

**DOES JANUS VS. AFSCME SIGNAL THE DEATH OF  
MANDATORY BAR ASSOCIATIONS?**

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ABSTRACT

In *Janus vs. AFSCME*, a closely-divided U.S. Supreme Court overturned a 41-year-old precedent and ruled that the practice of public sector unions charging agency fees to non-members in bargaining units, without affirmative consent, was “compelled speech.” The dissent warned that the decision had weaponized the First Amendment, and noted that “almost all economic and regulatory policy affects or touches speech.”

Does the logic of *Janus* apply to mandatory bar association dues? There is strong evidence it does. And if it signals the death of mandatory bar associations, would that necessarily be a bad thing for the legal profession? This essay examines the evidence, particularly as it involves the author’s own licensing jurisdiction of the state of Washington, and makes the argument that the traditional bar association model is a thing of the past.

Last year, in *Janus vs. AFSCME*,<sup>1</sup> the United States Supreme Court overturned a forty-one-year-old precedent, *Abood vs. Detroit Bd. of Ed.*,<sup>2</sup> fulfilling a longtime wish for those hostile to organized labor.<sup>3</sup> Essentially, the Court determined that public sector employees must affirmatively *opt into* union membership – membership could not be presumed.

At issue in *Janus* were the agency fees that public sector unions could charge nonmembers in bargaining units, “not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities.”<sup>4</sup> Ruling for the Court, Justice Samuel Alito found this to be compelled speech, and held that:

[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.<sup>5</sup>

In dissent, Justice Elena Kagan accused the majority of “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”<sup>6</sup> As she warned: “Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long.”<sup>7</sup>

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<sup>1</sup> *Janus vs. AFSCME*, 138 S. Ct. 2448 (2018).

<sup>2</sup> 431 U.S. 209 (1977); *see also Janus*, 138 S. Ct. at 2484 (“By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.”).

<sup>3</sup> James Feigenbaum & Alexander Hertel-Fernandez, *The Supreme Court just dealt unions a big blow in Janus. Here's what you need to know about the political fallout.*, WASH. POST (June 27, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/27/the-supreme-court-just-dealt-unions-a-big-blow-in-janus-heres-what-you-need-to-know-about-the-political-fallout/?noredirect=on&utm\\_term=.553029885919](https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/27/the-supreme-court-just-dealt-unions-a-big-blow-in-janus-heres-what-you-need-to-know-about-the-political-fallout/?noredirect=on&utm_term=.553029885919). (“The *Janus* decision comes as part of a broader push by conservative donors, activists and business interests to weaken the U.S. labor movement. The intellectual foundation for the case and funding for the costly litigation came from donors seeking to limit unions’ ability to raise funds and add new members.”).

<sup>4</sup> *Janus*, 138 S. Ct. at 2461.

<sup>5</sup> *Id.* at 2486.

<sup>6</sup> *Id.* at 2501 (Kagan, J., dissenting).

<sup>7</sup> *Id.* at 2502 (Kagan, J., dissenting).

But does the logic of *Janus* apply to mandatory bar association dues? There is strong evidence it does.<sup>8</sup> And if it does, thus signaling the death of mandatory bar associations, would that necessarily be a bad thing for the legal profession? This essay examines the evidence and suggests why the traditional bar association model is obsolete.

### I. THE BROAD SWEEP OF JANUS

Two conservative law professors had warned in an amicus brief against overturning *Abood*, noting that it could have, as Kagan's dissent noted, broad implications:

New York, California and other states require attorneys to purchase education on competence issues, like substance abuse and mental health, and on the elimination of bias. . . . Like the dissenting public employees described in *Abood*, some attorneys may disapprove of the messages they are compelled to subsidize. But the First Amendment does not permit them to continue practicing without meeting CLE requirements.<sup>9</sup>

They noted further that:

[c]ompelled government subsidies for services that include speech are not limited to union dues, bar dues, and a few obscure regulatory schemes. There is no principled way to draw a line between these cases and the many instances where the government compels individuals to purchase speech, or to purchase services from private actors who are free to spend the compelled subsidies on speech.<sup>10</sup>

Indeed, the leading U.S. Supreme Court decision, *Keller vs. St. Bar of Calif.*,<sup>11</sup> on bar dues rested upon *Abood*.<sup>12</sup>

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<sup>8</sup> One columnist foresaw this possibility: “Among the other things that might be challenged if government-imposed payments become unconstitutional ‘compelled speech’: bar dues, student-association fees, utility bills, auto-insurance premiums, continuing-education requirements for doctors and other professionals, homeowners association dues, training for school-bus drivers and others, vaccinations, attorney-supervised real estate closings.” Dana Milbank, *The Kochs are trying to kill unions. Be careful what you wish for.*, WASH. POST (Feb. 26, 2018), [https://www.washingtonpost.com/opinions/the-kochs-are-trying-to-kill-unions-be-careful-what-you-wish-for/2018/02/26/ce810844-1b45-11e8-9de1-147dd2df3829\\_story.html?utm\\_term=.3df1f3fb1231](https://www.washingtonpost.com/opinions/the-kochs-are-trying-to-kill-unions-be-careful-what-you-wish-for/2018/02/26/ce810844-1b45-11e8-9de1-147dd2df3829_story.html?utm_term=.3df1f3fb1231).

<sup>9</sup> Brief of Professors Eugene Volokh & William Baude as *Amici Curiae* in Support of Respondents at 13, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466) (citations omitted).

<sup>10</sup> *Id.* at 16.

<sup>11</sup> 496 U.S. 1 (1990).

<sup>12</sup> *Id.* at 13 (“*Abood* held that a union could not expend a dissenting individual’s dues for ideological activities not ‘germane’ to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified

As one attorney wrote:

The *Keller* deduction rests on the premise that a bar association can distinguish between activities for which compulsory dues may be used and activities for which such fees may not be used. The *Janus* Court, on the other hand, rejected the union's division of fees into chargeable and nonchargeable expenses as unworkable and insufficiently protective of nonmembers' First Amendment rights.<sup>13</sup>

In one case, “Arnold Fleck, a North Dakota lawyer, sued his state bar association after he learned it had contributed \$50,000 to oppose a state ballot measure. Fleck had contributed \$1,000 to support the same measure. He objected to being compelled by state law to pay \$380 a year to support the bar association.”<sup>14</sup> As the *Los Angeles Times* reported, “[a] federal judge and the 8th Circuit, based in St. Louis, rejected his constitutional challenge to the forced dues, citing a 1990 high court ruling in *Keller vs. State Bar of California* that had upheld mandatory dues while also freeing lawyers from subsidizing political donations.”<sup>15</sup>

However, the Supreme Court ultimately vacated and remanded the ruling in light of *Janus*.<sup>16</sup> This occurred in December 2018 even though the *Keller* deduction was plainly available to Fleck on the State Bar Association of North Dakota (SBAND) dues statement thanks to his activism:

The following new section appears near the end of the revised Statement:

OPTIONAL: Keller deduction relating to nonchargeable activities. Members wanting to take this deduction may deduct \$10.07 if paying \$380; \$8.99 if paying \$350; and \$7.90 if paying \$325. (See Insert.)

SBAND computes this deduction as a percentage of annual license fees based on the percentage of the prior year's fees that SBAND spent on non-germane activities. Next to this explanation is a blank allowing the member to write in an amount to be deducted from the license fees due. At the end

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by the State's interest in regulating the legal profession and improving the quality of legal services.”).

<sup>13</sup> Daniel A. Himebaugh, *Bar Membership After Janus*, NWLAWYER (Dec. 2018), [http://nwlawyer.wsba.org/nwlawyer/december\\_2018?pg=21#pg21](http://nwlawyer.wsba.org/nwlawyer/december_2018?pg=21#pg21).

<sup>14</sup> David G. Savage, *Supreme Court suggests forcing lawyers to pay bar association dues violates their free speech*, L.A. TIMES (Dec. 3, 2018), <https://www.latimes.com/politics/la-na-pol-court-bar-dues-20181203-story.html>.

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

<sup>16</sup> *Id.* at 12–16.

of the Statement, the member adds optional fees selected to the annual license fee and subtracts the “Keller deduction” if chosen.<sup>17</sup>

The conservative group arguing the case declared victory, and noted that “18 states—including one of the largest, New York—do not require attorneys to join bar associations[.]”<sup>18</sup>

In Oregon two attorneys are suing their mandatory bar association:

Diane Gruber and Mark Runnels argue in a suit filed [August 29, 2018] in federal court that paying compulsory dues infringes on their First Amendment rights because it helps pay for political and ideological speech they disagree with.

“This isn't an attack on the state bar,” attorney Michael L. Spencer, who filed the suit on behalf of the plaintiffs, told the Oregonian. “The requirement to be a member of the bar violates our free speech and free association rights under the *Janus* decision.”<sup>19</sup>

In neighboring Washington, “[t]he Washington State Supreme Court has directed the state bar association's Board of Governors to defer action on proposed bylaw amendments pending a comprehensive review of the bar's structure in light of a United States Supreme Court decision barring public-sector unions from collecting fees from nonmembers.”<sup>20</sup> An article noted that “the bar has been roiled in recent years by debate over the cost of bar dues, including whether they should be spent on political activities such as supporting the gay-marriage initiative approved by Washington voters in 2012.”<sup>21</sup> The bar had also acceded to the creation of limited-license “law technicians,” and “[s]ome in the bar have questioned whether these technicians should take business away from attorneys, as well as their participation in the bar's governance.”<sup>22</sup> To be plain, there have been a number of scandals that possibly make membership to the WSBA less appealing and prestigious.

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<sup>17</sup> *Fleck v. Wetch*, 868 F.3d 652, 654–55 (8th Cir. 2017), *cert. granted, judgment vacated*, 139 S. Ct. 590 (Dec. 3, 2018).

<sup>18</sup> Press Release, Goldwater Inst., *Goldwater Wins Free Speech Victory at the U.S. Supreme Court* (Dec. 3, 2018).

<sup>19</sup> Jason Tashea, *Oregon lawyers sue over mandatory bar dues in wake of Supreme Court's union dues decision*, A.B.A. J. (Sept. 4, 2018) [http://www.abajournal.com/news/article/citing\\_supreme\\_court\\_decision\\_2\\_lawyers\\_sue\\_oregon\\_state\\_bar](http://www.abajournal.com/news/article/citing_supreme_court_decision_2_lawyers_sue_oregon_state_bar).

<sup>20</sup> Steve Miletich, *State Supreme Court calls a 'timeout' for Washington Bar Association to review its rules*, SEATTLE TIMES (Oct. 11, 2018), <https://www.seattletimes.com/seattle-news/politics/state-supreme-court-calls-a-timeout-for-washington-bar-association-to-review-its-rules/>.

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

<sup>22</sup> *Id.*

In 2017, the youngest ever president of the Washington State Bar Association resigned under investigation for alleged criminal activity. In October 2018 Robin Haynes was “charged with stealing from two Spokane-area law firms where she previously worked.”<sup>23</sup> The bar association did not seem publicly embarrassed: “We recognize Ms. Haynes' leadership in the organization for more than seven years, including as a New and Young Lawyer at-large board member and WSBA President, wrote Bill Pickett, president of the Washington State Bar Association.”<sup>24</sup>

Reports from December 2018 state that “[a] woman who works for the Washington State Bar Association has accused an executive of its governing board of sexual harassment and claims the agency didn't hold him accountable despite an investigation that backs up her allegations.”<sup>25</sup> The woman, Kara Ralph, worked as an event coordinator for the bar, and made her accusations against Dan’L W. Bridges, a governor-elect at the time of the alleged impropriety.<sup>26</sup> It was reported that “[a]n employment lawyer later hired to investigate what happened found ‘it more likely than not that Mr. Bridges engaged in certain actions that he strongly denies,’ but Ralph claims the bar's board of governors failed to discipline Bridges. Instead, the bar's governing board later elected Bridges as its treasurer, the claim states.”<sup>27</sup>

In turn, Bridges “filed his own tort claim against the bar with the state’s risk-management department, contending the allegations are part of ongoing retaliation against him for his whistle-blowing about ‘conflicts of interest, self-dealing and irregularities’ within the agency.”<sup>28</sup> His attorney asserted “among other things that bar officials have threatened and bullied Bridges for questioning agency expenses, including a nearly \$300,000 compensation package for the bar's executive director, and for his support of changes to the agency's bylaws that Bridges says would bring more oversight of the agency.”<sup>29</sup> In 2019, the longtime executive director of the WSBA was fired, and a lawsuit alleged that her termination by the association’s board

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<sup>23</sup> Will Campbell, *Former president of Washington State Bar Association charged with stealing from Spokane law firms*, SPOKESMAN-REVIEW (Oct. 16, 2018), <http://www.spokesman.com/stories/2018/oct/16/former-president-of-washington-state-bar-associati/>.

<sup>24</sup> *Id.*

<sup>25</sup> Lewis Kamb, *Woman alleges sexual harassment, says Washington State Bar Association didn't hold board exec accountable*, SEATTLE TIMES (Dec. 11, 2018), <https://www.seattletimes.com/seattle-news/washington-state-bar-association-employee-claims-agencys-board-failed-to-discipline-governor-who-allegedly-harassed-her/>.

<sup>26</sup> *Id.*

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

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

<sup>29</sup> *Id.*

was in violation of the state's Open Public Meetings Act.<sup>30</sup> It was reported that "a member of the board's minority faction" sought "the removal of three board members among the ruling faction."<sup>31</sup>

On March 7, 2019, a bill to repeal the State Bar Act passed the Washington House by a 96-1 margin.<sup>32</sup> In a sign of its disconnect, the WSBA expressed surprise over the bill's success, with one member of its Board of Governors writing that the board was not advised about the bill, and the discussions that shaped it between legislators and the chief justice.<sup>33</sup> He stated that "[t]he WSBA serves the public and WSBA's members in ways that state government cannot. I believe that its sudden disappearance would be disastrous for the legal profession and the public."<sup>34</sup> He claimed the bill was "rushed out and is poorly conceived."<sup>35</sup>

Would it be unreasonable for an attorney licensed in Washington to feel trepidation about being compelled, through payment of bar dues, to support all of this? Moreover, if public sector unions are now compelled to make a door-to-door case for membership,<sup>36</sup> should not bar membership also be voluntary?

The WSBA was established statutorily in 1933.<sup>37</sup> Many attorneys feel ambivalence towards the bar association to which they pay dues, and Washington's has been no exception—facing rebellions over dues, including one in 2012: "The organization that oversees and supports Washington state's nearly 29,000 active lawyers says it likely will have to cut a variety of programs, including those that support legal aid to the poor, after the attorneys voted to reduce their dues by \$3.6 million—one-quarter of the group's budget."<sup>38</sup> At the time it was reported that "the bar association has amassed

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<sup>30</sup> See Lewis Kamb, *Amid turmoil, judge rules Washington State Bar Association must disclose correspondence that explains director's firing*, SEATTLE TIMES (Apr. 14, 2019), <https://www.seattletimes.com/seattle-news/judge-rules-washington-state-bar-association-subject-to-open-meetings-law/>.

<sup>31</sup> *Id.*

<sup>32</sup> See Bill History, H.B. 1788, 66<sup>th</sup> Leg., Reg. Sess. (Wash. 2019), <https://app.leg.wa.gov/bills/summary?BillNumber=1788&Year=2019&Initiative=false>.

<sup>33</sup> See Posting of Brian Tollefson, TollefsonBOG@outlook.com, to owner-alerts@kitsaplaw.com (Mar. 10, 2019) (on file with author).

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

<sup>35</sup> *Id.*

<sup>36</sup> See generally Brendan Williams, *Somebody's Knocking, Should I let Them In?: The Fight Over Unions Enters the Home*, 43 VT. L. REV. (2018).

<sup>37</sup> WASH. REV. CODE § 2.48.010 (2018).

<sup>38</sup> Gene Johnson, *State lawyers cut their bar association dues by \$3.6M*, EVERETT HERALD (Apr. 12, 2012), <https://www.heraldnet.com/news/state-lawyers-cut-their-bar-association-dues-by-3-6m/>.

reserves of more than \$5 million, which could be used to ease any cuts in the short term.”<sup>39</sup>

In 2016, the WSBA significantly increased its dues—from \$385 in 2017 to \$449 in 2018,<sup>40</sup> and members filed a petition to reverse that action, and base dues increases upon inflation.<sup>41</sup> The Washington Supreme Court invalidated that effort in a 2017 *sua sponte* order stating that “[t]hat the lawyer license fees proposed by the license fee rollback petition, if the petition were to pass, would not be reasonable both as to the level of fees that it proposes and as to the requirement that future license fee increases be tied to the consumer price index.”<sup>42</sup>

In 1991 the WSBA even secured a ruling from the Washington Supreme Court to quash an effort by its employees to unionize:

In early 1991 several Bar Association employees attempted to organize, seeking representation by the United Food and Commercial Workers Union (Union) for purposes of collective bargaining. The Bar Association refused to recognize the Union as the collective bargaining representative of its employees. Then in November of 1991, the Union asked this court to change our General Rule (GR) 12, which outlines the purposes and the powers of the Bar Association. The suggested rule change amendment would have required the Bar Association to collectively bargain with its employees.

On October 8, 1992, this court declined to adopt the Union's suggested rule change.<sup>43</sup>

In *Janus*, Justice Alito complained of the opaqueness of union expenses: “How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.”<sup>44</sup> Similarly, it is impossible for a WSBA member to assess the reasonableness of \$23.7 million in the bar association expenditures proposed for

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<sup>39</sup> *Id.*

<sup>40</sup> Karen Denise Wilson, *Treasurer's Report*, NWLAWYER (July/Aug. 2016), [http://nwlawyer.wsba.org/nwlawyer/july\\_august\\_2016?pg=12#pg12](http://nwlawyer.wsba.org/nwlawyer/july_august_2016?pg=12#pg12).

<sup>41</sup> See S.B. 5721, 65th Leg., Reg. Sess. § 1(3) (Wash. 2018) (“On December 20th, the bar received a petition for a referendum to reject the increase and to require that future increases of the license fee not be a greater percentage than the consumer price index increase for Seattle.”).

<sup>42</sup> In the Matter of the WSBA Board of Governor's Approval of Lawyer License Fees for 2018, 2019, and 2020, and the License Fee Rollback Petition, Order No. 25700-B-571 (Wash. 2017), <https://lawmrh.files.wordpress.com/2017/01/supreme-court-of-washington-order-25700-b-571.pdf>.

<sup>43</sup> *Wash. St. Bar Ass'n v. State*, 890 P.2d 1047, 1048 (1995).

<sup>44</sup> *Janus*, 138 S. Ct. at 2482 (footnote omitted).

fiscal year 2019.<sup>45</sup> Is an annual expense of \$834,709 for the Board of Governors too much?<sup>46</sup> Without knowing all of the details, one may concede an expense of \$5,884,275 for attorney discipline,<sup>47</sup> to protect the profession and its clients, but putting out a magazine at a net annual loss of almost \$200,000?<sup>48</sup> And rather than locate in less-costly Olympia, the state capital, the bar association is paying \$1.8 million in annual rent in expensive downtown Seattle.<sup>49</sup>

There is no real evidence that bar associations influence the law for the better. For all of the spending largesse of the WSBA, Washington has ranked last in the nation for court funding.<sup>50</sup> The last major court funding effort came in 2005.<sup>51</sup> Nor does the American Bar Association (ABA) necessarily inspire confidence.

During his contentious Senate confirmation process, in which he was accused of sexual misconduct, Justice Brett Kavanaugh “and his Republican defenders had cited the ABA’s previously glowing endorsement of the nominee—‘the gold standard,’ as one leading Republican put it.”<sup>52</sup> Prior to his 2006 confirmation to the U.S. Court of Appeals, the ABA had “downgraded the rating of the nominee to simply ‘qualified’—meaning he met the ABA’s standards to become a judge but was not necessarily an outstanding candidate.”<sup>53</sup> Somehow concerns about his temperament had been set aside by 2017, allowing his leading defender, Sen. Lindsey Graham (R., S.C.), to use the ABA’s rating as a weapon:

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<sup>45</sup> *WSBA BUDGET For the Fiscal Year Ended September 30, 2019*, WASH. ST. BAR ASS’N, [https://www.wsba.org/docs/default-source/about-wsba/finance/fy-2019-budget.pdf?sfvrsn=e89a00f1\\_6](https://www.wsba.org/docs/default-source/about-wsba/finance/fy-2019-budget.pdf?sfvrsn=e89a00f1_6).

<sup>46</sup> *See id.* at 4.

<sup>47</sup> *See id.* at 5.

<sup>48</sup> *See id.* at 9.

<sup>49</sup> *See id.* at 16. Seattle is one “of the nation’s most expensive places to rent an office, passing Chicago and Los Angeles just in the last three years.” Mike Rosenberg, *Seattle rents for offices soaring much faster than elsewhere*, SEATTLE TIMES (Feb. 20, 2018), <https://www.seattletimes.com/business/real-estate/seattle-rents-for-offices-soaring-much-faster-than-elsewhere/>.

<sup>50</sup> *See 2015 State of the Judiciary*, WASH. COURTS 11, <https://www.courts.wa.gov/newsinfo/content/stateOfJudiciary/january2015.pdf>.

<sup>51</sup> *See* 2005 Wash. Sess. Laws ch. 457.

<sup>52</sup> Avi Selk, *The American Bar Association had concerns about Kavanaugh 12 years ago. Republicans dismissed those, too.*, WASH. POST (Sept. 28, 2018), <https://www.washingtonpost.com/politics/2018/09/28/american-bar-association-had-kavanaugh-concerns-years-ago-republicans-dismissed-those-too/>.

<sup>53</sup> *Id.*

If you lived a good life, people would recognize it, like the American Bar Association has — the gold standard. His integrity is absolutely unquestioned. He is very circumspect in his personal conduct, harbors no biases or prejudices. He's entirely ethical, is a really decent person. He is warm, friendly, unassuming. He's the nicest person — the ABA.<sup>54</sup>

Belatedly, the ABA called for an FBI investigation of the charges against Kavanaugh, but it was too late.<sup>55</sup> After his confirmation, they dropped an effort to re-rate him.<sup>56</sup>

As one columnist wrote:

The American Bar Association (ABA) is mired in a slump. The once-venerable organization, about to mark its 140<sup>th</sup> birthday, is awash in bad news. Membership is declining; revenue is down; last year's operating deficit was \$7.7M, prompting an \$11M budget reduction; lay-offs and offered buyouts are rampant; and a former-employee embezzled \$1.3M from the organization.<sup>57</sup>

As he noted, in observations that could also apply to state bar associations:

The legal profession's image is eroding; lawyers were recently ranked among the least trusted of all vocations. Meanwhile, the legal profession has sky-high rates of divorce, suicide, alcohol and drug abuse, stress-related illness, and job dissatisfaction. Notwithstanding its efforts to advance diversity and equal opportunity, the ABA presides over a profession that has a glass house problem. Female attorneys still are not paid the same as males, minority attorneys do not represent a proportionate share of senior positions, and the poorest law students —often minorities—are bearing the heaviest burden of law school debt.<sup>58</sup>

But no one is *compelled* to become an ABA member. Indeed, where there is a *choice* to joining, bar associations struggle:

These organizations are working hard to welcome, attract and retain the young professionals because this new group shows little inclination to

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<sup>54</sup> *Id.*

<sup>55</sup> *See id.*

<sup>56</sup> Ariane de Vogue, *American Bar Association drops review of Kavanaugh*, CNN (Oct. 15, 2018), <https://www.cnn.com/2018/10/15/politics/kavanaugh-aba-review/index.html>.

<sup>57</sup> Mark A. Cohen, *Is the American Bar Association Passé?*, FORBES (Aug. 1, 2018), <https://www.forbes.com/sites/markcohen1/2018/08/01/is-the-american-bar-association-passe/#17901d959bda>.

<sup>58</sup> *Id.*

joining. Bar associations, like associations in different industries, are seeing millennials shy away from being part of an organized group.<sup>59</sup>

This phenomenon is not unique to bar associations. As one columnist noted: “According to Sarah Sladek, author of ‘The End of Membership As We Know It,’ [sic] an estimated sixty-two percent of associations in the U.S. are either experiencing flat or declining membership, with a steeper decline among younger members.”<sup>60</sup> A past ABA president related that “attorneys seem to be more interested in devoting themselves to their personal lives in their spare time than going to an association meeting.”<sup>61</sup> To these challenges we can probably add the face-to-face disconnection from one another that social media accentuates.<sup>62</sup>

Instead of the ABA, overtly-partisan membership groups like the Federalist Society have become of paramount influence for prospective federal judges. At least four members of the Supreme Court have been Federalist Society members, while another, Justice Alito, has regularly addressed its meetings.<sup>63</sup> By January 2019, “[t]wenty-five of the 30 appeals court judges Trump has appointed are or were members of the society.”<sup>64</sup> Outspoken conservative activist Ginni Thomas, the wife of Justice Clarence Thomas, has been actively involved with the group: “Ginni Thomas counts as a mentor Leonard Leo, the Federalist Society leader who has guided conservative court nominations for decades; last year, she gave him one of her awards.”<sup>65</sup>

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<sup>59</sup> Marilyn Odendahl, *Bar associations work hard to show young lawyers the benefits of membership*, IND. LAWYER (Nov. 4, 2015), <https://www.theindianlawyer.com/articles/38615-bar-associations-work-hard-to-show-young-lawyers-the-benefits-of-membership>.

<sup>60</sup> Aebra Coe, *ABA Decline: Why Are Fewer Lawyers Joining The Club?*, LAW 360 (July 24, 2018), <https://www.law360.com/articles/1065518>.

<sup>61</sup> *Id.*

<sup>62</sup> *See, e.g.*, Darby Saxbe, *The Social Media Disconnect*, PSYCHOL. TODAY (Feb. 26, 2018), <https://www.psychologytoday.com/us/blog/home-base/201802/the-social-media-disconnect> (noting that “researchers found that face-to-face communication increased subjective well-being by both increasing connectedness and decreasing social isolation. Social media use, on the other hand, only increased subjective well-being through increasing connectedness, but not through decreasing social isolation.”).

<sup>63</sup> *See* David Montgomery, *Conquerors of the Courts*, WASH. POST (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/>.

<sup>64</sup> *Id.*

<sup>65</sup> Dan Zak, *What is Ginni Thomas saying now? The evolution of an unusually outspoken Supreme Court spouse*, WASH. POST (Dec. 27, 2018), [https://www.washingtonpost.com/lifestyle/style/what-is-ginni-thomas-saying-now-the-evolution-of-an-unusually-outspoken-supreme-court-spouse/2018/12/26/883da960-f753-11e8-8c9a-860ce2a8148f\\_story.html](https://www.washingtonpost.com/lifestyle/style/what-is-ginni-thomas-saying-now-the-evolution-of-an-unusually-outspoken-supreme-court-spouse/2018/12/26/883da960-f753-11e8-8c9a-860ce2a8148f_story.html).

It is a well-known fact that unhappiness is chronic among attorneys. According to one article, “[l]awyers struggle with substance abuse, particularly drinking, and with depression and anxiety more commonly than some other professionals, according to a new study conducted by the American Bar Association together with the Hazelden Betty Ford Foundation.”<sup>66</sup> Most law school graduates end up regretting going to law school.<sup>67</sup> One poll found that “just 23 percent of law school graduates said that their education was worth the cost and only 20 percent said that their schooling prepared them well for post-grad life.”<sup>68</sup>

One woman, recounting in a *New York Times* piece the suicide of her husband, a “high-powered” attorney, noted that “[a]ccording to some reports, lawyers also have the highest rate of depression of any occupational group in the country. A 1990 study of more than 100 professions indicated that lawyers are 3.6 times as likely to be depressed as people with other jobs. The Hazelden study found that 28 percent of lawyers suffer depression.”<sup>69</sup> According to a University of Washington professor:

law students generally start school with their sense of self and their values intact. But, in his research, he said, he has found that the formal structure of law school starts to change that.

Rather than hew to their internal self, students begin to focus on external values, he said, like status, comparative worth and competition. “We have seven very strong studies that show this twists people’s psyches and they come out of law school significantly impaired, with depression, anxiety and hostility,” he said.<sup>70</sup>

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<sup>66</sup> Elizabeth Olson, *High Rate of Problem Drinking Reported Among Lawyers*, N.Y. TIMES (Feb. 4, 2016), <https://www.nytimes.com/2016/02/05/business/dealbook/high-rate-of-problem-drinking-reported-among-lawyers.html>.

<sup>67</sup> Vivia Chen, *LSAT Takers Hit 16-Year High, But Most Grads Regret Going to Law School*, AM. LAWYER (Feb. 22, 2018), <https://www.law.com/americanlawyer/2018/02/22/lSAT-takers-hit-16-year-high-but-most-grads-regret-going-to-law-school/?slreturn=20190317122620>.

<sup>68</sup> Abigail Hess, *Only 23% of law school grads say their education was worth the cost*, CNBC (Feb. 21, 2018), <https://www.cnn.com/2018/02/21/only-23-percent-of-law-school-grads-say-their-education-was-worth-the-cost.html>. One writer even noted that “the plight of burnt-out attorneys, particularly those at law firms, has recently spawned an industry of experts devoted to helping lawyers leave law.” Leigh McMullan Abramson, *The Only Job With an Industry Devoted to Helping People Quit*, ATLANTIC (Jul. 29, 2014), <https://www.theatlantic.com/business/archive/2014/07/the-only-job-with-an-industry-devoted-to-helping-people-quit/375199/>. She writes that “[t]he problem can begin with the choice to go to law school, which is often made for reasons having nothing to do with the actual practice of law and without diligence about whether the profession is really a fit.” *Id.*

<sup>69</sup> Eilene Zimmerman, *The Lawyer, the Addict*, N.Y. TIMES (July 15, 2017), <https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html>.

<sup>70</sup> *Id.* As Patrick Krill, the director of the Legal Professionals Program at the Hazelden Betty Ford Foundation, writes: “If you value your reputation, hide any struggles you might have or, better yet, pretend they don’t exist. These are the messages that many attorneys hear—both formally and informally—beginning on the first day of law school and continuing throughout

It is hard to discern any substantive actions by state bar associations to combat these discouraging trends and the damage to the profession that they represent. The WSBA, for example, spends less than half as much money annually on its Member Wellness Program (\$142,499)—described as a “program whose goal is to help lawyers prevent and/or address psychological, emotional, addiction, family, health, stress, and other personal problems and provide education and services to foster member well-being”<sup>71</sup>—than it was reported to spend on its executive director’s salary.<sup>72</sup>

The gender gap also remains wide in the legal profession, with 2014 data showing that “[m]edian pay for full-time female lawyers was 77.4 percent of the pay earned by their male counterparts.”<sup>73</sup> It has also been reported that “[a]t big American law firms, there is a 44 percent difference in pay between female partners and their male colleagues, largely because men bring in more big-ticket legal cases, or are better at getting credit for doing so.”<sup>74</sup> Matters are even worse for women of color in the legal practice.<sup>75</sup> Women in law firms are also still subjected to sexual harassment—with even “Proskauer Rose, the venerable New York law firm that has worked on several high-profile sexual harassment investigations for major corporations” being sued for alleged harassment by “the head of Proskauer’s labor and employment practice in Washington, and of its whistleblowing and retaliation legal group.”<sup>76</sup> Today,

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their careers.” Patrick Krill, *The Legal Profession’s Drinking Problem*, CNN (Feb. 6, 2016), <https://www.cnn.com/2016/02/06/opinions/lawyers-problem-drinkers-krill/index.html>.

<sup>71</sup> WSBA BUDGET, *supra* note 45, at 8. Krill notes that “[t]he bulk of responsibility for reducing alcohol abuse and mental health problems . . . has largely fallen to under-staffed, under-prioritized and worst of all, underutilized organizations known as lawyer assistance programs.” Krill, *supra* note 70.

<sup>72</sup> See Kamb, *supra* note 30 (“As executive director, Littlewood most recently made \$272,184 a year.”).

<sup>73</sup> Debra Cassens Weiss, *Full-time female lawyers earn 77 percent of male lawyer pay*, A.B.A. J. (Mar. 17, 2016), [http://www.abajournal.com/news/article/pay\\_gap\\_is\\_greatest\\_in\\_legal\\_occupations/](http://www.abajournal.com/news/article/pay_gap_is_greatest_in_legal_occupations/).

<sup>74</sup> Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html>.

<sup>75</sup> See Vivia Chen, *Yup, It’s Great to Be a White Male Lawyer!*, AM. LAW. (Sept. 7, 2018), <https://www.law.com/americanlawyer/2018/09/07/yup-its-great-to-be-a-white-male-lawyer/> (among other things, noting that “[w]omen of color say they still get mistaken for administrative staff, court personnel and janitorial staff!”).

<sup>76</sup> Meredith Mandell & Hilary Rosenthal, *Proskauer, law firm known for handling high-profile sex harassment cases, is accused itself*, NBC (May 15, 2018), <https://www.nbcnews.com/news/us-news/proskauer-law-firm-known-handling-high-profile-sex-harassment-cases-n874411>. It was reported that:

Proskauer is not alone in promoting its #MeToo expertise while having defended gender discrimination and harassment lawsuits. The Sanford Heisler firm also brought a \$100 million

women—who account for thirty-eight percent of all attorneys<sup>77</sup>—may question whether state bar associations are doing anything to combat the perception that the law can be a “good old boys” club.<sup>78</sup>

In conclusion, for those looking for a sense of legal community, today “[t]here are bar associations to join that are specific to an attorney’s gender, ethnicity, practice area, religion, sexual orientation and client base, among other characteristics.”<sup>79</sup> Such pluralism, and *Janus*, may signal the death of mandatory state bar associations, but that is not necessarily a bad thing.<sup>80</sup> New means of connectedness for attorneys may work better than old models.

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class-action discrimination suit last month against Morrison & Foerster, a San Francisco firm. The case alleges that women who took maternity leave at the firm have been denied opportunities for advancement and higher pay. *Id.*

<sup>77</sup> See Jennifer Cheeseman Day, *More Than 1 in 3 Lawyers Are Women*, U.S. CENSUS (May 8, 2018), <https://www.census.gov/library/stories/2018/05/women-lawyers.html>.

<sup>78</sup> See, e.g., Dorothy L. Tarver, *Obstacles Faced By Women in the Law*, NEW ORLEANS BAR ASS’N (Mar. 1, 2018), <http://www.neworleansbar.org/news/committees/obstacles-faced-by-women-in-the-law> (“Male attorneys often report reluctance to mentor women attorneys and prefer the bonding that occurs in all-male social or sporting events; thus creating ‘boys clubs’ or ‘old boys networks.’”).

<sup>79</sup> Coe, *supra* note 60 (“In Washington, D.C., alone there are 37 voluntary bar associations available for attorneys to join, according to a listing on the D.C. Bar website.”).

<sup>80</sup> Indeed, perhaps mandatory bar associations can adapt and demonstrate a value proposition worth *voluntarily* investing in. The Illinois State Bar Association is voluntary, and yet still reports having 28,000 members. See *About the ISBA*, ILL. ST. BAR ASS’N, <https://www.isba.org/about> (last visited Apr. 17, 2019). The voluntary New York State Bar Association has an annual budget of around \$24 million. See *Vital Statistics*, N.Y. ST. BAR ASS’N, <http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26982> (last visited Apr. 17, 2019).