RETHINKING MANDATORY STATE BARS

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ABSTRACT

Mandatory state bars were originally established to better regulate lawyers, advance the profession's interests, and protect the public. Today, however, renewed uncertainty about their constitutionality and questions about what these bars can do and say has led to a spate of litigation against them. This is therefore a good time to rethink the wisdom of maintaining these bars. The Article first describes the unsettled state of the law. It then notes that due to the constraints courts have placed on mandatory bars, some cannot perform traditional bar functions, such as proposing improvements in the substantive law. These bars cannot defend courts from unjust attacks or act to protect democratic norms. A few are unduly constrained by the political preferences of government actors. Yet due to their close relationship with courts, some play an outsized role in writing the law governing lawyers. The Article then explains why these bars do not appear to better regulate lawyers or protect the public than alternative regulatory structures. Mandatory bar membership does, however, cost somewhat less than lawyer licensing fees and state bar dues in other states. Mandatory bars also ensure that all lawyers can reap the benefits of belonging to a bar organization. Yet many lawyers do not take advantage of those benefits, and some might gain more from using their money to join a different bar association. This Article recommends that jurisdictions seriously reconsider whether it makes sense to compel state bar membership any longer.

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INTRODUCTION

Mandatory state bars are under renewed attack. As conceived more than a century ago, they would enable lawyers to form powerful organizations to advance their interests and help regulate the legal profession. But since the first mandatory bar appeared, some lawyers have objected to the requirement that they join a state bar.[1] Recent uncertainty about the constitutionality of compelling bar dues payments, and what mandatory bars can do and say, have led to numerous legal challenges against them.[2] As a result of the litigation and legal constraints on these bars, some mandatory bars cannot work for law reform. They cannot defend courts from unjust attacks or act to protect democratic norms. Due to their close relationship with the courts, some play an outsized role in writing the law governing lawyers. At the same time, some are unduly constrained by the political preferences of government actors. These constraints—and the uncertain legal landscape—make this a good time to rethink the wisdom of continuing mandatory state bars.[3]

Today, there are mandatory bars in thirty-one states and the District of Columbia.[4] They are usually state agencies or public corporations that are instrumentalities of the judiciary.[5] Sometimes called integrated bars, they typically combine the features of voluntary state bar associations with some regulatory functions such as discipline, admission, or lesser licensing

1. *See* DAYTON DAVID MCKEAN, THE INTEGRATED BAR 42 (1963); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 8 AM. BAR. FOUND. RSCH. J. 1, 3 (1983).

2. *See, e.g.*, Marilyn Cavicchia, *The Post-Janus World: A Look at Recent Court Challenges to Mandatory Bars*, 47 BAR LEADER 36 (2022), https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2021_22/july-august/the-post-janus-world-a-look-at-recent-court-challenges-to-mandatory-bars/ [https://perma.cc/P4TN-N63B].

3. Over the years, others have called for a serious reappraisal of the value of mandating membership in state bars. *See, e.g.*, Schneyer, *supra* note 1, at 5–6, 106–07; Ralph H. Brock, *Giving Texas Lawyers Their Dues: The State Bar's Liability Under* Hudson *and* Keller *for Political and Ideological Activities*, 28 SAINT MARY'S L.J. 48, 49 n.5 (1996).

4. *See* McDonald v. Longley, 4 F.4th 229, 237 (5th Cir. 2021). This includes the hybrid Nebraska State Bar Association, which uses mandatory bar dues for regulatory activities and voluntary dues for other bar activities. *See In re* Rule Change to Create a Voluntary State Bar of Nebraska, 841 N.W.2d 167, 178–79 (Neb. 2013).

5. *See, e.g.*, OR. REV. STAT. § 9.010(2) (2023); *Our Mission*, STATE BAR OF TEX. (2024), https://www.texasbar.com/AM/Template.cfm?Section=Our_Mission&Template=/CM/HTMLDisplay.cfm&ContentID=48845 [https://perma.cc/C73W-K2P6].

requirements.[6] Mandatory bars are often directly involved in drafting the rules and laws governing lawyers. Like voluntary state bar associations, they also work to raise lawyer competence through educational initiatives and provide a site for lawyer socialization and mentoring. Both types of state bars also work to improve the courts and access to legal services.[7]

Mandatory state bars began to appear in the early 1920s.[8] Herbert Harley, a journalist and a lawyer, was the chief proponent. At that time, only a fraction of lawyers belonged to voluntary state bar associations.[9] He believed that compulsory statewide bar associations could influence state legislatures more effectively than voluntary, financially weak bar organizations.[10] Not only could mandatory bars work to achieve court reform, but a self-regulating mandatory bar could restrict the number of lawyers, discipline misbehaving lawyers, and set minimum fee schedules.[11] Mandatory bars could also gain greater resources to raise the quality of the profession and fill a regulatory vacuum.[12] Proponents argued that a mandatory bar would benefit the public "through improved professional standards; more effective discipline; a unified voice of expertise on legal issues; and more effective fulfilment of the public obligation of the bar, such as increasing the availability of legal services."[13]

As Professor Ted Schneyer observed more than forty years ago, there is a certain incoherence to the dual function of mandatory bars as a guild protecting lawyers' interests and as a protector of the public.[14] Moreover, today, only nineteen of those bars perform significant regulatory functions

6. Thirteen mandatory bars only administer lesser regulatory functions, such as CLE compliance and management of the client security fund. *See, e.g.*, *Minimum Continuing Legal Education (MCLE)*, MO. BAR (2024), https://mobar.org/site/MCLE/MCLE_Home/site/content/MCLE/My_MCLE.aspx?hkey=3816c777-d9e3-4ba7-90bf-6746680ce10c [https://perma.cc/QLW5-JFD9]; *Regulations and Rules of Procedure of the Client Security Fund of the Missouri Bar*, MO. BAR (2021), https://missourilawyershelp.org/wp-content/uploads/2022/12/CSF-Rules-and-Regulations-approved-11-19-2021-.pdf [https://perma.cc/C72Y-JVU5].

7. *See, e.g.*, *Welcome to the Virginia State Bar*, VA. STATE BAR (2024), https://www.vsb.org/ [https://perma.cc/H5Z4-6WJJ].

8. MCKEAN, *supra* note 1, at 42–43.

9. *Id.* at 40.

10. *Id.* at 36, 39–40.

11. *Id.* at 34–36; Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35, 38 (1994).

12. Schneyer, *supra* note 1, at 17–18.

13. Smith, *supra* note 11, at 39.

14. *See* Schneyer, *supra* note 1, at 6–7.

such as admission or discipline.[15] It is not clear that those bars do a better job of regulating lawyers than lawyer regulators working in separate agencies in other jurisdictions. It is also unclear whether mandatory bars perform their other important functions—e.g., public protection, educating, and mentoring members—better than voluntary bars. Due to First Amendment concerns raised by compelled dues payments and membership, there are now some important functions that mandatory bars cannot perform at all.

This article begins in Part I with a description of two U.S. Supreme Court cases that considered constitutional challenges concerning mandatory bars. It also discusses the Court's 2018 decision in *Janus v. American Federation of State, County, and Municipal Employees*, which seemingly upended the legal scaffolding that supported compelled dues payments to mandatory bars.[16] The Court has declined to address the uncertainty created by *Janus*, notwithstanding the ensuing spate of litigation challenging the constitutionality, activities, and speech of mandatory bars. Part II identifies some current problems associated with mandatory bars. The first set of problems arises from the constitutional limits on what mandatory bars can do or say, which have seriously constrained their ability to function as lawyer organizations. The second set of problems arises from mandatory bars' status as governmental instrumentalities. As a result, some mandatory bars have too much influence on the development of the law governing lawyers. At the same time, government actors can exercise too much control over internal bar activities. Part III considers whether mandatory bars are—as originally predicted—better at regulating lawyers or protecting the public than the alternatives in other states. There is no clear evidence that they are. Part IV examines some arguments in favor of continuing to mandate state bar membership. For instance, mandatory bars appear to cost lawyers less

15. Eighteen mandatory state bars retain some responsibility for handling lawyer discipline. *See Directory of Lawyer Disciplinary Agencies 2011–12*, at 1–19, AM. BAR ASS'N (Dec. 2011), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011-12_disc_agency_directory.pdf [https://perma.cc/P895-XPKB] (listing names and addresses of lawyer disciplinary agencies in each jurisdiction). Seven of those same bars (Alabama, Alaska, Idaho, Nevada, Oregon, Utah, and Washington) plus the State Bar of Montana also handle bar admission. *See* NAT'L CONF. BAR EXAMINERS & AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2021, at 55–58 (Judith A. Gundersen & Claire J. Guback eds., 2021), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf [https://perma.cc/U9NF-Q47K].

16. 585 U.S. 878, 988 (2018).

than they would pay for licensing and state bar dues in other jurisdictions. Mandatory bar membership also ensures that all lawyers have access to the educational and other benefits offered by these organizations. The Conclusion notes that mandatory state bars and other actors are likely to resist change. Nevertheless, it urges courts and legislatures to seriously rethink whether it makes sense to continue mandatory state bars.

I. THE U.S. SUPREME COURT CASES

Lawyers have long objected to compelled membership in mandatory state bars, likening it to compelled membership to labor unions.[17] It was not until 1961, however, that the U.S. Supreme Court considered a constitutional challenge to mandatory membership. In *Lathrop v. Donohue*, a Wisconsin lawyer challenged the constitutionality of the requirement that he join and pay dues to the mandatory State Bar of Wisconsin, which promoted "law reform" and opposed legislation that he supported.[18] The Court rejected the claim that the requirement that appellant pay bar dues violated his constitutional freedom of association rights, finding that the case presented a freedom of association claim "no different from that which we decided in *Railway Employees' Department v. Hanson*."[19] In *Hanson*, the Court held that the Railway Labor Act "did not, on its face, abridge protected rights of association" in authorizing union shop agreements that conditioned the non-union employees' continued employment on payment of union dues.[20] The *Lathrop* Court noted that in *Hanson*, non-union employees were required to pay union dues even though the union also engaged in some activities similar to the legislative activities in which the State Bar engaged.[21] The *Lathrop* plurality emphasized, however, that it was only confronted with the question of "compelled financial support of group activities, not with involuntary membership in any other aspect."[22] It

17. The rise of the mandatory state bar movement coincided with the rise of labor unions in the United States. Some opponents characterized mandatory bars as "closed shop[s]" of lawyers. MCKEAN, *supra* note 1, at 25–26.

18. *See* 367 U.S. 820, 822–23 (1961).

19. *Id.* at 842 (citing Ry. Emps.' Dept. v. Hanson, 351 U.S. 225 (1956)).

20. *Id.*

21. *Id.* at 842–43. It also noted that the State Bar's legislative activity was "not the major activity of the State Bar." *Id.* at 839.

22. *Id.* at 828.

reserved the question of whether appellant "may constitutionally be compelled to contribute his financial support to political activities which he opposes."[23]

Almost thirty years later, in *Keller v. State Bar of California*, the Court considered a claim that use of petitioners' mandatory state bar dues to finance ideological or political activities with which they disagreed violated their constitutional free speech rights.[24] The State Bar of California had used a portion of bar dues to lobby or speak on issues such as gun control, school prayer, and abortion.[25] The Court again noted the "substantial analogy" between the relationship of the State Bar and its members and employee unions and their members.[26] Both entities faced the possibility that free riders would benefit from union or state bar activities if they were not required to pay their fair share.[27]

The *Keller* Court also discussed the 1977 decision in *Abood v. Detroit Board of Education*. In *Abood*, the Court held that agency shop dues that nonunion 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.[28] Relying on the reasoning in *Abood*, the unanimous *Keller* Court held that the State Bar of California could constitutionally use bar dues to fund activities "germane" to the state's interest in establishing the State Bar, which was "regulating the legal profession and improving the quality of legal services."[29] Compulsory dues could not, however, be expended to endorse or advance other political or ideological issues.[30] The Court acknowledged that "[p]recisely where the line falls" between activities the bar could fund with compulsory bar dues and political or

23. *Id.* at 847–88.

24. *See* 496 U.S. 1, 6, 9 (1990). The Court declined to consider a broader freedom of association claim because the lower courts had not addressed it. *Id.* at 17. That claim was that petitioners "cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*." *Id.*

25. *Id.* at 15.

26. *Id.* at 12.

27. *Id.*

28. *See id.* at 9–10 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977)).

29. *Id.* at 13. The Court identified this state interest by consulting the statute that created the state bar.

30. *Id.* at 13–14.

ideological activities "will not always be easy to discern."[31] It noted, however, that "the extreme ends of the spectrum are clear" and that on the one end, compulsory dues could not be expended to advance gun control or a nuclear weapons freeze initiative, while on the other, dues spent for activities connected with lawyer discipline and proposing ethical codes for lawyers were germane.[32] It also indicated that the State Bar would need to 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.[33] It suggested that the State Bar could follow the procedures laid out in *Chicago Teachers Union v. Hudson*, which provided a mechanism for refunding to objecting members portions of union dues expended on non-germane activities.[34]

In 2018, the Supreme Court seemingly upended *Keller's* reasoning by overruling *Abood*. In *Janus v. AFSCME*, the Court considered whether an Illinois statute, which required public employees to pay agency fees to a union that took collective bargaining and other positions with which petitioners disagreed, violated their First Amendment free speech rights.[35] 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.[36] 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."[37] Applying this standard, the Court concluded 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."[38] Finding *Abood* "poorly reasoned," unworkable in the distinctions it drew

31. *Id.* at 15.
32. *Id.* at 15–16.
33. *Id.* at 16.
34. *See id*. at 16–17 (citing Chicago Tchrs. Union v. Hudson, 475 U.S. 292 (1986)).
35. 585 U.S. 878, 885 (2018). Agency fees are a percentage of union dues charged to employees who decline to join the union. *Id*. at 885.
36. *Id.* at 894–95. The *Janus* Court did not decide whether the more difficult-to-meet strict scrutiny standard should be applied because it concluded the statutory scheme at issue could not even survive exacting scrutiny. *Id.*
37. *Id.* at 894.
38. *Id.* at 896 (internal quotation marks omitted) (quoting Harris v. Quinn, 573 U.S. 616, 648–49 (2014)).

between chargeable and nonchargeable union expenditures, and inconsistent with the Court's other First Amendment cases, the 5-4 majority overruled it.[39] It concluded that public sector unions could no longer be permitted to extract agency fees from nonconsenting employees.[40] Although Justice Elena Kagan, in her dissent, noted that *Abood*'s reasoning was imbedded in *Keller*,[41] the majority in *Janus* did not address this concern.[42]

Since *Janus*, the Court has repeatedly declined to take up a case addressing the continued vitality of *Keller* or clarifying whether the exacting scrutiny standard applies to the compelled speech issues raised by mandatory bars.[43] Only two justices have shown an appetite to consider such a case, stating, "[n]ow that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*."[44] The question of whether the exacting scrutiny standard applies to mandatory bars is important. As noted, exacting scrutiny requires that a compelled subsidy of speech serve "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[45] It appears that the jurisdictions with voluntary state bars and separate lawyer regulatory agencies can achieve the states' interests (regulating the legal profession and improving the quality of legal service) in a less constitutionally problematic manner than mandatory bars.[46] If so, the practice of compelling dues payments to state bars would need to end.

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39. *Id.* at 886.

40. *Id.* at 929.

41. *Id.* at 949–50 (Kagan, J., dissenting).

42. Justice Kagan raised this same point more explicitly in her dissent in *Harris v. Quinn*, 573 U.S. 616, 670 (2014). In *Harris*, another 5-4 decision, the Court found that the First Amendment prohibited the collection of agency fees from objecting individuals who were not full-fledged public employees. *Id*. at 646–47, 657. In dictum, the *Harris* majority rejected the argument that invalidating agency fees for unions put mandatory state bars' dues payments in constitutional jeopardy. *Id.* at 655–56.

43. *See* Fleck v. Wetch, 937 F.3d 1112 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020); Jarchow v. State Bar of Wis., No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019), *cert. denied*, 140 S. Ct. 1720 (2020); Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 79 (2021); Taylor v. Buchanan, 4 F.4th 406 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1441 (2022); Schell v. Chief Just. of Okla. Sup. Ct., 11 F.4th 1178 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1440 (2022); McDonald v. Longley, 4 F.4th 229 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022); File v. Martin, 33 F.4th 385 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 745 (2023).

44. Jarchow, 140 S. Ct. at 1720 (2020) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

45. Janus v. Am. Fed'n of State, Cnty. & Mun. Emp.'s, Council 31, 585 U.S. 878, 894 (2018).

46. *See* Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 17–20 (2020).

In the meantime, the Goldwater Institute, ideologically aligned organizations, and like-minded lawyers have pursued claims in several states challenging mandatory state bars on constitutional grounds or the germaneness of the bars' activities.[47] The courts have continued to treat *Lathrop* and *Keller* as binding and to apply the reasoning of those cases—as they understand it.[48] A few courts have addressed the broader freedom of association question left open in *Lathrop*, which was whether mandatory bar membership violated petitioners' associational rights by engaging in political or ideological activities with which petitioners disagreed.[49] The courts have applied the germaneness test to this issue, but they have defined germane versus non-germane activities differently.[50] They have also disagreed about whether even a *de minimis* amount of non-germane activity would render compelled bar membership unconstitutional.[51] The implications of these disagreements are discussed in more detail below.

II. SOME PROBLEMS ASSOCIATED WITH MANDATORY STATE BARS

The uncertainty about the constitutionality of compelled dues payments and the pressure on mandatory bars to limit themselves to "germane" activities has rendered many of these state bars reluctant to engage in substantive law reform efforts, to defend courts unjustly criticized, or to protect rule of law norms. Moreover, the organizations' status as agencies of the courts presents other problems. It positions some mandatory bars to play an outsized role in drafting the law governing lawyers, sometimes to the detriment of the public. At the same time, the mandatory bars are so

47. *See, e.g.*, Scott Day Freeman, *Goldwater Fights for Free Speech in Oregon Federal Court*, GOLDWATER INST. (Apr. 4, 2024), https://www.goldwaterinstitute.org/goldwater-fights-for-free-speech-in-oregon-federal-court/ [https://perma.cc/4DAL-2XVK]; *see also* Cavicchia, *supra* note 2.

48. *See, e.g.*, Taylor v. Buchanan, 4 F.4th 406, 408 (6th Cir. 2021) ("Even where intervening Supreme Court decisions have undermined the reasoning of an earlier decision, we must continue to follow the earlier case if it 'directly controls' until the Court has overruled it.") (internal citation omitted); Jarchow v. State Bar of Wis., No. 19-3444, 2019 WL 8953257, at *1 (7th Cir. Dec. 23, 2019) (noting that lawyers' constitutional claims about being required to join state bar and pay dues were foreclosed by *Keller*).

49. *See* Schell v. Chief Just. of Okla. Sup. Ct., 11 F.4th 1178, 1191 (10th Cir. 2021); McDonald v. Longley, 4 F.4th 229, 244–45 (5th Cir. 2021); Pomeroy v. Utah State Bar, No. 2:21-cv-00219, 2024 WL 1810229, at *14–16 (D. Utah Apr. 25, 2024).

50. *See, e.g.*, *Schell*, 11 F.4th at 1192; *McDonald*, 4 F.4th at 244.

51. *See infra* pp. 138–42.

closely tied to the courts that they risk losing the independence needed to manage their internal affairs and to promote important norms.

A. The Constitutional Constraints

i. Constraints on Legislative and Law Reform Efforts[52]

One of the reasons elite lawyers formed modern bar associations in the 1870s was to pursue law reform.[53] Harley also believed that it was "the duty and the responsibility [of the bar] to modernize and clarify the great body of substantive law" and that this would be better accomplished through bar integration.[54] Since then, state bar associations have contributed significantly to law reform efforts that benefited the public.[55]

In recent years, voluntary state bars or their sections have proposed or lobbied for or against changes concerning a wide range of substantive law issues.[56] They are not legally constrained from making recommendations,

52. The discussion in this subsection is limited to legislative activity, and the next focuses on certain other expressive activities, but the same legal tests generally apply. Advocacy through amicus briefs is also subject to the same limitations as law reform efforts but is not further discussed here.

53. *See* MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 11 (1988) ("Law and judicial reform were concerns that mobilized leading lawyers into forming bar associations in the 1870s . . . ."); JULIA A. OSBORNE, BUCKEYE BARRISTERS: A HISTORY OF THE OHIO STATE BAR ASSOCIATION 24 (2005) (noting that the Ohio State Bar Association's purpose when it was formed was, in part, "to advance the science of jurisprudence [and] to promote reform in the law . . . .").

54. Herbert Harley, *Organizing the Bar for Public Service*, 4 OR. L. REV. 1, 16 (1924).

55. *See, e.g.*, TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 248–251 (1987) (describing efforts by Illinois State Bar Association and others in 1950s to rewrite Illinois criminal law); Richard B. Ott, *Bar Representation Before Legislature Proves Effective*, 14 WASH. L. REV. & ST. BAR J. 346, 346 (1939) (describing how the Washington State Bar Association drafted and sponsored legislation benefitting widows); *Our State Bar Associations: The New York State Bar Association*, 47 A.B.A. J. 1111, 1112 (1961) (describing state bar's legislative efforts).

56. *See, e.g.*, Jason Grant, *Among the State Bar's 2022 Legislative Priorities: COVID Vax Requirements, Changing Police Qualified Immunity, and Restructuring 'Archaic' State Court System*, N.Y. L.J., Feb. 18, 2022, at 1; *see also* Barbara L. Jones, *The MSBA Has an Agenda*, MINN. LAW. (Dec. 31, 2007), https://minnlawyer.com/2007/12/31/the-msba-has-an-agenda/ [perma.cc/2P8Y-CSXL]; *Approved Legislative Positions Updated 9/25/23*, CONN. BAR ASS'N (Sept. 25, 2023), https://www.ctbar.org/docs/default-source/legislative-affairs/meeting-agendas/legislative-agenda-sept-2023.pdf?sfvrsn=6fcb5f0a_4 [https://perma.cc/BZ24-LXGW]; *2024 Affirmative Legislative Program*, IOWA STATE BAR ASS'N (Apr. 29, 2024), https://www.iowabar.org/?pg=IowaBarBlog&blAction=showEntry&blogEntry=106805 [https://perma.cc/L4N6-BWZY] (click ISBA website hyperlink to see chart); *Position Statements*, N.J. STATE BAR ASS'N, https://njsba.com/advocacy/position-statements/ [https://perma.cc/E3PQ-PMZB]; *Ohio Bar Legislative*

taking positions, or lobbying. The bars' efforts can benefit the public and busy or under-resourced state legislators.[57] The primary constraint on the voluntary bars is that if they advocate on controversial issues, they risk losing members who disagree with the organizations' positions. As a result, organizational approval is usually required for voluntary state bar sections to propose legislation.[58]

Mandatory state bars are more constrained. At one time, the mandatory bars all engaged in legislative activity concerning the substantive law.[59] But as noted, the *Keller* Court found that mandatory state bars could not constitutionally use bar dues to fund legislative activities not "germane" to the state's interest in regulating the legal profession and improving the quality of legal services available to people of the state.[60] Consequently, several mandatory bars now limit their legislative activities to topics directly concerning lawyer regulation, judges, courts, and access to legal representation.[61] They seek to avoid taking positions on "social issues."[62]

Priorities, OHIO BAR, https://www.ohiobar.org/advocacy/legislative-priorities/ [https://perma.cc/7F7Q-DL2C].

57. This has long been true. *See* William D. Guthrie, *Bar Associations in the United States*, 136 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 157, 161 (1928) ("Few important statutes are enacted by the Legislature of the State of New York without the expert advice and collaboration of the State Bar Association, or of one or more of the local bar associations.").

58. This process usually requires review by a legislative committee and the bar's executive committee. *See, e.g.*, *Association Structure, Policies and Procedures* IX, ILL. STATE BAR ASS'N (May 17, 2019), https://www.isba.org/policies/structure [https://perma.cc/7DK5-KKH7].

59. WILLIAM A. GLASER, THE ORGANIZATION OF THE INTEGRATED BAR 22 (1960).

60. Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990).

61. *See, e.g.*, N.C. STATE BAR ASS'N, FISCAL AND OPERATING POLICIES OF THE NORTH CAROLINA STATE BAR COUNCIL 34 (Jan. 24, 2020), https://www.ncbar.gov/media/376797/fiscal-policies.pdf [https://perma.cc/BDR9-ZEWN] (stating that the North Carolina State Bar will not lobby except "where there is a direct relationship between the matters at issue and the State Bar's core regulatory responsibility, which is the government of the legal profession"). *See also* STATE BAR OF ARIZ., STATE BAR OF ARIZONA 2023 LOBBYING REPORT, https://www.azbar.org/media/p2bjohoc/a-2023-sba-lobbying-report-final-for-website.pdf [https://perma.cc/S94C-B9S9] (reflecting no lobbying in 2023 and opposition to only two bills that related to lawyer admission and discipline); *Legislative Bill Watch*, STATE BAR OF MONT., https://www.montanabar.org/Membership-Regulatory/Member-Resources/Legislative-Bill-Watch [https://perma.cc/FED3-5NTX] (indicating that with one exception, bar only took positions on issues relating to judges and lawyer regulation).

62. *See, e.g.*, *Legislative Policy*, STATE BAR ASS'N OF N.D., https://www.sband.org/page/legislat_policy [https://perma.cc/C5ZB-AB9Y] (stating that when it comes to "broader issues of social policy" where the issues "generally have strong political overtones," the Bar will "generally avoid taking positions"); Wash. State Bar Ass'n, General Rule 12(C) Analytical Statement (Oct. 22, 2004), https://www.wsba.org/docs/default-source/about-wsba/legislative/policies-and-procedures/gr12cstatementgr12cstatementa31859f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=e4ce3cf1_4 [https://perma.cc/XE6E-Z3EL] (stating that WSBA will not "[t]ake positions on political or

Even when the topic is "germane," the process for gaining mandatory state bar approval for legislative action can be onerous.[63] For example, the Virginia State Bar will not engage in legislative advocacy except when it is "on topics that pertain to the regulation of the practice (or with a very tight nexus thereto)" and only after it has received approval from the Virginia Supreme Court.[64] Nevertheless, some mandatory state bars will engage in a broad range of legislative activities.[65] They sometimes do so through voluntary sections or committees funded by members' voluntary payments of additional dues.[66]

This use of voluntary dues payments to enable lobbying on a broad range of issues was rejected by the Fifth Circuit in *McDonald v. Longley*.[67]

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social issues which do not relate to or affect the practice of law or the administration of justice").

63. Like voluntary state bars, mandatory bars typically require that a section's legislative proposals be vetted by a legislative or executive committee and the bar's governing body. *See, e.g.*, *Public Affairs Legislative Guidelines*, OR. STATE BAR, https://www.osbar.org/pubaffairs/seccom_guidelines.html [https://perma.cc/D3JD-JT3U]. Some mandatory bars require that proposed legislative positions be approved by a supermajority of the section's members. *See, e.g.*, KY. BAR ASS'N, 2023–24 SECTION & DIVISION OFFICER HANDBOOK 26 (July 2023), https://cdn.ymaws.com/www.kybar.org/resource/resmgr/sections/2023-24_section_&_division_o.pdf [https://perma.cc/RYQ8-2NTB]. The Idaho State Bar requires approval by the entire bar membership of any legislative advocacy. *See* IDAHO STATE BAR, 2023 RESOLUTION PROCESS: VOTE PAMPHLET 1 (2023), https://isb.idaho.gov/wp-content/uploads/1-2023-Voter-Pamphlet-no-indicia-with-links.pdf [https://perma.cc/8DGC-K2Y8].

64. E-mail from Cameron M. Rountree, Exec. Dir., Va. State Bar, to author (July 7, 2024, 9:44 AM EDT) (on file with author). It should be noted that Virginia is one of only three states that has both mandatory and voluntary state bars. The voluntary Virginia Bar Association, composed of about 4,000 members, will advocate for legislative changes in the substantive law. *About the Virginia Bar Association*, VA. BAR ASS'N, https://www.vba.org/page/about_us#:~:text=About%204%2C000%20lawyers%20and%20law,type%20and%20size%20of%20organization [https://perma.cc/XWR3-5PJZ]; *2024 VBA Legislative Agenda Progress*, VA. BAR ASS'N, https://www.vba.org/page/2024-bills [https://perma.cc/ASE3-4EAX].

65. *See e.g.*, *Public Policy Positions Search*, STATE BAR OF MICH., https://www.michbar.org/publicpolicy/ppolicydb_results [https://perma.cc/MZ4E-RPF7] (reflecting State Bar's position on bills relating to animal research, marriage, and mental health, among other topics); *2024 Missouri Bar-Initiated Legislative Proposals*, MO. BAR, https://mobar.org/site/content/About/Government-Relations/bar-endorsed-bills.aspx [https://perma.cc/N4JH-GDTK] (describing Bar proposals concerning various aspects of substantive law); Cale Battles et al., *State Bar Achieves Much in the 2023–24 Legislative Session*, WIS. LAW., June 2024, at 55 (reporting on the State Bar's legislative efforts on topics including business law, elder law, bankruptcy, and civil rights).

66. *See, e.g.*, FLA. BAR, STANDING BOARD POLICIES: OPERATIONAL POLICIES OF THE FLORIDA BAR § 9.11(b) (May 10, 2024), https://www-media.floridabar.org/uploads/2024/05/2024_11-MAY-SBPs-5-10-24-1.pdf [https://perma.cc/LRF8-ZDR4]; Order Regarding State Bar of Michigan Activities, No. 2004-01 (Mich. Feb. 3, 2004), https://www.michbar.org/file/publicpolicy/pdfs/ao2004-01.pdf [https://perma.cc/FTU7-X4X4]; Battles et al., *supra* note 65.

67. McDonald v. Longley, 4 F.4th 229, 238–39, 248–49 (5th Cir. 2021).

In that case, three lawyers complained that the State Bar of Texas had violated their associational rights by lobbying for forty-seven bills "on subjects ranging from LGBT rights to trusts and estates."[68] The court first noted that compelling a lawyer to join a bar association engaged in non-germane activities burdens the lawyer's associational rights.[69] It further reasoned that when a bar association engages in non-germane activities, "part of its expressive message is that its members stand behind its expression."[70] The court then found that most of the State Bar's legislative activities were non-germane.[71] The court noted that the Texas State Bar Act forbids the State Bar from using dues to influence the passage or defeat of any legislative measure "unless the measure relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice."[72] It concluded that advocating for changes to the state's substantive law was non-germane to the purposes identified in *Keller* where they were disconnected from the Texas court system or the law governing lawyers.[73] Even though these legislative proposals were drafted by sections that were voluntarily funded, the court found this insufficient to circumvent *Keller*'s germaneness requirement. The court reasoned that the State Bar's mandatory dues also supported these legislative efforts in various ways, including by partly funding the voluntary sections, funding a Government Relations Department that coordinated the State Bar's legislative program, and funding the State Bar's Board of Directors which approved these proposals.[74] Finding that the non-germane activities infringed on plaintiffs' First Amendment associational rights, the court stated that the State Bar had "multiple other constitutional options," including to halt non-germane activities.[75] "But it may not continue mandating membership in the Bar as currently structured . . . ."[76]

68. *Id.* at 239.
69. *Id.* at 245.
70. *Id.* at 245–46.
71. *Id.* at 248, 252.
72. *Id.* at 238.
73. *Id.* at 247–48. Thus, even lobbying for legislative changes that would benefit low-income Texans was non-germane. *Id.* at 248, 251. The court stated, "[t]hose may be salutary activities. But they are aimed at making substantive Texas law more favorable to low-income Texans, not at 'regulating the legal profession' or 'improving the quality of legal services,' so they are non-germane under *Keller*." *Id.* at 251.
74. *Id.* at 238–39, 249.
75. *Id.* at 252.
76. *Id.*

Since then, the mandatory state bars in the Fifth Circuit have significantly curtailed their legislative activities.[77] The *McDonald* decision and other lawsuits have also affected some other mandatory state bars. In 2022, the Oregon State Bar determined that "[p]roposals seeking changes in substantive areas of the law must either be germane by directly affecting lawyer responsibilities or the regulation of lawyers, or by directly affecting the quality of the legal system."[78] The New Mexico Board of Bar Commissioners voted to suspend lobbying, at least temporarily.[79] The Alabama State Bar president has clarified that the function of its Government Relations Liaison Committee is "to facilitate the function of the Legislature in passing laws which affect the judicial systems or the Alabama State Bar."[80] Some other mandatory bars have also become quite circumscribed in their legislative advocacy, focusing on legislation affecting lawyers and courts.[81] In some jurisdictions, these bars are the only sizable bars in the state, and their reluctance to engage more broadly in legislative activities can be a loss for state legislatures. It can also be a loss for the public.[82]

77. *See* Statement of Amends. to State Bar Rules & State Bar of Texas Bd. of Dirs. Pol'y Manual Approved at the Sept. 24 State Bar of Texas Bd. of Dirs. Meeting, at 5–6, McDonald v. Sorrels, No. 1:19-cv-00219-LY (W.D. Tex. Sept. 30, 2021) (describing changes in legislative program); *Legislation*, MISS. BAR, https://www.msbar.org/programs-affiliates/legislation/ [https://perma.cc/YNP6-BS2B] ("The Mississippi Bar's ability to take a position on proposed legislation is limited to matters affecting the regulation of the profession and the improvement of the quality of legal services."); Boudreaux v. Louisiana State Bar Ass'n, 86 F.4th 620, 624 (5th Cir. 2023) (noting that the Louisiana State Bar Association has stopped almost all of its legislative activities).

78. Memorandum from OSB Gen. Couns. to Section Exec. Comm'rs (Mar. 9, 2022), https://www.osbar.org/_docs/resources/KellerSectionsLegislativeActivity.pdf [https://perma.cc/X3CN-YTWJ].

79. *Board of Bar Commissioners December 8, 2021 Meeting Minutes*, STATE BAR OF N.M. (Dec. 8, 2021), https://www.sbnm.org/Portals/NMBAR/AboutUs/Governance/minutes/Minutes%20December%202021.pdf?ver=XT_if_atmXEmKiAhzsaZtg%3D%3D [https://perma.cc/P7XG-C69W].

80. C. Gibson Vance, *Purpose and Scope*, ALA. BAR (July 22, 2022), https://www.alabar.org/assets/2022/08/2023-GLS-PS.pdf [https://perma.cc/DU7T-XYCL] (stating the committee can, however, "provide mediation or facilitation services at the request of members of the State government to help bring about constructive resolution of proposed legislation").

81. *See, e.g.*, *Minutes Hawaii State Bar Association Board Meeting*, HAW. STATE BAR ASS'N (Jan. 24, 2024), https://hsba.org/images/hsba/HSBA%20Board/Minutes/2024/HSBA_Board_Mtg_Min_1_24_2024.pdf [https://perma.cc/2849-APTX]. It was unclear what legislative activities—if any—the South Carolina Bar has engaged in recently. It declined to respond to several requests for information.

82. Although state bars do not always propose or support legislative changes that benefit the public, in some cases they do. *See, e.g.*, McDonald v. Longley, 4 F.4th 229, 247–48 (5th Cir. 2021) (describing legislative activities); *see also* Grant, *supra* note 56.

ii. Constraints on Other "Non-Germane" Activities

Mandatory state bars are also constrained from engaging in some other important activities. This is because these bars cannot use mandatory dues to fund non-germane activities of an ideological nature which fall outside of the state's interest in "regulating the legal profession and improving the quality of legal services."[83] Some courts and mandatory bars have taken this to mean that state bar leaders and bar journals cannot communicate—even to their members—on a broad range of topics.

For example, even though lawyers are encouraged by the rules of professional conduct to defend judges and courts who are "unjustly criticized" and "to further the public's confidence in the rule of law,"[84] mandatory bars will almost never do so. During Donald Trump's candidacy and presidency, when he verbally attacked the impartiality, national origin, and competence of federal judges for decisions with which he disagreed, the American Bar Association (ABA), some voluntary state bars, and other voluntary bar associations defended the judges.[85] Only one mandatory state bar spoke out, and on only one occasion.[86] Since then, mandatory bars have continued to remain silent, even though verbal attacks on judges and threats to judges' safety have escalated.[87] Lawyers Defending American Democracy, a lawyer organization formed "to defend and uphold the rule of law,"[88] has urged mandatory bars to speak out, arguing that *Keller* does not prevent them from doing so.[89] It asserts that defending courts and

83. Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990).

84. MODEL RULES OF PRO. CONDUCT pmbl., P.6, r. 8.2 cmt. 3 (AM. BAR ASS'N 2024).

85. *See* Leslie C. Levin, *"This is Not Normal": The Role of Lawyer Organizations in Protecting Constitutional Norms and Values*, 69 WASH. U. J. L. & POL'Y 173, 191–96 (2022).

86. *Id.* at 193; *State Bar Board Urges Respect for the Independent Judiciary*, STATE BAR OF WIS. (Feb. 10, 2017), https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=25403 [https://perma.cc/MES4-QGM8].

87. Joseph Tanfani et al., *Threats to US Federal Judges Doubled Since 2021, Driven by Politics*, REUTERS (Feb. 13, 2024, 10:55 AM), https://www.reuters.com/world/us/threats-us-federal-judges-double-since-2021-driven-by-politics-2024-02-13/ [https://perma.cc/M3Q5-DHLH]; Brian Lee, *As Threats to Judges Spike, Legislative Response May Be Jump-Started*, LAW.COM (Jan. 5, 2024, 4:31 PM), https://www.law.com/newyorklawjournal/2024/01/05/as-threats-to-judges-spike-legislative-response-may-be-jump-started/ [https://perma.cc/6UDF-6F5G].

88. *Our Purpose*, LAWS. DEFENDING AM. DEMOCRACY, https://ldad.org/about [https://perma.cc/ZAB3-DS3V].

89. *How State Bars Can Defend Democracy and the Rule of Law Consistent with* Keller v. State Bar of California, LAWS. DEFENDING AM. DEMOCRACY (Jan. 16, 2024), https://ldad.org/wp-content/uploads/2024/06/Keller-Memo-June-2024-v2.pdf [https://perma.cc/2MYL-F4XK].

supporting the rule of law are "germane" to the bars' core functions.[90]

While this argument has some appeal, *Keller* and its history do not seem to support it. The precipitating event in *Keller* was statements by the California State Bar president at an annual meeting rebuking U.S. Senate candidate Pete Wilson, among others, for seeking political gain by verbally abusing the California Supreme Court.[91] The State Bar president's statements were subsequently distributed in State Bar materials.[92] The claim concerning the Bar president's comments was resolved in the lower court on other grounds.[93] Yet it was against this backdrop that the *Keller* Court declined to broaden its definition of germaneness, even though the State Bar was authorized by statute to also engage in "improvement of the administration of justice."[94] The Court deliberately excluded this language from its definition of germane activities, limiting it to the goals of regulating the legal profession and improving the quality of legal services.[95] As one commentator noted, "the difficulty of distinguishing germane to the administration of justice from political activities was not lost on the members of the [*Keller*] Court at oral argument."[96]

In recent years, mandatory bars have faced legal challenges for other types of statements. In *Schell v. Chief Justice of Oklahoma*, appellant asserted that his freedom of speech and association rights were violated by six articles published in the *Oklahoma Bar Journal*.[97] The Tenth Circuit found four of the articles were germane to the Oklahoma State Bar's core functions.[98] The court remanded for discovery and consideration of whether the two other articles advanced non-germane, ideological positions. One of those articles criticized "big money and special interest groups" making campaign contributions and electing judges, giving donors the ability to

90. *Id.*

91. *See* Harriet Chiang, *State Bar to Talk Power This Weekend*, S.F. CHRON., Aug. 24, 1990, at A5; James B. Lake, *Lawyers, Please Check Your First Amendment Rights at the Bar: The Problem of State-Mandated Bar Dues and Compelled Speech*, 50 WASH. & LEE L. REV. 1833, 1834 (1993).

92. Lake, *supra* note 91, at 1834.

93. Keller v. State Bar of Cal., 767 P.2d 1020, 1031–33 (Cal. 1989), *rev'd on other grounds*, 496 U.S. 1 (1990).

94. CAL. BUS. & PROF. CODE § 6031(a) (West 1990).

95. *See* Keller, 496 U.S. at 14–15.

96. Lake, *supra* note 91, at 1848 n.119.

97. *See* Schell v. Chief Just. of Okla. Sup. Ct., 11 F.4th 1178, 1192 (10th Cir. 2021). The appellant had also complained about other bar statements, but they were time-barred.

98. *Id.*

"buy court opinions."[99] The other article advocated for prisoners to be able to bring tort suits against jails and prisons.[100] The court noted that if the articles were non-germane, the district court would need to determine whether appellant could advance a freedom of association claim, and that a "potential open issue is to what degree, in quantity, substance, or prominence, a bar association must engage in non-germane activities in order to support a freedom-of-association claim based on compelled bar membership."[101]

The Fifth Circuit took a different approach when considering bar members' freedom of association claims in *Boudreaux v. Louisiana State Bar Association*.[102] As it had in *McDonald v. Longley*, the court defined germaneness very narrowly.[103] It found the State Bar's "Wellness Wednesday" tweets—which touted the benefits of eating nuts, urged members to regularly exercise, and encouraged lawyers to get sunlight—"fail[ed] the germaneness test from *McDonald* and *Keller* because they do not sufficiently relate to legal practice or the legal profession."[104] It continued, "[e]ven assuming healthier lawyers are generally more effective lawyers, the LSBA is not an all-encompassing wellness service that may comment on every facet of lawyers' health and fitness."[105] The court observed that the germaneness standard "requires inherent connection to the practice of law and not mere connection to a personal matter that might impact a person who is practicing law."[106] The court also found non-germane a tweet about an iPhone software update and tweets promoting community engagement opportunities for lawyers, such as holiday charity drives.[107] The court further concluded that the State Bar had shared with members a non-germane *Reuters* news article that described the ABA's

99. *Id.* at 1194.
100. *Id.* at 1193.
101. *Id.* at 1195 n.11.
102. 86 F.4th 620 (5th Cir. 2023).
103. *See supra* note 72 and accompanying text. Fifth Circuit Judge Jerry E. Smith wrote the opinion in *McDonald* and the later decision in *Boudreaux*.
104. *Boudreaux*, 86 F.4th at 632.
105. *Id.* The court expressed concern about finding a limiting principle stating, "[i]f a bar association may tout the health benefits of broccoli, may it also advise attorneys to practice Vinyasa yoga, adhere to a particular workout regimen, or get married and have children, if it believes that those activities improved attorney wellness and therefore the quality of legal services in the state?" *Id.* at 632–33.
106. *Id.* at 633.
107. *Id.* at 633–34. The court noted that the latter were not related to legal pro bono. *Id*. at 634.

focus on student loan debt and the effects that debt had on young lawyers' life decisions.[108] The court noted that "the test from *McDonald*, however, is not about whether speech is 'law-related,' but whether it is related to '*regulating* the legal profession and *improving the quality* of legal services.'"[109] In the court's view, it was "not clear how merely reading the article would improve a lawyer's practice."[110] In addition, the court found that the State Bar's display on its website of a large LGBT pride flag icon that read "LGBT Pride Month" and its link to an article about the history of gay rights in the United States were non-germane.[111] Although the Fifth Circuit had stated in *McDonald* that the State Bar "can promote inclusion of LGBT individuals in the legal profession,"[112] the *Boudreaux* court concluded that the LGBT icon and article were non-germane, because neither drew a link between "LGBT causes in society writ large" and the improvement of legal practice in the state.[113]

As it had in *McDonald*, the court also took an all-or-nothing approach to the consequences of a state bar engaging in non-germane activities: any non-germane activity irreparably deprived members of their associational rights. The court declined to recognize a *de minimis* exception to *Keller* and *McDonald*, even though the LSBA argued "that if every single tweet and email must be strictly 'germane,' then mandatory bar associations could not exist. The risk would be too great of making some statement that a court found insufficiently linked to the bar association's purposes."[114] The court found "that doomsday theory is unpersuasive."[115] Concluding that that the State Bar's mandatory membership and dues were unconstitutional, it

108. *Id.*
109. *Id.*
110. *Id.* The court added that the article "then highlights the Administration's and the American Bar Association's efforts to enact loan forgiveness. If anything, the thrust of the article is backhanded support for student-debt relief, a nakedly political position." *Id.*
111. *Id.* at 635–36.
112. *Id.* at 636.
113. *Id.*
114. *Id.* at 637.
115. *Id.* After *Boudreaux*, the State Bar announced, "you may notice changes [in the *Texas Bar Journal*] as we work to ensure ongoing compliance, including a move away from some human-interest features and humor-related articles that are not sufficiently connected to regulating the legal profession, improving the quality of legal services, or the functioning of the state's courts or legal system." Trey Apffel, *Your TBJ, Post* Boudreaux, STATE BAR OF TEX. (Jan. 2024), https://www.texasbar.com/AM/Template.cfm?Section=articles&ContentID=62518&Template=/CM/HTMLDisplay.cfm [https://perma.cc/KXH5-DPZ6].

remanded the case to the lower court to determine the remedy.[116]

One district court subsequently disagreed with *Boudreaux*, using reasoning that merits discussion. In *Pomeroy v. Utah State Bar*, another freedom of association challenge, the court adopted a *de minimis* exception for non-germane activities.[117] It noted that *Keller* required mandatory bars to provide refund mechanisms for members whose dues are used for non-germane purposes and that this system pre-supposes "the possibility that a state bar might engage in at least some non-germane activities."[118] When rejecting *Bourdeaux's* reasoning, it stated:

> [T]he lack of a *de minimis* exception could convert this court into a perpetual monitor of every bar journal article and social media post. A single tweet wishing attorneys a happy Memorial Day or posting a picture of a puppy dressed like a judge could render mandatory state bars unconstitutional—or at least result in lengthy legal proceedings.[119]

Instead, it adopted the Tenth Circuit's suggestion in *Schell* that if articles were non-germane, to look to the "quantity, substance, [and] prominence of the non-germane conduct."[120] It concluded that only one challenged satirical bar journal article—that took a swipe at President Donald Trump—was arguably non-germane,[121] but that this was insufficient to violate plaintiff's freedom of association rights.[122] An appeal is pending.[123]

Most recently, the Ninth Circuit also rejected the Fifth Circuit's conclusion in *Boudreaux* that *any* non-germane activities automatically rendered compelled bar membership unconstitutional—but for different

116. *See Boudreaux*, 86 F.4th at 638, 640.

117. Pomeroy v. Utah State Bar, No. 2:21-cv-00219-TC-JCB, 2024 U.S. Dist. LEXIS 76670, at *18–*19 (D. Utah Apr. 25, 2024). The court also took a broader view of what constituted "germane" activities. For example, it found germane an article reviewing a book that proposed criminal penalties for anyone who learned of a sexual assault but chose to protect the institution over the victim. *Id.* at *25, *29

118. *Id.* at *19.

119. *Id.* at *18–19.

120. *Id.* at *17.

121. *Id.* at *36. The article included arguments for and against the electoral college and compared corporate transitions of power to political transitions, presenting lessons "for Donald Trump." *Id.*

122. *Id.* at *37.

123. Notice of Appeal, Pomeroy v. Utah State Bar, No. 2:21-cv-00219-TC-JCB, 2024 U.S. Dist. LEXIS 76670 (D. Utah Apr. 25, 2024) (No. 24-04054) (filed May 21, 2024).

reasons than the *Pomeroy* court. In *Crowe v. Oregon State Bar*, the court considered plaintiffs' freedom of association challenge to two statements that appeared in the *Oregon Bar Bulletin* following racially motivated killings in Portland.[124] The first was the Oregon State Bar's (OSB) "Statement on White Nationalism and Normalization of Violence," which was immediately followed by a joint statement by some Oregon specialty bar associations supporting the OSB's statement.[125] The latter included some statements critical of President Donald Trump.[126] The court found that plaintiff could establish an infringement on his associational freedom by showing that "a reasonable observer would attribute meaning to [bar] membership" or "would impute to him [an organization's] message to which he objects."[127] It expressly noted, however, that "[t]he bare fact that an attorney is a member of a state bar does not send any expressive message."[128]

In *Crowe*, the court concluded that plaintiff had shown that "a reasonable observer would attribute meaning to his membership in OSB" because the OSB through formatting and in other ways "endorsed the Specialty Bar's statement criticizing then-President Trump and suggested that all members agreed with it."[129] The court stated, "if OSB had made clear that its own statement reflected the views of OSB's leadership—and not its members—then there would be no infringement."[130] Moreover, even if there were an infringement, it would not be unconstitutional if the activity was germane.[131] But in that case, at least some of the specialty bars' statement was not germane because "much of its criticism of then-President Trump did not relate to the justice system at all."[132] The court dismissed the claims

124. *See* Crowe v. Or. State Bar, 112 F.4th 1218, 1225 (9th Cir. 2024).
125. *Id.*
126. *Id.* at 1225–1227.
127. *Id.* at 1235, 1236.
128. *Id.* at 1236. In a footnote, it later expressly disagreed with *McDonald's* holding—reiterated in *Boudreaux*—that "if a state bar engages in non-germane activities, compelled membership is necessarily unconstitutional." *Id.* at 1239 n.10. The *Crowe* court noted, "in many circumstances, membership in a state bar, standing alone, has no expressive meaning" and in those circumstances, even the bar's non-germane activities do not infringe on a member's freedom of association. *Id*.
129. *Id.* at 1236. The court reached this conclusion by reviewing the language in the OSB's Statement, the fact that the statements appeared on adjoining pages and were bordered in green by the OSB's colors and noting that it was signed by the OSB's President and Chief Executive Officer.
130. *Id.* at 1237.
131. *Id.* at 1239.
132. *Id.* For instance, the statement criticized Trump for describing Haiti and African countries as

against OSB on sovereign immunity grounds, but directed the lower court to determine forward-looking relief against the individual officer defendants.[133]

As this discussion indicates, the courts are at odds about what constitutes germane speech and about how much non-germane activity might render compelled membership unconstitutional. This uncertainty makes it difficult for state bars to predict which of its activities may be found problematic and no doubt chills the willingness of some state bars to engage in activities that some courts would find permissible.[134] Moreover, the state bars' inability in some jurisdictions to inform lawyers about issues that affect them (e.g., wellness, student debt), general topics that can affect their businesses (e.g., iPhone updates), and other law-related topics (e.g., big money contributions to judicial campaigns) is a loss for lawyers. In addition, even though some mandatory bars may be the only large bar organization in a state, they cannot defend judges from unjust criticism and will not criticize judges who depart from well-established judicial norms.[135] They seemingly cannot speak out collectively in support of democratic or rule of law norms. In short, lawyers cannot work through mandatory bars to fulfil some of their important responsibilities.

B. The Problems with Being a Governmental Instrumentality

For a variety of reasons, the legal profession has close connections with judges, and judges often favor the profession's interests.[136] As agencies of the judiciary, some mandatory bars have especially close connections with courts. This has proved to be a double-edged sword. It sometimes benefits lawyers in the development of the law governing lawyers. Yet there are also dangers in these arrangements, because mandatory state bars are more susceptible than voluntary bars to government interference in the bars' affairs.

"shithole countries." *Id*. at 1226–27.

133. *Id.* at 1225, 1240.

134. This is not an entirely new problem. *See* Schneyer, *supra* note 1, at 81 (noting this problem in the 1980's in the field of legislation and public policy making).

135. *See* Leslie C. Levin, *Mere Words: The Role of Bar Organizations in Maintaining Public Support for the Judiciary*, 87 LAW & CONTEMP. PROBS. 213, 239–41 (2024).

136. *See* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 458–59 (2008).

i. Too Much Influence Over the Law Governing Lawyers

Bar associations have long taken the lead in drafting rules governing lawyers' conduct.[137] Today, the ABA's *Model Rules of Professional Conduct* are often used as a starting point for promulgating states' rules.[138] The courts periodically consider whether to adopt the ABA's amendments to its *Model Rules* and other proposed changes to the law governing lawyers.[139] While state supreme courts are typically responsible for adopting the rules and other laws, in many jurisdictions, state bars are very involved in the rulemaking process. This is especially true of some mandatory state bars.[140]

Indeed, some states' laws expressly provide for mandatory state bars' involvement in drafting the rules governing lawyers.[141] The Oregon State Bar's Board of Governors, with the approval of State Bar members, has the statutory power to formulate rules of professional conduct for adoption by the Oregon Supreme Court.[142] The court cannot "formulate" rule changes, but justices sometimes work with State Bar committees that draft proposed amendments.[143] The mandatory North Carolina State Bar has statutory power to adopt rules of professional conduct, and the Supreme Court of North Carolina may only decline to have them entered if the chief justice concludes they are inconsistent with the statute governing the State Bar.[144]

137. The Alabama Bar Association was the first to adopt such a code in 1887. *See* Benjamin P. Crum, *The Alabama Code of Legal Ethics*, 2 ALA. LAW. 245, 245 (1941).

138. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules// [https://perma.cc/L27Q-5DW8].

139. The ABA also promulgates other model rules for jurisdictions to consider. *See, e.g.*, MODEL RULES OF LAW. DISCIPLINARY ENF'T (AM. BAR ASS'N 2002). In addition, rule proposals sometimes come from other sources.

140. The only voluntary state bar that appears quite as involved is the New York State Bar Association (NYSBA). The NYSBA is charged with drafting comments to New York's Rules of Professional Conduct, but where there is a conflict, the court-adopted rules prevail. *Professional Standards*, NYSBA, https://nysba.org/attorney-resources/professional-standards/ [https://perma.cc/ZG93-V9SS].

141. *See, e.g.*, ALA. CODE § 34-3-43(a)(3) (2024).

142. OR. REV. STAT. § 9.490(1) (2023). The Oregon State Bar Board of Governors, like the boards of many mandatory bars, includes non-lawyer members, but they are in the minority. OR. REV. STAT. § 9.025(1)(a)(C) (2023) (indicating four of nineteen members of Board are members of the public).

143. *See* Edwin J. Peterson, *Lawyer-Client Conflicts of Interest Law: Contributions of Chief Wallace P. Carson, Jr. During a Time of Dynamic Change*, 43 WILLAMETTE L. REV. 527, 528, 536 (2007).

144. N.C. GEN. STAT. § 84-21 (2023).

The court has only rejected the State Bar's proposals on three occasions.[145] The Idaho State Bar Board of Commissioners also has the statutory authority to formulate rules governing lawyer conduct.[146] These proposed rules must be approved by State Bar members and must then be approved the Idaho Supreme Court.[147] That court almost always waits for State Bar proposals rather than initiating its own.[148] It only rarely rejects a State Bar proposal.[149]

The State Bar of Texas is also deeply involved in the adoption of rules governing lawyers. Although that court has the inherent and statutory authority to adopt rules governing the State Bar,[150] the Texas State Bar Act provides for a process for the State Bar to propose to the court changes to the Disciplinary Rules of Professional Conduct.[151] That process requires a state bar referendum on rule proposals before they are sent to the Texas Supreme Court.[152] The court "has historically chosen to defer to a vote of State Bar members before making significant changes" to its Disciplinary Rules of Professional Conduct.[153] Moreover, the court may not reject or approve only part of a State Bar's proposed rule.[154] From 1987–2024, there were seven State Bar referenda on proposed rule changes and three referenda were defeated on votes by State Bar members.[155] Texas's rules

145. E-mail from Brian Oten, Ethics Couns., N.C. State Bar, to Maryanne Daly-Doran, Reference Libr., Univ. Conn. L. Sch. (June 10, 2024, 12:15 PM EDT) (on file with author).

146. IDAHO CODE § 3-408 (2024).

147. IDAHO CODE § 3-413 (2024); IDAHO BAR COMM'N R. 905(b), 906(b) (2024).

148. Leslie C. Levin, *The Politics of Lawyer Regulation*: *The Case of Malpractice Insurance*, 33 GEO. J. LEGAL ETHICS 969, 999 n.227 (2020).

149. *See* Daniel Ortner, *Idaho Supreme Court Rejects Controversial Ethics Rule 8.4(g)*, FEDERALIST SOC'Y (Feb. 22, 2023), https://fedsoc.org/scdw/idaho-supreme-court-rejects-controversial-ethics-rule-8-4-g [https://perma.cc/XUD3-559D] (reporting that the court "recently took the extraordinary state of unanimously rejecting a proposal by the Idaho State Bar Commissioners").

150. TEX. GOV'T CODE ANN. § 81.024(a) (West 2023); Nathan L. Hecht et al., *How Texas Court Rules are Made* 2–3, https://www.txcourts.gov/media/1374851/How-Court-Rules-Are-Made.pdf [https://perma.cc/T44M-HRE2].

151. *See* TEX. GOV'T CODE ANN. § 81.024(b) (West 2023).

152. *See* TEX. GOV'T CODE ANN. §§ 81.0878, 81.08792 (West 2023). The latter provision states that a "proposed disciplinary rule may not be adopted by the supreme court unless the rule is approved by" state bar members. TEX. GOV'T CODE ANN. § 81.08792 (West 2023).

153. SUNSET ADVISORY COMM'N, STATE BAR OF TEX. & BD. OF L. EXAM'RS, STAFF REPORT WITH FINAL RESULTS 2016–2017, at 13 (June 2017), https://www.sunset.texas.gov/public/uploads/files/reports/State%20Bar%20of%20Texas%20and%20Board%20of%20Law%20Examiners%20Staff%20Report%20with%20Final%20Results_6-21-17_0.pdf [https://perma.cc/FE8R-F56K].

154. TEX. GOV'T. CODE ANN. § 81.0879 (West 2023).

155. SUNSET ADVISORY COMM'N, *supra* note 153, at 15; Lowell Brown, *Texas Lawyers Approve Rule Amendments in 2021 Rules Vote*, STATE BAR OF TEX. (Mar. 4, 2021),

governing lawyers are among the least protective of clients in the nation.[156]

Even when mandatory state bar involvement in rulemaking is not provided for by court rule or statute, courts will sometimes ask mandatory state bars to study an issue and make recommendations.[157] It is important to note, however, that in several jurisdictions, rule proposals also come from the courts or other sources.[158] Some state courts establish a committee or task force to investigate an issue, either before or after they receive bar input.[159] Some will also seek public comment.[160] Moreover, courts will sometimes amend, reject, or ignore mandatory bar rule proposals.[161] Thus, mandatory state bars' heavy involvement in drafting the laws governing lawyers is a feature of some—but not all—mandatory bars.

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https://blog.texasbar.com/2021/03/articles/state-bar/texas-lawyers-approve-rule-amendments-in-2021-rules-vote/ [https://perma.cc/97M6-Q63G]; Adolfo Pesquera, *New Rules for Attorney Discipline Pending Before Texas Supreme Court*, TEX. LAW. (June 4, 2024, 3:30 PM), https://www.law.com/texaslawyer/2024/06/04/new-rules-for-attorney-discipline-pending-before-texas-supreme-court/ [https://perma.cc/UJQ6-FMA2].

156. *See* Leslie C. Levin, *Ordinary Clients, Overreaching Lawyers, and the Failure to Implement Adequate Client Protection Measures*, 71 AM. U. L. REV. 447, 485–88 (2021).

157. *See, e.g.*, D.C. BAR RULES OF PRO. CONDUCT REV. COMM., PROPOSED AMENDMENTS TO SELECTED RULES OF THE D.C. RULES OF PROFESSIONAL CONDUCT 6 (Feb. 2020), https://www.dcbar.org/getmedia/d74cb4d3-2a52-4456-9766-c3fe460e93ef/Rules-Review-Committee-Report-FN-February-2020 [https://perma.cc/4467-9FSV].

158. *See, e.g.*, *Forum FAQs*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/rules/Forum-FAQ [https://perma.cc/Y4UV-Y5LU] (stating that anyone can file a petition to adopt or amend a rule); Karen Sloan, *Mississippi Supreme Court Proposes Mandatory Pro Bono*, LEGAL INTELLIGENCER (Sept. 29, 2010, 12:00 AM), https://www.law.com/thelegalintelligencer/almID/1202472650752/ [https://perma.cc/B95U-FLMN].

159. *See, e.g.*, REPORT TO THE ARIZONA JUDICIAL COUNCIL FROM THE TASK FORCE ON ETHICS RULES GOVERNING THE STATE ATTORNEY GENERAL, COUNTY LAWYERS, AND OTHER PUBLIC LAWYERS 5 (Dec. 14, 2023), https://www.azcourts.gov/LinkClick.aspx?fileticket=qWUVQ-QWYpo%3d&portalid=84 [https://perma.cc/F77H-76AN] (describing task force established on court's initiative); Press Release, La. Sup. Ct. (Oct. 31, 2008), https://www.lasc.org/Press_Release?p=2008-18 [https://perma.cc/F5WX-S2H7] (describing court committee constituted after court received recommendations from the mandatory state bar).

160. *See, e.g.*, *In re* Guidelines for Submission and Review of Proposed Rule Amendments, Order 2023-32 (Ky. Sup. Ct. Sept. 19, 2023), https://www.kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202332.pdf [https://perma.cc/GTV2-H4NM].

161. For example, the Oklahoma Bar Association proposed a rule amendment to permit lawyers to counsel clients concerning marijuana laws. Kimberly Hays, *December 2018 President's Message*, OKLA. BAR ASS'N, https://www.okbar.org/governance/president-messages/2018december [https://perma.cc/D3LR-CZ8C]. The Oklahoma Supreme Court never acted on the proposal. Likewise, the Nevada Supreme Court rejected the mandatory bar's proposal to require lawyers to carry malpractice insurance. *See* Levin, *supra* note 148, at 1012–1014.

ii. Potential For Too Much Control by Courts or Legislatures

While some mandatory bars may have too much influence in the rulemaking process, in some instances, courts and legislatures can wield too much power over the bars' activities. Initially, lawyers sought the help of legislatures to establish mandatory state bars, but later turned to courts to do so.[162] Court orders 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.[163] 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."[164]

The legal profession has also acted in other ways to encourage courts to regulate lawyers and claim the exclusive power to do so.[165] At the same time, the bar justifies its deep involvement in its own regulation ("self-regulation") to the importance of remaining independent. As the ABA's *Model Rules* preamble notes, self-regulation "helps maintain the legal profession's independence from government domination."[166] It continues, "[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."[167]

As Professor Bruce Green suggests, when the bar argues for preserving lawyers' "independence" it is "really advancing an idea of powers: that the courts should have (relatively) exclusive authority to regulate lawyers."[168] At the same time, he argues, the profession may actually regard judicial regulation of lawyers as "the lesser of two evils."[169] In fact, some government regulation of the profession will almost certainly better protect the public than true self-regulation. Nevertheless, there is also a serious need

162. MCKEAN, *supra* note 1, at 42–48.
163. *Id.* at 48.
164. *Id.*
165. *See, e.g.*, Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 QUINNIPIAC L. REV. 97, 148–50, 157–60 (2018).
166. MODEL RULES OF PRO. CONDUCT pmbl., P.11 (AM. BAR ASS'N 2024).
167. *Id.*
168. Bruce Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 605 (2013).
169. *Id.*

for lawyers to maintain some measure of independence from all branches of government so that they can freely challenge the state—including judges—when necessary.

There have been a few occasions when mandatory bar activities have been seriously constrained by the government. One example comes from California, which maintained a mandatory bar until 2017.[170] During the 1980s, due to the California legislature's displeasure with the State Bar over its political activities and its administration of the Bar-run lawyer discipline system, it declined to approve the dues bill the State Bar needed to collect membership fees.[171] This left the State Bar unable to raise money for its operations for five months, until the legislature reconvened and a dues bill was signed into law.[172] More recently, in 2016, the legislature again failed to pass a State Bar dues bill, in part because of "a deep ideological divide over how much oversight the Legislature should have over the [State Bar]."[173] After more than two months of uncertainty about how the State Bar would fund its operations, the California Supreme Court rescued the State Bar by authorizing it to collect interim dues.[174]

In Florida, the state supreme court has drastically limited the Florida Bar's diversity and inclusion efforts. After Governor Ron DeSantis took office in 2019, he quickly appointed three conservative supreme court justices and the court began to eliminate efforts to promote diversity in the profession.[175] In 2021, after the Florida Bar's Business Law Section adopted a new speaker policy modelled on the ABA's policy—which required diversity in its continuing legal education (CLE) panels[176]—the supreme

170. *See infra* note 196 and accompanying text.

171. *See* Dan Morain, *Justices Reject California Bar's Financial Plea*, L.A. TIMES, Nov. 20, 1985, at A20; William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 546–49 (1995).

172. RICHARD L. ABEL, LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT 22–25 (2011).

173. Maria Dinzeo, *Calif. Legislature Leaves State Bar Unfunded*, COURTHOUSE NEWS SERV. (Sept. 1, 2016), https://www.courthousenews.com/calif-legislature-leaves-state-bar-unfunded/ [https://perma.cc/AE9C-FBB2].

174. Lorelei Laird, *California Supreme Court Orders Interim Dues for State Bar of California*, A.B.A. J. (Nov. 18, 2016), https://www.abajournal.com/news/article/california_supreme_court_orders_interim_dues_for_state_bar_of_california [https://perma.cc/SC8N-M3BV].

175. *See* Akela Lacy, *DeSantis Stacked Florida's Supreme Court with Cronies Who Wage His War on Wokeness—or Else*, INTERCEPT (June 3, 2023, 5:00 AM), https://theintercept.com/2023/07/03/desantis-florida-supreme-court/ [https://perma.cc/5F2M-NMG2].

176. *See* David L. Hudson Jr., *Diversity in CLE: Florida Supreme Court Order Devalues the Legal Profession's Inclusion Goals, Experts Say*, A.B.A. J. (Oct. 1, 2021),

court issued an order prohibiting approval of CLE credits that uses "quotas based on race, ethnicity, gender, religion, national origin or sexual orientation."[177] This effectively precluded Florida lawyers from obtaining CLE credit for attending ABA programs. The court subsequently accepted comments from the Florida Bar, the ABA, other bar associations, and a letter from eighty-five law school deans asking the court to reverse its position, but the court declined to do so.[178] The ABA subsequently modified its policy so that Florida lawyers could earn CLE credit by attending ABA programs.[179]

This was only the beginning of the court's campaign to eliminate diversity, equity, and inclusion (DEI) efforts from the Florida Bar's activities. In 2023, on its own initiative, the court removed "bias elimination" CLE from the sub-group of courses lawyers must choose from to fulfil their CLE requirements.[180] The following year, it directed the Florida Bar to remove all funding for its diversity and inclusion efforts from its budget.[181] As a consequence, the Florida Bar has ended its Diversity and

https://www.abajournal.com/magazine/article/florida-supreme-court-order-devalues-the-legal-professions-inclusion-goals-experts-say [https://perma.cc/G4LR-W5UD]. The policy required one diverse panelist for groups of three or four and two diverse speakers for groups of five to eight with "diversity" defined broadly to include "race ethnicity, gender, religion, national origin or sexual orientation." It provided exceptions if a diverse panelist could not be found after a diligent search. *Id.*

177. *In re* Amend. to Rule Regulating the Fla. Bar 6-10.3, 315 So. 3d 637, 639 (Fla. 2021).

178. *In re* Amend. to Rule Regulating the Fla. Bar 6-10.3, 335 So. 3d 77, 80-82 (Fla. 2021); Dara Kam, *Florida Supreme Court Draws Fire Over Rule on Continuing Lawyer Education*, TAMPA BAY TIMES (July 9, 2021), https://www.tampabay.com/news/florida-politics/2021/07/09/florida-supreme-court-draws-fire-over-rule-on-continuing-lawyer-education/ [https://perma.cc/9MNS-3TE6]; Noreen Marcus, *A Florida Supreme Court Justice Warns of "A Series of Drastic Changes" Served Up by His Conservative Colleagues*, FLA. BULLDOG (Dec. 17, 2021), https://www.floridabulldog.org/2021/12/florida-supreme-court-justice-warns-of-series-of-drastic-changes-by-conservative-colleagues/ [https://perma.cc/MAU3-VPQ5].

179. Madison Arnold, *ABA Goes Way of Fla., Eliminates CLE Diversity Requirements*, LAW360 (Apr. 11, 2022, 4:32 PM), https://www.law360.com/pulse/articles/1482809/aba-goes-way-of-fla-eliminates-cle-diversity-requirements [https://perma.cc/RVY7-SE6M]. The ABA now simply encourages programs to "invite and include" CLE panelists from diverse backgrounds. *Id.*

180. Michael A. Mora, *Florida Supreme Court Modifies Professionalism, CLE Rules*, LAW.COM (Aug. 2, 2023, 2:13 PM), https://www.law.com/dailybusinessreview/2023/08/02/florida-supreme-court-modifies-professionalism-cle-rules/ [perma.cc/E68L-DB34]; Alex Ebert, *Florida's Anti-DEI Push Axes 'Bias Elimination' Lawyer Training*, BLOOMBERG L. (Feb. 29, 2024, 11:33 AM), https://news.bloomberglaw.com/social-justice/floridas-anti-dei-push-axes-bias-elimination-lawyer-training [perma.cc/FAP2-FLFX].

181. *The Florida Bar Board of Governors Regular Minutes January 19, 2024*, at 3–4, FLA. BAR (2024), https://www-media.floridabar.org/uploads/2024/04/Regular-Minutes-January-19-2024-meeting-Revised.pdf [https://perma.cc/FZA8-6TAC]; Jack Karp, *Fla. Justices Tell State Bar to Eliminate Diversity Funding*, LAW360 (Jan. 31, 2024, 4:43 PM),

Inclusion Committee—which also supported some local bar organizations' diversity initiatives[182]—and may not request other funds for diversity programs.[183] The court has also asked the State Bar's Board of Governors to remove references to "diversity and inclusion" from its standing board policies.[184]

Around this same period, the supreme court also dissolved its own Standing Committee on Fairness and Diversity, eliminated a requirement that new judges attend a day-long program on fairness and diversity,[185] and eliminated the possibility of satisfying judicial ethics training requirements through designated courses on diversity and fairness.[186] Florida Supreme Court Justice Jorge Labarga, the sole dissenter, stated "this unilateral action potentially eliminates vital educational content from our state courts' judicial education curriculum and does so in a manner inconsistent with this Court's years-long commitment to fairness and diversity education."[187] Moreover, the order, "paves the way for a complete dismantling of all fairness and diversity initiatives in the State Courts System."[188] The court subsequently allowed public comment on these changes,[189] but the Florida Bar—possibly concerned about displeasing the court—did not comment. The 1,300-member Cuban American Bar Association was the only bar organization that filed a comment concerning these changes.[190]

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https://www.law360.com/pulse/articles/1792467/fla-justices-tell-state-bar-to-eliminate-diversity-funding [https://perma.cc/JA9W-ZB6M].

182. Noreen Marcus, *Supreme Court Justices Take Shortcuts to End Lawyer Diversity Training; Write Rules that Boost Business Interests*, FLA. BULLDOG (Mar. 10, 2024, 4:50 AM), https://www.floridabulldog.org/2024/03/supreme-court-justices-take-shortcuts-end-lawyer-diversity-training-writes-rules-boosting-business// [https://perma.cc/7T5S-5D8D].

183. Alex Ebert, *Florida Bar Diversity Funding Cut by State Supreme Court (2)*, BLOOMBERG L. (Jan. 31, 2024, 1:08 PM), https://news.bloomberglaw.com/us-law-week/florida-bars-diversity-funding-cut-off-by-state-supreme-court [https://perma.cc/AW6U-LAUM].

184. Madison Arnold, *Fla. Bar Eyes Scraping Diversity Language from Board Policy*, LAW360 (Nov. 13, 2024, 4:21 PM), https://www.law360.com/pulse/mid-law/articles/2260440/fla-bar-eyes-scraping-diversity-language-from-board-policy [https://perma.cc/7DGN-ECL8].

185. *In re* Standing Comm. on Fairness and Diversity, No. AOSC23-7 (Fla. 2023), https://supremecourt.flcourts.gov/content/download/859293/file/AOSC23-7.pdf [https://perma.cc/4GPL-U2KG].

186. *In re* Amends. to Fla. Rule of Gen. Prac. & Jud. Admin. 2.320, 356 So. 3d 766, 767 (Fla. 2023).

187. *Id.* at 768.

188. *Id.*

189. Jim Saunders, *Court Sticks with Decision on Judges' Educations*, ORLANDO SENTINEL, Sept. 9, 2023, at A4.

190. *See* Cuban Am. Bar Ass'n, Comment on *In re* Amends. to Fla. Rule of Gen. Prac. & Jud.

Of course, supreme courts—not the bar—determine lawyer CLE and judicial training requirements. But the important point is that DEI is an area in which some government actors are adversely affecting salutary goals of the organized bar. For example, the mandatory Alabama Bar has noticeably cut back on DEI efforts,[191] seemingly because of concerns about the State Bar's vulnerability. One knowledgeable individual stated, "in general, the current climate surrounding diversity and equitable inclusion programs/initiatives or even as a concept exists in a fragile state at best after the Anti-DEI bill passed by our legislature and signed by the Gov. on March 20, 2024."[192] That legislation prohibits state agencies from maintaining any office, location, or department that promotes DEI programs, as defined in the statute.[193] During this period of increased politicization of a number of issues, it makes sense to ask whether it would be preferable for state bars to operate as independent organizations rather than as governmental entities.

III. ARE MANDATORY STATE BARS BETTER THAN THE ALTERNATIVES?

At a time when the future of mandatory bars is legally uncertain, and some of their work has been curtailed, it makes sense to ask: should mandatory state bars continue? Recall that the justification for mandatory bars was that they would provide a *better* way to regulate lawyers, lobby the legislature, and protect the public than weaker voluntary state bars. Perhaps that was once true. But today, it is not clear that, on the whole, mandatory bars are better able to achieve their stated goals than states with voluntary state bars.[194]

Admin. 2.320 (Apr. 18, 2023).

191. The Alabama State Bar president announced that the theme of February 2022 would be "diversity and inclusion." Tazewell T. Shepard, III, *President's Page*, 83 ALA. LAW. 8, 10 (2022). In contrast, there was no programming concerning DEI at its 2024 annual meeting and no mention of the topic in its annual report. ALA. STATE BAR, ALABAMA STATE BAR 2024 YEAR IN REVIEW, https://www.alabar.org/assets/2024/07/2023-24-Annual-Report.pdf [https://perma.cc/2FUC-PXY4].

192. E-mail from Ala. State Bar Member, to Maryanne Daly-Doran, Univ. of Conn. L. Sch. Reference Libr. (May 30, 2024, 11:43 AM EDT) (on file with author).

193. S.B. 129, 2024 Leg., Reg. Sess. (Ala. 2024); Kyle Gassiott, *Alabama Governor Signs Anti-DEI Law*, NPR (Mar. 20, 2024, 7:35 PM), https://www.npr.org/2024/03/20/1239761019/alabama-governor-signs-anti-dei-law [https://perma.cc/Y4MC-XEDJ].

194. This is not meant to suggest that there are no mandatory state bars that perform their regulatory functions better than outside regulators in some other states. For a discussion of the problems with New York's system, which is run by outside regulators, see Stephen Gillers, *Lowering the Bar:*

A. Are Mandatory Bars Better Regulators?

There is no clear evidence that mandatory bars do a better job administering important lawyer regulatory functions than states with separate regulatory agencies. This is unsurprising: there is nothing inherent in being a mandatory bar that should make them better regulators. Indeed, over the years, some jurisdictions concluded that it was preferable to move admissions and discipline functions outside of mandatory bars and into separate agencies.[195] Most recently, in 2017, the California legislature voted to decouple the State Bar of California's regulatory functions from a new voluntary California Lawyers Association.[196]

Today only eight mandatory bars handle admission to law practice.[197] Admissions processes have become more uniform across jurisdictions, largely due to the widespread use of the Uniform Bar Examination and the National Conference of Bar Examiners' model Character and Fitness application.[198] There are no studies indicating that the mandatory bars make fewer "mistakes" when admitting lawyers or denying admission than do bar admissions agencies in other jurisdictions (nor is this easily measured). Their bar exam cut scores are roughly comparable to those used in jurisdictions with separate admissions agencies.[199] While some admissions practices are less desirable than others—such as intrusive character and fitness questions about past mental health treatment — some mandatory bars continue to ask these questions, as do some states with separate bar admissions agencies.[200]

How Lawyer Discipline in New York Fails to Protect the Public, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 490, 496–540 (2014).

195. *See* Schneyer, *supra* note 1, at 4.

196. *See* S.B. 36, 2017–18 Leg., Reg. Sess. (Cal. 2017) (codified at CAL. BUS. & PROF. CODE §§ 6001–6141.3 (West 2023).

197. *See supra* note 15.

198. *See Adoption of the Uniform Bar Examination with NCBE Tests Administered by Non-UBE Jurisdictions*, NCBE (Feb. 22, 2022), https://www.ncbex.org/sites/default/files/2023-02/UBE_Adoption.pdf [https://perma.cc/T6KP-CJ2W]; *NCBE Character and Fitness Sample Application*, NCBE (Jan. 12, 2021), https://www.ncbex.org/sites/default/files/2023-02/NCBE-Character-and-Fitness-Sample-Application-4.pdf [https://perma.cc/8VGG-3YXS].

199. *See UBE Minimum Scores*, NCBE, https://www.ncbex.org/exams/ube/ube-minimum-scores [https://perma.cc/9L8L-57CQ] (indicating range of cut scores for the eight mandatory bars that administered bar admission were similar to cut scores in other jurisdictions).

200. *See Mental Health Character & Fitness Questions for Bar Admission*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/disabilityrights/resources/character-and-fitness-mh/ [https://perma.cc/SHP9-AHE3] (indicating that the Alabama and Nevada mandatory bars, as well as

Proponents of mandatory bars expected these bars to make the biggest improvements in the realm of lawyer discipline.[201] While some mandatory bars initially brought improvements,[202] it is hard to compare lawyer discipline systems today. Recidivism data are difficult—and often impossible—to obtain. It is possible, however, to make a few very general observations. The discipline systems administered by mandatory state bars appear to be somewhat less well-funded than the other state discipline agencies. Using data from the most recent ABA *Survey on Lawyer Discipline Systems*—to which most but not all jurisdictions responded—it appears that the lowest-funded mandatory state bar discipline system was funded at $75.75 per lawyer, as compared to $96.18 per lawyer for the lowest-funded state discipline agency in other jurisdictions.[203] The highest discipline budgets per lawyer were in states with separate state discipline agencies and in two mandatory bar jurisdictions that received funding in addition to state bar dues.[204]

Discipline budgets are extremely crude measures and not necessarily indicative of the quality of the systems. For example, California's discipline system receives the second most dollars for lawyer discipline per capita ($383), yet it is deficient in several respects.[205] Moreover, in some jurisdictions, the lower per capita expenditures may mean that mandatory bars are more cost effective due to shared office space or that the cost of

some jurisdictions with separate bar admission agencies, continue to directly ask about mental health).

201. *See* MCKEAN, *supra* note 1, at 120 (stating "[n]o argument for the integration of the bar has been more widely or frequently used" than the argument that mandatory bars would fill the need for more or improved lawyer discipline).

202. *See* Schneyer, *supra* note 1, at 18, 21.

203. The Kentucky, Nebraska, and Texas systems were the lowest-funded discipline systems on a per capita basis, with allocations of $75.75, $87.20, and $87.30, respectively, for each admitted lawyer. *See* AM. BAR ASS'N, STANDING COMMITTEE ON PROFESSIONAL REGULATION, 2021 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.), Chart VII, at 2, 3, 5 (Nov. 2023) [hereinafter ABA SOLD], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sold-survey/2021/2021-chart-7-budget-source-funding.pdf [https://perma.cc/BY2D-MDEG]. The lowest expenditure in states where a separate agency handled discipline were in New York's Second Department and Ohio, with $96.18 and $99 per capita expenditures, respectively. *See id.* at 4.

204. Jurisdictions that spent over $200 per lawyer on discipline were Arizona, California, Colorado, Hawaii, Illinois, Kansas, New Hampshire, Louisiana, and North Dakota. Alaska and Nevada, where mandatory bars handle discipline, also had budgets exceeding $200 per capita. *See id*. at 1–4.

205. *See* Matt Hamilton, *After 'Real Housewives' Scandal, Scathing Audit Says California Fails to Stop Corrupt Lawyers*, L.A. TIMES (Apr. 14, 2022), https://www.latimes.com/california/story/2022-04-14/california-state-bar-failed-stop-corrupt-attorneys-tom-girardi-audit [https://perma.cc/E8FW-69ZB].

doing business is generally lower. Other metrics could also be used to assess discipline systems (e.g., time to resolution, appropriateness of disposition, complainant satisfaction), but that data are unavailable, incomplete, or difficult to compare. It seems worth noting, however, that some of the most important innovations in lawyer discipline have come from states where lawyer discipline is handled by a separate agency.[206] There is no clear evidence that most mandatory bars do a better job in this regard.[207]

B. Do Mandatory Bars Lead to Better Public Protection?

Efforts to compare whether mandatory bars are "better" at protecting the public are also challenging. Sometimes state bar rule proposals are good for lawyers *and* the public. For example, when the Oregon State Bar voted to require lawyers to maintain malpractice insurance through a bar-funded program, it was prompted by lawyers' concerns about rising insurance costs as much as an interest in protecting the public.[208] State bars sometimes use public interest arguments to advance regulations that are manifestly good for lawyers.[209] Although no systematic comparison has been performed, it would not be surprising if some mandatory bars propose more lawyer regulation that protects the public than voluntary state bars. After all, one of the purposes of mandatory state bars is public protection. Public protection

206. For example, Iowa, which has a voluntary state bar, was the first discipline system to use random audits of trust accounts to detect defalcations. *See* Emily Couric, *Random Audits of Trust Accounts*, A.B.A. J., Oct 1986, at 70. Likewise, Colorado and Illinois, which also have voluntary state bars, were the first jurisdictions to adopt the use of self-assessments to improve lawyers' practices and help avoid discipline. *See* Susan Saab Fortney, *Keeping Lawyers' Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession*, 33 GEO. J. LEGAL ETHICS 891, 900–09 (2020).

207. Earlier efforts to explore this question reached similar conclusions. *See, e.g.*, MCKEAN, *supra* note 1, at 123–24 ("Perhaps all that can be said for the improved-discipline argument for the integrated bar is that it is unproved."); Schneyer, *supra* note 1, at 23 (noting that with the systems jurisdictions have in place, "there is no reason to think that the voluntary bar states as a class have less effective disciplinary enforcement than the unified states").

208. *See* Levin, *supra* note 148, at 997–98.

209. For example, when a Michigan Supreme Court Task Force recommended deleting from the State Bar's rules language stating that the Bar shall "promote the interests of the legal profession in the state," the State Bar sought to retain the language, arguing that even efforts that benefit lawyers' economic interests could increase access to justice. *See* STATE BAR OF MICH., STATE BAR OF MICHIGAN COMMENTS ON THE REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON THE ROLE OF THE STATE BAR OF MICHIGAN 5 (July 31, 2014), https://www.michbar.org/file/news/releases/archives14/BOCcomments.pdf [https://perma.cc/K83K-VPFD].

is not typically central to the mission of voluntary state bars.[210]

Yet mandatory bars do not consistently put the public's interests before lawyers' interests. For example, after a Washington State Bar Association (WSBA) task force recommended that the WSBA propose to the Washington Supreme Court that lawyers be required to maintain malpractice insurance,[211] the Board of Governors held a public hearing and received written comments. The Board then voted 9-5 to reject the recommendation.[212] The majority indicated they were reflecting the will of the State Bar members, who were "overwhelmingly opposed" to mandatory insurance.[213] Likewise, a "firestorm" of member opposition led to the death of the WSBA's efforts to propose a mandatory fee arbitration rule for lawyers.[214]

These examples are not meant to suggest that mandatory bars never put public protection ahead of lawyers' interests.[215] But it is unclear that, on balance, the existence of mandatory bars leads to more lawyer regulation that protects the public than is found in jurisdictions with voluntary state bars. For example, Schneyer noted that mandatory state bars, as a group,

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210. *Compare About CLA*, CAL. LAWS.' ASS'N, https://calawyers.org/cla/ [https://perma.cc/C7AH-Z7FK] (stating that association "is a member-driven, mission-focused organization dedicated to the professional advancement of attorneys practicing in the state of California"), *with Our Mission*, STATE BAR OF NEV., https://nvbar.org/about-us/our-mission/#:~:text=Our%20Mission%20is%20to%20govern,our%202024%2D2026%20Strategic%20Plan [https://perma.cc/UZ9S-V4LV] ("Our Mission is to govern the legal profession, to serve our members, and to protect the public interest.").

211. WASH. STATE BAR ASS'N, MANDATORY MALPRACTICE INS. TASK FORCE, REPORT TO WSBA BOARD OF GOVERNORS 2 (Feb. 2019), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report.pdf?sfvrsn=359e99f5_4 [https://perma.cc/EF8Z-8HWP].

212. Timothy Darragh, *Washington State Bar Nixes Mandatory Malpractice Insuranc*e, BESTWIRE (May 31, 2019).

213. *Id.* The State Bar of Georgia's Board of Governors also declined to adopt a mandatory insurance requirement or an insurance disclosure rule proposed by its Professional Liability Insurance Committee due, in part, to lawyer opposition. *See* Everett Catts, *State Bar Votes to Keep Professional Liability Insurance, Disclosure Optional*, DAILY REP. ONLINE (Oct. 26, 2021), https://www.bloomberglaw.com/document/X2FU1AMG000000?jcsearch=hdh45kemhj#jcite [https://perma.cc/V4CY-DM6Q].

214. Levin, *supra* note 156, at 466.

215. Indeed, in 2017, the Idaho State Bar voted in support of a rule requiring lawyers to carry insurance to protect the public. *See* Levin, *supra* note 148, at 1000–02. Similarly, in 2018, the Nevada State Bar Board of Governors petitioned the Nevada Supreme Court for a rule change that would require lawyers to maintain malpractice insurance, but the court declined to adopt it after hearing opposition from lawyers. *See id.* at 1013–14.

were slower to adopt client security funds than states with voluntary bars.[216] Likewise, a more recent comparison of client protection measures revealed that of the ten states with the fewest client protection measures, eight were states with mandatory bars.[217] Of course, state bar recommendations are not, in most states, the only reason why courts adopt or reject rule changes governing lawyers. Judges' attitudes, the composition of court-appointed committees, insurers, recent instances of lawyer misconduct, and other factors also influence which rules are ultimately adopted.[218] But it is far from clear that mandatory bars lead to more public protection than is found in jurisdictions with voluntary state bars.

IV. THE CASE FOR MANDATING STATE BAR MEMBERSHIP

There are three reasons, apart from convenience, to continue mandatory state bars. The first reason—which almost exclusively benefits lawyers—is that some mandatory bars play a very powerful role in the promulgation of rules governing lawyers. This enables those bars to more effectively protect lawyers' interests.[219] Although voluntary state bars also propose rule changes to courts, they do not typically have as much influence over the rulemaking process as some of the mandatory bars. This power to further lawyers' economic interests was precisely what Harley had hoped for, but from the public's perspective, it is hardly a compelling reason to preserve mandatory bars.

The second reason asserted for maintaining mandatory bars is that their annual membership fees are typically lower than the bar registration fees and voluntary state bar dues that lawyers pay in other jurisdictions. One

216. Schneyer, *supra* note 1, at 100.

217. *See* Levin, *supra* note 156, at 494. The comparison looked at whether jurisdictions required written fee agreements, mandatory fee arbitration, insurance payee notification, trust account overdraft reporting, and random audits of trust accounts. *Id.*

218. Another factor may be the extent to which a state is consumer protection oriented. It appears that the most consumer protection-oriented states tend to vote for Democrats in presidential elections. *See, e.g.*, RYAN CLARKSON ET AL., INTERNATIONAL COMPARATIVE LEGAL GUIDES, CONSUMER PROTECTION LAWS AND REGULATIONS USA 2024, at § 1.1 (Dec. 4, 2024), https://iclg.com/practice-areas/consumer-protection-laws-and-regulations/usa#:~:text=States%20with%20the%20broadest%2C%20most,New%20York%2C%20Connecticut%20and%20Vermont [https://perma.cc/VQ7J-W635] (reporting that the states with greatest consumer protections are Hawaii, California, Illinois, New York, Massachusetts, Connecticut, and Vermont). Many of the states with mandatory bars are in the South, Midwest, and Upper Plains and tend to vote for Republicans.

219. *See, e.g.*, *supra* note 141 and accompanying text.

reason why a court-appointed task force in Michigan recommended continuation of the integrated State Bar of Michigan in 2014 was "the cost of regulating the legal profession is born entirely by attorneys licensed to practice law, at a cost below the national average."[220] (Note, however, that the State Bar does not administer bar admissions or discipline.) The Task Force also contended that the State Bar "provided services and performed its mission more efficiently and at a lower cost nationally than if it were done by a voluntary bar."[221] In Michigan, lawyers pay $415 to be licensed,[222] while in nearby Minnesota, licensing fees plus membership in the voluntary Minnesota State Bar Association total $564.[223] The services offered to bar members by the two state bars do not appear, on their face, to be significantly different,[224] although closer study may reveal some differences. The total cost to Wisconsin lawyers is undeniably lower, however, and this seems true in other states with mandatory bars.[225]

220. TASK FORCE ON THE ROLE OF THE STATE BAR OF MICH., REPORT TO THE MICHIGAN SUPREME COURT 5 (June 2, 2014). In fact, virtually all jurisdictions report that lawyers, and not taxpayers, pay for lawyer regulation. *See, e.g.*, ABA SOLD, *supra* note 203.

221. TASK FORCE ON THE ROLE OF THE STATE BAR OF MICH., *supra* note 220, at 5.

222. *See License Renewal: Frequently Asked Questions*, STATE BAR OF MICH., https://www.michbar.org/licenserenewalfaq [https://perma.cc/DKM9-DEMK].

223. *See Annual Lawyer Registration Fees*, MINN. SUP. CT. LAW. REGISTRATION OFF., https://lro.mn.gov/for-lawyers/annual-lawyer-registration-fees/ [https://perma.cc/P3W9-MT9E] (reporting that licensing fees for lawyers admitted more than three years are $274); *See MSBA Membership Categories*, MINN. STATE BAR ASS'N, https://www.mnbar.org/docs /default-source/marketing/attorney-info-sheet.pdf?sfvrsn=53d144e2_24 [https://perma.cc/G2U8-QLTK] (stating that dues for lawyers admitted over five years are $290). Part of the difference in the two states' dues is because Minnesota spends somewhat more per capita on lawyer discipline. *See* ABA SOLD, *supra* note 203, at 3.

224. The Michigan Task Force touted the State Bar's journal, Casemaker, the Practice Management Resource Center, and ethics helpline. TASK FORCE ON THE ROLE OF THE STATE BAR OF MICH., *supra* note 220, at 5 n.13. In Minnesota, comparable benefits seemingly can be obtained from the Minnesota State Bar Association and a regulator-run ethics hotline. *See Member Services Guide*, MINN. STATE BAR ASS'N, https://www.mnbar.org/members/membership-benefits/member-services-guide [https://perma.cc/M2BZ-9AY5]; *Advisory Opinions (Ethics Hotline)*, MINN. LAWS. PRO. RESP. BD., https://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx [https://perma.cc/KAS5-8L88].

225. For example, the Utah State Bar charges most lawyers $425, plus up to $20 for the Client Security Fund. *See Licensing Statuses, Types & Policies*, UTAH STATE BAR, https://www.utahbar.org/licensing/status-type-policies/ [https://perma.cc/47V6-765W]. In nearby Colorado, the licensing fees and voluntary Colorado Bar Association (CBA) dues for lawyers total up to $660, and CBA members with a primary Colorado address must also pay for an affiliated membership with a local bar association. *See Paying Your Registration Fees*, COLO. SUP. CT., https://www.coloradosupremecourt.com/Current%20Lawyers/Fees_Registration.asp [https://perma.cc/DQ3C-SK7P]; *Attorney Member Pricing Sheet*, COLO. BAR ASS'N,

The third, and most compelling, reason for maintaining mandatory bars is that they potentially expose every lawyer admitted to practice in the state to their socialization, mentoring, and educational functions. Indeed, bar organizations are an important site where lawyers construct their understanding of what it means to be a professional.[226] Socialization occurs through discussions with other lawyers, listservs where ethical issues are discussed, participation in mentoring programs, and in other ways.[227] Bar organizations also help lawyers maintain competence through educational offerings that enable lawyers to stay up to date with the law.[228] These benefits are available to every lawyer belonging to a mandatory state bar. Many lawyers in jurisdictions with voluntary state bars do not join those organizations.[229]

Of course, lawyers who do not belong to their voluntary state bars may not be practicing law or may belong to a local, specialty or affinity bar association that better meets their needs. Yet some practicing lawyers in states with voluntary bars do not belong to any bar association. We do not know how many. Those lawyers miss the socialization, mentoring, and educational benefits of belonging to a bar organization. This may be especially true of government lawyers and lawyers with less lucrative private practices who cannot afford both the annual cost of state lawyer licensing fees and the cost of a bar membership. The latter might be solo and small law firm practitioners who could greatly benefit from belonging to a bar association.

While this is concerning, it may not be a sufficient reason to compel

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https://www.cobar.org/Portals/COBAR/Repository/Membership/2024-25%20CBA%20Attorney%20Member%20Pricing%20Sheet%20(1).pdf?ver=KFfz3AGUulv6Efbo8GMMnw%3d%3d [https://perma.cc/Q3JT-9TFE]. Some of the cost difference is because Utah spends about $140 per lawyer for discipline while Colorado spends $275 per capita. ABA SOLD, *supra* note 203, at 1, 5.

226. *See* Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS IDEALS/LAWYERS PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177, 185 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992)

227. *See* Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194, 208–12 (2011) [hereinafter *Specialty Bars*]; Leslie C. Levin, *Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers*, 37 ARIZ. ST. L.J. 589, 607–14 (2005).

228. *See* Levin, *Specialty Bars*, *supra* note 227, at 206–08.

229. While in some states the percentage of lawyers who belong to voluntary bars is high, in others, it is not. *See* Levin, *supra* note 46, at 8–9 (noting that in a few jurisdictions, less than half of the admitted lawyers practicing in the state belong to the voluntary state bar).

state bar membership. Recent mandatory state bar surveys reveal that some mandatory state bar members do not take advantage of the benefits offered by their state bars. The most valuable or most used state bar services are CLE (which virtually all lawyers must complete) and bar publications (usually the monthly magazine).[230] In one jurisdiction, 45% of respondents only visited the mandatory state bar's website a few times a year—or less.[231] In three states that conducted surveys, a sizable percentage of respondents did not belong to any of the practice sections,[232] which typically cost extra. Yet these sections are where lawyers are most likely to learn practice-specific information that will enable them to stay up to date with the law. In one large state, almost three-quarters of respondents were unaware of the state bar's mentoring program.[233] In another state, 41% of respondents wanted nothing more from the bar than to pay the licensing fee and receive regulatory updates.[234]

Thus, mandating state bar membership does not necessarily lead lawyers to take advantage of the state bar's offerings. There are several reasons why this may be the case. Some licensed lawyers may not be practicing law. Other lawyers may feel they do not have the time. Lawyers who resent being forced to join mandatory bars or feel that the state bar does

230. *See* OKLA. BAR ASS'N, 2022 MEMBER SURVEY Q10 (2022), https://ams.okbar.org/eweb/content/pdf/OBAMemberSurveyResults.pdf [https://perma.cc/X6UA-62KQ]; WYO. STATE BAR, 2023 WYOMING STATE BAR MEMBER SURVEY RESULTS 55 (2023), https://www.wyomingbar.org/wp-content/uploads/2023-Bar-Member-Survey-Results.pdf [https://perma.cc/A9P3-V72B]; *see also* Taylor Tasler, *Wanted: Expanded Services: State Bar Member Survey Results*, ARIZ. ATT'Y., Mar. 2024, at 38, 39 (ranking CLE and the State Bar's magazine as most valuable after the Arizona State Bar website).

231. UTAH STATE BAR, UTAH STATE BAR 2022 SURVEY: TOPLINE RESULTS (Dec. 2022), https://www.utahbar.org/wp-content/uploads/2023/02/Bar-Survey-2022.pdf [https://perma.cc/FX6B-UE2Y].

232. *See* S.C. BAR, YOUR BAR: YOUR VOICE SURVEY RESULTS (2021), https://www.scbar.org/media/filer_public/3a/da/3ada489e-1bd6-46b3-bb51-9199484dc107/item_report_membershipsurvey_10121.pdf [https://perma.cc/9YQP-WRC5] (indicating 41% of respondents were not members of any section); IDAHO STATE BAR, 2021 IDAHO STATE BAR MEMBERSHIP SURVEY 36–37 (2021), https://isb.idaho.gov/wp-content/uploads/2021-Membership-Survey-Results-WEB.pdf [https://perma.cc/Q847-DDM8] (reporting that 59% of respondents did not belong to any section); WASH. STATE BAR, MEMBER ENGAGEMENT SURVEY: FY 22 QUARTER 2 OVERVIEW (2022), https://wsba.org/docs/default-source/about-wsba/wsba-wide-documents/membership-engagement-survey-second-quarter-fy-2022-.pdf?sfvrsn=b9fe13f1_2 [https://perma.cc/6UXS-FYKH] (indicating that 67% percent did not belong to a section).

233. *See* FLA. BAR, RESULTS OF THE 2024 FLORIDA BAR MEMBERSHIP OPINION SURVEY 22 (2024), https://www-media.floridabar.org/uploads/2024/04/2024-Membership-Opinion-Survey-Report-Final.pdf [https://perma.cc/6YBC-9N5R].

234. WASH. STATE BAR, *supra* note 232.

not perform its job well may be less likely to use the bar's services. For some lawyers, the state bar may not be the most useful bar organization for their purposes.[235] Some state bars may not have sections or committees focused on a lawyer's practice area.[236] State bars may not provide a comfortable environment for some lawyers[237] or may be too geographically distant for some members to take advantage of in-person bar activities.

Rather than mandating state bar membership, the better approach may be for law schools to educate law students about the importance of bar membership, not only for their professional growth and development of business networks, but to maintain their competence. This should include advising students that they may find it useful to belong to a specialty bar association that can help them stay up to date with the law in their fields, a local bar association where they can attend in-person events, or an affinity bar where they can receive more organic mentoring. Bar organizations could also engage students through on-campus programs, mentoring, and pro bono opportunities that pair students with bar members. Some bar associations already incentivize membership by offering free law student membership or free membership during the first year of practice.[238] Some use sliding dues scales based on years in practice, income, or types of practice to make the organizations more affordable.[239] Some voluntary bars

235. *See id.* (reporting that 30% of those who did not belong to a practice section indicated they did not belong because there were other associations more relevant to their practice areas).

236. For example, the mandatory Utah and West Virginia state bars do not have Immigration Law sections or committees, even though lawyers perform immigration work in every state. Telephone Interview with Diana Gough, Licensing Manager, Utah State Bar (Nov. 14, 2024); Telephone Interview with Kathy Henning, Exec. Assistant, W. Va. State Bar (Nov. 14, 2024). Likewise, the Mississippi Bar does not indicate on its website that it has an Immigration or Elder Law sections, even though the latter is a common—and growing—practice area.

237. *See, e.g.*, S.C. BAR, *supra* note 232, at 6 (reporting that only 54% of responding members felt like they belonged in the State Bar and only 49% believed that overall, members were treated fairly).

238. *See, e.g.*, *Law Student Membership*, PA. BAR ASS'N, https://www.pabar.org/site/Become-a-Member/Law-Students-Signup/Law-Student-Membership [https://perma.cc/LL7F-MNU5] (offering free membership for law students); *NYSBA Membership*, N.Y. STATE BAR ASS'N, https://nysba.org/membership/ [https://perma.cc/C9SH-X4Y3] (describing complimentary membership for first year of practice).

239. *Our Membership*, IOWA STATE BAR ASS'N, https://www.iowabar.org/?pg=ourmembership [https://perma.cc/R9DM-AK9Z] (using sliding scale based on years of practice); *Join Today*, CONN. BAR ASS'N, https://www.ctbar.org/home/join-today [https://perma.cc/CRL8-J85Z] (providing discount for lawyers employed by government, legal services, or a Connecticut law school); *Membership Application*, ARK. BAR ASS'N, https://www.arkbar.com/members/membership-application [https://perma.cc/Z4S5-QGC8] (indicating reduced dues for lawyers earning less than $100,000 of law-related income).

have been very successful in their efforts to recruit members.[240] But many bar associations have realized that to attract and retain members, they need to identify new ways to foster engagement by meeting modern lawyers' needs.[241]

Some practicing lawyers will never avail themselves of a bar organization's benefits, even when they are required to join one. Like horses brought to water, they cannot be made to drink. Lawyers are more likely to engage in bar activities in organizations where they are comfortable, where bar events are easily accessible, and where their personal interests align with the interests of other members. Those organizations may not be the mandatory state bars.

CONCLUSION

Given the problems and uncertainty confronting mandatory state bars, it seems unlikely that anyone would choose to form such a bar today. Paradoxically, some of these organizations have too much control over the content of the rules governing lawyers and too little ability to engage in substantive law reform or to speak out in other important respects. Mandatory state bars, as governmental instrumentalities, can also be subject to too much government involvement in the bar's internal affairs. Of course, the legal profession will always be subject to government regulation. Yet the importance of the legal profession maintaining some independence—even from courts—should not be underestimated. There are times when lawyers must challenge courts and other government actors to protect democratic values, human rights, and the rule of law. They do so more powerfully when they speak with a collective voice.

There will inevitably be resistance to the idea of organizational change. Indeed, David Lowery has argued that the most fundamental goal of an

240. *See* Levin, *Specialty Bars*, *supra* note 227, at 202 (stating that membership in American Immigration Lawyers Association "has grown significantly in recent years"). Since the article was published, AILA's membership has increased by 45%. *See Member Benefits*, AILA, https://www.aila.org/join [https://perma.cc/GLT9-TDF5] (reporting that organization includes more than 16,000 members).

241. *See, e.g.*, Robert J. Derocher, *Knocking on All the Doors and Rethinking Everything: New Approaches to Bar Membership*, 43 BAR LEADER 7 (2018), https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2018_19/november-december/knocking-on-all-the-doors-and-rethinking-everything-new-approaches-to-bar-membership/ [https://perma.cc/K4PN-FKRW].

organization is to survive as an organization and that all other goals are secondary.[242] Mandatory state bars are all that many lawyers and judges have ever known. Some are deeply invested in the success and continuation of the organizations. Mandatory bar employees who benefit from public pensions and other government benefits will no doubt resist changes that could convert their work into private sector jobs. Bar-related mutual insurance companies may see market disadvantages to ending a mandatory bar. Not surprisingly, when recent changes in the structure of mandatory bars occurred in California and Nebraska, those changes were initiated outside the state bars.[243]

As the title of this article suggests, it is time to *rethink* mandatory state bars. Each mandatory bar is somewhat differently positioned. Some may be performing important regulatory functions well. Of course, it might be fairly asked whether these functions could be performed equally well by a separate state agency. Some mandatory bars may be meeting the educational and other professional needs of a high percentage of its members.[244] But in some jurisdictions, lawyers might be better off using the money that goes to mandatory state bars' association-type activities to join a different bar association. The public might also benefit, because some state bars wield outsized power with respect to lawyer regulation yet are severely constrained in their ability to advocate for substantive law reform. They are precluded from defending judges from unjust criticism or defending rule of law norms. Even if the U.S. Supreme Court does not take up a case that ends the viability of mandatory state bars, it is time to rethink whether each of the mandatory state bars makes good sense any longer.

242. David Lowery, *Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying*, 39 POLITY 29, 46–47, 53 (2007). *Cf.* JAMES Q. WILSON, POLITICAL ORGANIZATIONS 10 (1995) ("Whatever else [voluntary] organizations seek, they seek to survive.").

243. *See In re* Rule Change to Create a Voluntary State Bar of Neb., 841 N.W.2d 167 (Neb. 2013); S.B. 36, 2017–18 Leg., Reg. Sess. (Cal. 2017).

244. Mandatory bars would need to conduct member surveys to know whether this is the case. Based on electronic searches and inquiries to state bars, it appears that less than half of the mandatory bars have recently surveyed their members on bar usage and member satisfaction.