Jan. 28, 2020), <https://www.iowabar.org/page/Legislative> [<https://perma.cc/TF7V-MA37>].

<sup>69</sup> See Minor Myers, *How Delaware Makes Its Corporate Law* 17, 20–22 (Nov. 2019) (unpublished manuscript) (on file with author).

<sup>70</sup> *New York State Bar Association Joins Amicus Briefs on Same-Sex Marriage Cases Before U.S. Supreme Court*, N.Y. STATE BAR ASS'N (Mar. 1, 2013), <https://www.nysba.org/CustomTemplates/Content.aspx?id=951> [<https://perma.cc/GKV7-H636>].

<sup>71</sup> See, e.g., *PBA House of Delegates Approves Resolution for Government Action on Climate Change*, PA. BAR ASS'N (Nov. 25, 2015), <https://www.pabar.org/public/news%20releases/pr112515.asp> [<https://perma.cc/S9K9-772B>]; *Resolution*, MASS. BAR ASS'N (2017), <https://www.massbar.org/docs/default-source/publications-document-library/ejournal/2017-18/massbar-immigration-resolution-final-012617-docx---massbar-immigration-resolution-2017.pdf?sfvrsn=2> [<https://perma.cc/593F-U3BT>].

<sup>72</sup> See, e.g., Kelly Glista & Edmund H. Mahony, *Bar Association Vote on Gun Control Support Ruled a Tie; Group Won't Join Case*, HARTFORD COURANT (Aug. 20, 2014), <https://www.courant.com/news/connecticut/hc-cba-newtown-voting-0821-20140820-story.html> [<https://perma.cc/3Z7A-M8MK>].

<sup>73</sup> Schneyer, *supra* note 1, at 1–2.

## A. THE SUPREME COURT'S DECISIONS ON MANDATORY STATE BARS

In 1961, the United States Supreme Court addressed some of these arguments in *Lathrop v. Donohue*, when it rejected a claim by a Wisconsin lawyer that he could not constitutionally be compelled to join and support a state bar association which expressed opinions on, and attempted to influence, legislation.<sup>74</sup> The Court relied on its prior decision in *Railway Employees' Department v. Hanson*, in which it had found that the Railway Labor Act did not abridge railroad employees' rights of association by authorizing agreements that effectively conditioned employees' continued employment on the payment of union dues.<sup>75</sup>

Almost thirty years later, in *Keller v. State Bar of California*, the Supreme Court considered a claim that use of petitioners' mandatory State Bar dues to finance certain ideological or political activities to which they did not subscribe violated their First and Fourteenth Amendment rights.<sup>76</sup> The State Bar had used a portion of bar dues to lobby or speak on issues such as gun control, school prayer, and abortion.<sup>77</sup> The Court observed that *Lathrop* only decided the issue of whether a lawyer could be compelled to pay bar dues and reserved judgment on the free speech claims.<sup>78</sup> The *Keller* Court noted the "substantial analogy" between the relationship of the State Bar and its members and employee unions and their members.<sup>79</sup> Both faced the possibility that free riders would benefit from union or state bar activities if they were not required to pay their fair share.<sup>80</sup>

The *Keller* Court also discussed its 1977 decision in *Abood v. Detroit Board of Education*, in which it held that agency shop dues that non-union public employees were required to pay to a public employees' union could not, consistent with the First Amendment, be used to fund the expression of political views or the advancement of ideological causes not germane to the union's duties as the collective bargaining representative.<sup>81</sup> Relying on *Abood*, the unanimous *Keller* Court held that the State Bar could constitutionally use bar dues to fund activities related to the goals of regulating the legal profession and improving the quality of legal services. Compulsory dues could not, however, be expended to endorse or advance other

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<sup>74</sup> 367 U.S. 820, 842–43 (1961).

<sup>75</sup> *Id.* (citing *Railway Emps.' Dep't. v. Hanson*, 351 U.S. 225 (1956)). In *Hanson*, the Court had noted, "[o]n the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U.S. at 238.

<sup>76</sup> 496 U.S. 1, 4, 6 (1990).

<sup>77</sup> *Id.* at 15.

<sup>78</sup> *Id.* at 9.

<sup>79</sup> *Id.* at 12.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 9–10 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977)).

political or ideological issues.<sup>82</sup> It also found that mandatory bar associations must establish procedures for allowing members to challenge expenditures not related to the goals of regulation of the profession and improving the quality of legal services.<sup>83</sup> The portion of bar dues used for such purposes must be refunded to objecting members.

#### B. *JANUS* AND ITS AFTERMATH

In 2018, the United States Supreme Court seemingly upended the reasoning underlying *Keller* when it overruled *Abood* in *Janus v. AFSCME*.<sup>84</sup> In its 5-4 decision, the *Janus* Court considered whether an Illinois statute which forced public employees to pay agency fees to a union that took collective bargaining and other positions with which petitioners disagreed violated their First Amendment rights by compelling them to subsidize private speech on matters of substantial public concern.<sup>85</sup> It found that compelling a person to subsidize speech of other private speakers raises First Amendment concerns and applied “exacting scrutiny” in judging the constitutionality of compelled agency fees.<sup>86</sup> The Court explained that exacting scrutiny requires that a compelled subsidy of speech must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>87</sup> When applying that standard, the Court found that the state’s compelling interest in “labor peace” could be readily achieved “through means significantly less restrictive of associational freedoms than assessment of agency fees.”<sup>88</sup> It pointed to the federal Postal Service employment experience, which it believed demonstrated that an exclusive union representative can work effectively for employees without assessing agency fees.<sup>89</sup> Finding *Abood* “poorly reasoned,” unworkable in the distinctions it drew between chargeable and nonchargeable union expenditures, and inconsistent with the Court’s other First Amendment cases, the majority overruled it.<sup>90</sup> It concluded that public sec-

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<sup>82</sup> *Id.* at 13–14. In what proved to be an understatement, the Court noted that “[p]recisely where the line falls” between activities the bar could fund with compulsory bar dues and political or ideological activities “will not always be easy to discern.” *Id.* at 15.

<sup>83</sup> *Id.* at 16.

<sup>84</sup> See 138 S. Ct. 2448 (2018).

<sup>85</sup> Agency fees are a percentage of union dues charged to employees who decline to join the union. *Id.* at 2460.

<sup>86</sup> *Id.* at 2464–65. “Exacting scrutiny” lies between the difficult-to-meet strict scrutiny standard and the more relaxed standard for commercial speech. *Id.* at 2465. The *Janus* Court did not decide whether strict scrutiny should be applied because it concluded that the statutory scheme at issue could not even survive exacting scrutiny. *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2466 (quoting *Harris v. Quinn*, 573 U.S. 616, 648–49 (2014) (internal quotation marks omitted)).

<sup>89</sup> *Id.* at 2465–66. While the Court assumed that “labor peace” was a compelling state interest, it rejected arguments that avoiding free riders was a compelling interest. *Id.* at 2466.

<sup>90</sup> *Id.* at 2460, 2481.

tor unions were no longer allowed to extract agency fees from nonconsenting employees.<sup>91</sup>

Not long thereafter, the Supreme Court granted certiorari in *Fleck v. Wetch*, in which the Eighth Circuit, relying on *Keller*, had rejected petitioner's claim that North Dakota's mandatory state bar violated his freedom not to associate and not to subsidize speech with which he disagreed.<sup>92</sup> The Supreme Court vacated the decision in *Fleck* and remanded the case for further consideration in light of *Janus*.<sup>93</sup> In August 2019, the Eighth Circuit again ruled for the defendants, essentially on procedural grounds.<sup>94</sup> This was only a temporary reprieve for the mandatory bars, which are still facing constitutional challenges in Louisiana, Michigan, Oregon, Texas, and Wisconsin based on the reasoning in *Janus*.<sup>95</sup>

Professors William Baude and Eugene Volokh have argued that *Janus* likely signals the end of mandatory bar dues payments,<sup>96</sup> while Professors Erwin Chemerinsky and Catherine Fisk disagree.<sup>97</sup> The latter note that Baude and Volokh "ignore the Supreme Court's . . . reasoning" in *Harris v. Quinn*, which it decided four years earlier.<sup>98</sup> In *Harris*, the Court held that the First Amendment prohibited the collection of agency fees from objecting individuals who were not full-fledged public employees.<sup>99</sup> In dictum, it rejected the argument that invalidating agency fees for unions put mandatory state bars dues payments in constitutional jeopardy. The Court explained that mandatory dues serve a compelling government purpose, which includes the "State's interest in regulating the legal profession and improving the quality of legal services" and "a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices."<sup>100</sup>

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<sup>91</sup> *Id.* at 2486.

<sup>92</sup> 868 F.3d 652, 654 (8th Cir. 2017).

<sup>93</sup> See *Fleck v. Wetch*, 139 S. Ct. 590 (2018).

<sup>94</sup> *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019), *cert. denied*, 2020 WL 1124433 (mem.) (Mar. 9, 2020) (No. 19-670). The court concluded that *Fleck* had not properly preserved a constitutional freedom of association claim or adequately developed the record for such a claim. *Id.* at 1116.

<sup>95</sup> See GOLDWATER INST., *supra* note 6; Thomas Franz, *First Amendment Lawsuit Filed Against State Bar*, MICH. LAWS. WKLY (Sept. 4, 2019), <https://milawyersweekly.com/news/2019/09/04/first-amendment-lawsuit-filed-against-state-bar/> [<https://perma.cc/AE6F-JNMX>]. Indeed, a petition for certiorari in the Wisconsin case is pending in the Supreme Court. See *Jarchow v. State Bar of Wis.*, No. 19-3444 (7th Cir. order filed Dec. 23, 2019), *petition for cert. filed* (U.S. Dec. 31, 2019) (No. 19-831).

<sup>96</sup> See, e.g., William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 196 (2018).

<sup>97</sup> Erwin Chemerinsky & Catherine L. Fisk, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42 (2018).

<sup>98</sup> *Id.* at 55 (discussing *Harris v. Quinn*, 573 U.S. 616 (2014)).

<sup>99</sup> 573 U.S. at 646–47, 657.

<sup>100</sup> *Id.* at 655 (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990)).

The *Harris* dictum provides reason to believe that the Supreme Court may attempt to distinguish mandatory bar dues from agency fees paid to unions when it revisits the constitutionality of compelled bar dues in light of *Janus*. Chemerinsky and Fisk correctly observe that *Harris* suggests that mandatory state bars should be able to demonstrate a compelling state interest in regulating the legal profession and improving the quality of legal services.<sup>101</sup> Those bars may also be able to show a compelling state interest in allocating to lawyers, “rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.”<sup>102</sup> But if the Court carefully considers the alternatives to compelled payments—as it did in *Janus*—mandatory bars are unlikely to be able to show that the states’ interests cannot “be achieved through means significantly less restrictive of associational freedoms” than compelled dues payments to mandatory bars.<sup>103</sup>

### III. THE BENEFITS AND CONSTITUTIONALITY OF MANDATORY STATE BARS

This section seeks to address two questions. First, who benefits from mandatory state bars and in what ways? This question is important for courts to consider when deciding how hard they should work to preserve mandatory state bar dues payments. And second, can compelled dues payments to state bars survive the constitutional scrutiny that *Janus* seemingly requires?

#### A. WHO BENEFITS FROM MANDATORY STATE BARS?

Just as Herbert Harley anticipated over a century ago, lawyers are the primary beneficiaries of mandatory state bars. In addition to the educational, networking, and other benefits these bars provide, some exercise considerable control over lawyer discipline and other regulatory processes. They are a “powerful voice for lawyers” that help ensure that the profession continues to be deeply involved in its own regulation.<sup>104</sup> Mandatory bars may enable lawyers to lobby for lawyers’ interests even more effectively than voluntary bars because of their size, stature, and financial resources. Moreover, the state bars’ official or quasi-official role in the rulemaking process often allows them to set the rulemaking agenda and define the scope of the issues they will study.<sup>105</sup> Bar leaders can also exert control by determining who serves on the committees that consider the issues. Mandatory

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<sup>101</sup> Chemerinsky & Fisk, *supra* note 97, at 55–56.

<sup>102</sup> *Harris*, 573 U.S. at 655–56.

<sup>103</sup> *Id.* at 648–49.

<sup>104</sup> Jorge Aquino, *Gloves-Off Bar Brawl*, THE RECORDER, May 17, 1996, at 1; *see also* Trey Appfel, *A Structure Worth Defending*, 82 TEX. B.J. 312, 312 (2019) (arguing that through a mandatory bar “we are able to gather our collective might to advance and improve the legal profession”).

<sup>105</sup> This is not uniformly true. In Rhode Island, the supreme court sometimes creates its own committee to review the rules of professional conduct. *See* Thomas W. Lyons, *Confidentiality*, R.I. B.J., Sept.–Oct. 2006.

bars can prevent proposals that benefit the public from ever proceeding to the courts for consideration.<sup>106</sup>

State supreme courts also benefit from mandatory state bars. Supreme court justices are busy with their main work—deciding cases—and may lack the time to carefully oversee the operation of regulatory activities such as lawyer admission and discipline. They may also lack the time and resources to do their own fact-gathering on issues relating to lawyer regulation.<sup>107</sup> They often depend on the bars to gather facts, analyze issues, and make recommendations concerning lawyer regulation.<sup>108</sup> When mandatory bars routinely handle these tasks, they relieve the courts of the need to initiate action, appoint committees, or use judicial resources for factfinding and preliminary rule drafting. Moreover, by working together to regulate the legal profession, courts and lawyers both benefit by deterring state legislatures from seeking to regulate lawyers, thereby preserving the courts' power and prerogatives.<sup>109</sup>

And what about the public? If we put to one side the regulatory functions that mandatory bars perform, the public derives comparable benefits from mandatory and voluntary state bars. Both types of organizations help raise the quality of legal services and promote access to justice. The public also benefits from the state bars' close connection to the courts, which helps preserve the legal profession's independence from the state. This independence enables lawyers to defend democratic institutions and the rule of law. Yet the close connection between the court and the bar is potentially a double-edged sword: it may also cause judges to approach lawyer regulation in ways that benefit lawyers at the public's expense.<sup>110</sup>

Judges tend to decide many issues in ways that favor lawyers.<sup>111</sup> Judges—like all people—identify with and lean toward helping people who are like them.<sup>112</sup> This is especially true in the context of lawyer regulation, where there are rarely interest groups that are advocating for the public's

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<sup>106</sup> This is sometimes also true of voluntary state bars, but mandatory bars are often better-positioned to do this.

<sup>107</sup> See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market*, 37 GA. L. REV. 1167, 1207 (2003).

<sup>108</sup> See, e.g., Levin, *supra* note 41, at 33, 57–58.

<sup>109</sup> This explains, in part, why supporters of mandatory state bars warn that elimination of these bars may carry “a very substantial risk of increased legislative involvement in the regulation of lawyers.” Aquino, *supra* note 104.

<sup>110</sup> See, e.g., Levin, *supra* note 41, at 57 (describing Texas Supreme Court's rejection of malpractice insurance disclosure rule that State Bar of Texas opposed).

<sup>111</sup> BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 1 (2011).

<sup>112</sup> See MAX H. BAZERMAN & DON A. MOORE, *JUDGMENT IN MANAGERIAL DECISION MAKING* 125 (7th ed. 2009).



interests. State bars—whether they are voluntary or mandatory—sometimes support proposals that favor lawyers over the public.<sup>113</sup> Courts in states with mandatory bars may be even more willing to defer to the state bars’ proposals than are courts in states with voluntary state bars. Mandatory bars have greater legitimacy because they are often considered agencies or instrumentalities of the judiciary and ostensibly represent all the state’s lawyers. Their stated mission includes public protection. These bars often have official involvement in proposing lawyer regulation and routinely perform substantial work for the judiciary. If the mandatory bar’s proposals favor its members, and the court instinctively defers to the bar’s recommendations, the public may lose out in this process.

B. CAN MANDATORY STATE BAR DUES PAYMENTS SURVIVE  
CONSTITUTIONAL SCRUTINY?

Post-*Janus*, courts considering the constitutionality of compelled bar dues payments will seemingly need to decide whether such a requirement can survive “exacting scrutiny” or an even higher level of constitutional scrutiny.<sup>114</sup> This will require a finding that the compelled dues serve “a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>115</sup> The Supreme Court has thus far identified the following state interests served by requiring lawyers to pay state bar dues: the interest in “regulating the legal profession and improving the quality of legal services” and “a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.”<sup>116</sup> Even if these state interests are found to be “compelling,” those interests can almost certainly “be achieved through means significantly less restrictive of associational freedoms” than compelled dues payments. This is evidenced by looking at the jurisdictions with voluntary state bars.

The states’ interest in regulating the legal profession can be accomplished without requiring objecting lawyers to pay state bar dues—and without requiring mandatory state bars. Many states with mandatory bars have already moved certain lawyer regulatory functions to other entities. In California, the state legislature voted in 2017 to completely decouple the

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<sup>113</sup> Levin, *supra* note 41.

<sup>114</sup> See *Janus v. AFSCME*, 138 S. Ct. 2448, 2464–65 (2018). Baude and Volokh suggest an alternative approach, which is to find that mandatory state bars are state agencies and therefore, government speakers. They argue that bar dues can be viewed as occupational taxes which can be compelled by the government and do not constrain the government from speaking. Baude & Volokh, *supra* note 96, at 196–98. The Supreme Court would need to reconsider this approach because as Baude and Volokh acknowledge, the “government agency” argument was rejected in *Keller*. See *Keller*, 496 U.S. at 11.

<sup>115</sup> See *Janus*, 138 S. Ct. at 2465 (quoting *Knox v. Serv. Emp. Int’l Union*, 567 U.S. 298, 310 (2012)).

<sup>116</sup> *Harris v. Quinn*, 573 U.S. 616, 655–56 (2014).

State Bar of California's regulatory functions from its other bar functions.<sup>117</sup> The State Bar's mission is now "to protect the public" and its function is exclusively regulatory.<sup>118</sup> It collects lawyer licensing fees to fund its regulatory activities.<sup>119</sup> The new voluntary California Lawyers' Association, which is "dedicated to the professional advancement of attorneys practicing in the state of California," now hosts the state bar sections and offers CLE and member benefits to dues-paying members.<sup>120</sup> Moreover, there is no reason to think that states with mandatory state bars are better at administering lawyer regulation than states with voluntary bars. Indeed, some of the most underfunded and understaffed lawyer discipline systems are in states with mandatory bars.<sup>121</sup> Conversely, some of the most pro-active and innovative lawyer regulation is found in states with voluntary state bars.<sup>122</sup>

Mandatory state bars are also unlikely to demonstrate that bar dues payments should be compelled because these organizations help produce *better* laws governing lawyers. Even though the mandatory state bars' mission includes public protection, and several have governing boards that include non-attorney members, there is little evidence that mandatory bars are significantly more likely than voluntary state bars to propose lawyer regulation that benefits the public.<sup>123</sup> This may be because the boards rarely include more than a handful of lay board members. Moreover, the public board members are not typically consumer advocates and are sometimes recommended by lawyer-members of the board.<sup>124</sup>

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<sup>117</sup> See S.B. 36, 2017–18 Sess. (Cal. 2017).

<sup>118</sup> *Our Mission: What We Do*, STATE BAR OF CAL., <https://www.calbar.ca.gov/AboutUs/Our-Mission> [<https://perma.cc/8EUE-T7BK>] (last visited Mar. 8, 2020).

<sup>119</sup> STATE BAR OF CAL., *supra* note 54 and accompanying text.

<sup>120</sup> CAL. LAW. ASS'N, *supra* note 60.

<sup>121</sup> See, e.g., AM. BAR ASS'N, *supra* note 55, at charts VI, VII, IX—Part A (describing lawyer discipline statistics in Mississippi).

<sup>122</sup> See e.g., *Lawyer Self-Assessment Program*, COLO. SUPREME COURT, <https://coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp> [<https://perma.cc/S6YT-WS3J>] (last visited Mar. 11, 2020); *PMBR Self-Assessment Course FAQs*, ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, [https://registration.iardc.org/attyreg/Registration/Registration\\_Department/PMBR\\_FAQs/Registration/regdept/Rule\\_756e2\\_Self-Assessment\\_FAQ\\_s.aspx](https://registration.iardc.org/attyreg/Registration/Registration_Department/PMBR_FAQs/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx) [<https://perma.cc/WQZ2-HYY3>] (last visited Mar. 11, 2020).

<sup>123</sup> A few mandatory state bars (California, Arizona, Washington, and Utah) have adopted rules benefiting the public that allow trained non-lawyers to perform limited legal work. Likewise, only Oregon and Idaho—states with mandatory bars—require lawyers to maintain malpractice insurance to protect the public. But this may be more due to the "moralistic" political culture in the West, rather than these states having mandatory bars. Similar innovations have not been adopted in the South, where there are mostly mandatory bars but the political culture is more traditional. See Levin, *supra* note 41, at 26.

<sup>124</sup> See, e.g., *Bar Seeks a Public Member to Serve on Board of Governors*, FLA. B. NEWS (Nov. 18, 2019), <https://www.floridabar.org/the-florida-bar-news/bar-seeks-a-public-member-to-serve-on-the-board-of-governors/> [<https://perma.cc/N5BA-N3XV>]; *2019–2020 State Bar of Texas Officers, Directors, Liaisons, Section Representatives and Ex Officio*, STATE BAR OF TEX., <https://www.texasbar.com/Content/NavigationMenu/AboutUs/>

Mandatory state bars are also not demonstrably better than voluntary bars at “improving the quality of legal services” for the public. Both bars promote access to justice initiatives.<sup>125</sup> Both provide CLE and other professional development opportunities to improve lawyers’ performance. At most, mandatory bar supporters might claim that without compelled dues payments, some lawyers will not belong to *any* bar organization, which could adversely affect the quality of legal services those lawyers provide. This claim is probably true, but its strength is difficult to assess. Some mandatory state bar members currently fail to avail themselves of the bar’s professional development benefits.<sup>126</sup> If lawyers are not compelled to pay state bar dues, more lawyers might then be able to afford to join a specialty bar, which could be even more helpful than a state bar in improving competence in practice.<sup>127</sup> More importantly, it does not appear that jurisdictions with voluntary state bars (where some lawyers do not belong to any bar association) have more lawyers who perform poorly in practice than states with mandatory bars.<sup>128</sup>

Finally, the state’s interest in having lawyers—and not the public—pay the cost of ensuring that attorneys adhere to ethical practices can be achieved without compelling state bar dues payments. In virtually all of the jurisdictions with voluntary state bars, states use lawyer registration fees, bar application fees, and other bar-related fees paid by lawyers to pay for lawyer discipline and other regulation.<sup>129</sup> Lawyer regulatory functions are performed in those jurisdictions by state entities—other than bars—that are overseen by the judiciary. Thus, there is another way to achieve the state’s

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StateBarPresident/BoardofDirectors/MembersoftheBoard/default.htm  
[<https://perma.cc/82T4-ZAME>] (last visited Mar. 31, 2020).

<sup>125</sup> See, e.g., *Access to Justice Campaign*, STATE BAR OF MICH., <https://www.michbar.org/programs/ATJCampaign/home> [<https://perma.cc/637W-EEYJ>] (last visited Mar. 4, 2020); *Access to Justice*, OHIO STATE BAR ASS’N, <https://www.ohiobar.org/advocacy/access-to-justice/> [<https://perma.cc/H4BW-BJXY>] (last visited Mar. 1, 2020).

<sup>126</sup> See, e.g., WYO. STATE BAR, 2019 WYOMING STATE BAR SURVEY RESULTS 4 (2019), <https://www.wyomingbar.org/wp-content/uploads/2019-Bar-Member-Survey-Results.pdf> [<https://perma.cc/9DHF-YWM5>] (indicating that more than 20% of survey respondents had not used state bar CLE or read its magazine).

<sup>127</sup> See, e.g., Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194, 206–08, 211–12 (2011) (describing immigration lawyers who report that membership in the American Immigration Lawyers Association is essential for staying up-to-date and being a “good” lawyer).

<sup>128</sup> While there are no rigorous studies on the comparative efficacy of mandatory versus voluntary state bars in improving the quality of legal services, the states bear the burden of satisfying the constitutional standard. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799–800 (2011) (noting that the state bears the risk of uncertainty and that “ambiguous proof will not suffice”).

<sup>129</sup> See AM. BAR ASS’N, *supra* note 55 and accompanying text; ABA STANDING COMM. ON CLIENT PROTECTION, 2014–2016 SURVEY OF LAWYERS’ FUNDS FOR CLIENT PROTECTION § II, at 1–2 (2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2014\\_16\\_survey\\_of\\_lawyers\\_funds\\_for\\_client\\_protection\\_final.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_16_survey_of_lawyers_funds_for_client_protection_final.pdf) [<https://perma.cc/PG4T-FHDE>]; ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM’N, *supra* note 53, at 50–51 (reporting Illinois lawyer regulator’s sources of revenue).

interest in having lawyers pay to ensure their adherence to ethical practices that is significantly less restrictive of lawyers' associational freedoms than requiring objecting lawyers to pay bar dues to mandatory state bars.

#### CONCLUSION

It is ironic that lawyers have been the most vociferous opponents of mandatory bar dues, but may be the biggest losers if the Supreme Court concludes that state bar dues payments can no longer be constitutionally compelled. In that case, the Court may decide that lawyers can opt out of paying bar dues and bar membership, but that these state bars can otherwise continue as unified bars. If these bars suffer significant member defections and lost revenue, states may be forced to move all regulatory functions elsewhere. State bars would lose some power and status, and lawyers may eventually choose to form voluntary state bars. Without mandatory state bars to initiate regulatory proposals, vet them, and make recommendations, some states courts would need to become more proactive in identifying issues for consideration, constituting committees to study them, and making recommendations. This could make the process of regulating lawyers somewhat more burdensome for the judiciary. But it would also provide an opportunity for the courts to construct the rulemaking process in ways that more fully consider the public's interests and perspectives.