# First Amendment Proscriptions on the Integrated Bar: *Lathrop v. Donohue* Re-Examined

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A state's integration of its bar directly affects rights of individual attorneys that are protected by the first and fourteenth amendments to the United States Constitution.[1] An integrated bar is a state-compelled association of attorneys formed essentially for the purposes of licensing, regulating, and centralizing the discipline of member attorneys.[2] In addition to these purposes, the integrated bar is responsible for advancing the administration of justice, providing a forum for the discussion of legal practice and reform, and encouraging substantive legal education and research.[3] When any of those purposes are construed to authorize the disbursement of members' mandatory dues payments for political purposes that are objectionable to any member, the protections of the first amendment are implicated.

The constitutional issues of compelled attorney membership and the political use of membership dues were raised in *Lathrop v. Donohue*.[4] Mr. Lathrop, a Wisconsin attorney, questioned the constitutionality of the integration of the Wisconsin bar, alleging that compulsory

1. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. XIV provides in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." For a discussion of the free speech and association protections afforded by the first amendment and of that amendment's applicability to the states via the fourteenth amendment, see text & notes 82-83, 91-118 *infra*.

2. *In re* Unification of the New Hampshire Bar, 109 N.H. 260, 262, 248 A.2d 709, 711 (1968); Petition of Tennessee Bar Ass'n, 532 S.W.2d 224, 229-30 (Tenn. 1975). See text & notes 9-18 *infra* for a detailed discussion of the purposes and methods of bar integration.

3. ARIZ. S. CT. R. 27(a) (1973). *See In re* Florida Bar Bd. of Governors' Action, 217 So. 2d 323, 324 (Fla. 1969); Application of Mont. Bar Ass'n President, 163 Mont. 523, 526-27, 518 P.2d 32, 34 (1974).

4. 367 U.S. 820 (1961).

membership and the political use of his dues violated his rights of free speech and association.[5] In a plurality opinion, the United States Supreme Court held that none of Lathrop's rights of association were abridged by the bar integration, since the compulsory membership imposed only the duty to pay dues reasonably necessary to improve the profession.[6] The plurality refused to rule on the free speech issue, stating that the issue was not concretely before the Court. The Court reasoned that Lathrop had not disclosed his views concerning the integrated bar's political activity and had not indicated the extent to which his compelled financial support was used by the bar in its political endeavors.[7] The 1961 *Lathrop* decision was the last time that consideration was given by the Supreme Court to these first amendment issues relating to the integrated bar.

This Note re-examines the *Lathrop* decision in light of a line of labor law decisions which culminate in the recent Supreme Court opinion in *Abood v. Detroit Board of Education*.[8] Initially, the character, *raison d'etre*, and objectives of the integrated bar will be examined. In this context, the recent experiences of the state bars of Arizona and California are discussed in order to illustrate the extent of the first amendment problems that are involved. Next, the nature of the protected rights of free speech and association will be discussed. Also considered is whether the first amendment supports a concomitant right *not* to associate or embrace ideas imposed from without.

After examining the Supreme Court labor law decisions that relate to these first amendment issues, a detailed constitutional analysis of the integrated bar will be undertaken. This analysis considers whether compulsory membership in the integrated bar violates member attorneys' first amendment freedoms of association and whether there are constitutional limitations on bar activities financed by state-compelled attorney dues payments. Finally, the remedies available to attorneys faced with infringement of their first amendment rights will be discussed and suggestions will be made regarding how integrated bar associations can avoid constitutional difficulties.

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5. *Id.* at 822-23.

6. *Id.* at 828, 843. For a detailed discussion of the complex *Lathrop* vote, see discussion at text & notes 159, 170-79 *infra*.

7. 367 U.S. at 845-46.

8. 431 U.S. 209, 234 (1977) (use of compulsory agency shop dues for objectionable political purposes unrelated to collective bargaining held violative of employees' first amendment rights of free speech). See text & notes 145-54 *infra*.

## THE INTEGRATED BAR

### A. *Formation and Purposes*

An integrated bar is a compulsory association of attorneys that conditions the practice of law in a particular state upon membership and mandatory dues payments.[9] While the stated objectives and purposes of voluntary bar associations are quite similar to those of integrated state bars,[10] the characteristics of centralized organization, compulsory membership, and compulsory dues distinguish integrated bars from voluntary associations.[11] Bar integration is performed in one of three ways: 1) by direct legislative enactment;[12] 2) by legislation enabling a state supreme court to integrate;[13] or 3) by rule of a state supreme court in the exercise of its "inherent power" to integrate.[14] The choice of any one of these modes of bar integration creates a scheme of compulsory organization and funding, and thereby effectuates the intended purposes of the state.

The major purposes of bar integration are to license and discipline attorneys, and to improve the administration of justice.[15] Other purposes of integration include encouraging high professional standards of learning and conduct,[16] providing a forum for discussion of legal prac-

9. *In re* Unification of the New Hampshire Bar, 109 N.H. 260, 262, 248 A.2d 709, 711 (1968). *See* Lathrop v. Donohue, 367 U.S. 820, 825 (1961).

10. *Compare* G. WINTERS, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES 1 (1954) (detailed discussion of the purposes of voluntary bar associations) *with* discussion of purposes of integrated bars at text & notes 15-18, 29-32 *infra*.

11. D. MCKEAN, THE INTEGRATED BAR 24-25 (1963); G. WINTERS, *supra* note 10, at 6.

12. *E.g.*, 1933 Ariz. Sess. Laws ch. 66, at 251-65 (current version at ARIZ. REV. STAT. ANN. §§ 32-201 to -275 (1976 & Supp. 1980-81); 1927 Cal. Stats. ch. 34, at 38-45 (current version at CAL. BUS. & PROF. CODE §§ 6000-6206 (West 1974 & Supp. 1980)).

13. *E.g.*, GA. CODE ANN. §§ 9-701 to -705 (1973) (held to authorize integration in State Bar of Georgia, 219 Ga. 873, 873 (1963); N.H. REV. STAT. ANN. §§ 311:1 - 311:13 (1966 & Supp. 1979-80) (held to impliedly authorize integration in *In re* Unification of the New Hampshire Bar, 109 N.H. 260, 263-64, 248 A.2d 709, 711-12 (1968)).

14. *E.g.*, *In re* Integration of the Bar, 50 Hawaii 107, 109, 432 P.2d 887, 888 (1967); Application of Mont. Bar Ass'n President, 163 Mont. 523, 524, 518 P.2d 32, 32 (1974); Petition of Rhode Island Bar Ass'n, 111 R.I. 936, 937, 306 A.2d 199, 199 (1973); Petition of Tennessee Bar Ass'n, 532 S.W.2d 224, 229 (Tenn. 1975).

15. Petition of Tennessee Bar Ass'n, 532 S.W.2d 224, 229-30 (Tenn. 1975); LEGISLATIVE ANALYST OF THE STATE OF CALIFORNIA, A REPORT ON THE CALIFORNIA STATE BAR 9-10 (1980) [hereinafter LEGISLATIVE ANALYST'S REPORT]; Reinhaus, *In Defense of the Integrated Bar*, CAL. ST. B.J., Sept. 1938, at 35, 36. In considering the application of the Tennessee Bar Association for judicial integration, the Tennessee Supreme Court affirmed its inherent authority to do so, but only insofar as requiring licensing and discipline. 532 S.W.2d at 229-30. The court found "that the best efforts of voluntary bar associations acting through unpaid individual lawyers and committees cannot perform disciplinary investigations and enforcement at an acceptable level." *Id.* at 229. The court promulgated a new rule providing for attorney licensing, fee assessment, and discipline. *Id.* at 230-45. The fact that the court omitted consideration of the "improvement of the administration of justice" factor is particularly important because the scope of the integrated bar's activities were thereby limited. See discussion at text & notes 35-38 *infra*.

16. *In re* Integration of the Bar, 50 Hawaii 107, 107, 432 P.2d 887, 887 (1967); *In re* Unification of the New Hampshire Bar, 109 N.H. 260, 263-64, 248 A.2d 709, 712 (1968).

tice and law reform,[17] and eliminating the "free rider" who does not share in the costs of the public obligations of the profession.[18]

An integrated bar is recognized as the "administrative arm" of the state supreme court.[19] Furthermore, supreme court integration orders are regarded as having the status of state statutes and are given the force of state law.[20] Also, under many current integration schemes, the practice of law by properly educated and ethically competent bar members is treated as a privilege rather than as a right.[21]

The integrated State Bar of Arizona was created by legislative enactment approved on March 17, 1933.[22] The State Bar Act originally established the integrated bar as a "public corporation."[23] Subject to the approval of the Arizona Supreme Court, the state bar's board of governors[24] is vested with the authority to establish rules and regulations for attorney admissions,[25] licensing, and discipline,[26] to determine

17. Application of Mont. Bar Ass'n President, 163 Mont. 523, 526, 518 P.2d 32, 33 (1974); *In re* Unification of the New Hampshire Bar, 109 N.H. 260, 264, 248 A.2d 709, 712 (1968).

18. *See* Sams v. Olah, 225 Ga. 497, 503-05, 169 S.E.2d 790, 797-99 (1969), *cert. denied*, 397 U.S. 914 (1970); Application of Mont. Bar Ass'n President, 163 Mont. 523, 524-26, 518 P.2d 32, 32-33 (1974); *In re* Unification of the New Hampshire Bar, 109 N.H. 260, 264-65, 248 A.2d 709, 712 (1968). The "public obligations" of the profession are generally recognized by the establishment of clients' security funds and various mechanisms for continuing legal education and attorney licensing and discipline. Clients' security funds are designed to provide restitution to clients whose property and funds have been mulcted by unethical practitioners. Smith, *The Client's Security Fund: "A Debt of Honor Owed by the Profession"*, 44 A.B.A.J. 125, 127-28 (1958); Voorhees, *The Case for the Clients' Security Fund*, 42 J. AM. JUD. SOC'Y 155, 156 (1959). These funds are financed either through the regular bar dues payments of member attorneys, through a separate mandatory payment in addition to bar dues, or through a scheme of annual voluntary contributions. Bryan, *Clients' Security Fund Ten Years Later*, 55 A.B.A.J. 757, 760 (1969); ARIZ. S. CT. R. 27(c)(7) (Supp. 1980-81) (explicitly dividing mandatory dues into amount for Clients Security Fund and amount for funding normal operation of State Bar of Arizona, and providing for separate accounting).

19. Bridegroom v. State Bar, 27 Ariz. App. 47, 49, 550 P.2d 1089, 1091 (1976); Emslie v. State Bar, 11 Cal. 3d 210, 224, 520 P.2d 991, 998, 113 Cal. Rptr. 175, 182 (1974) (per curiam).

20. *See* Lathrop v. Donohue, 367 U.S. 820, 824-25 (1961).

21. *E.g.*, Gordon v. Clinkscales, 215 Ga. 843, 845, 114 S.E.2d 15, 19 (1960); Application for Mont. Bar Ass'n President, 163 Mont. 523, 525, 518 P.2d 32, 33 (1974); Petition of Rhode Island Bar Ass'n, 118 R.I. 489, 493, 374 A.2d 802, 804 (1977).

22. 1933 Ariz. Sess. Laws ch. 66, at 251-65 (current version at ARIZ. REV. STAT. ANN. §§ 32-201 to -275 (1976 & Supp. 1980-81)). For an extended discussion of the history of the State Bar of Arizona, see Murphy, *The Arizona Bar—From Individualism to Integration*, 2 ARIZ. L. REV. 37 (1960).

23. 1933 Ariz. Sess. Laws ch. 66, at 251 (current version at ARIZ. REV. STAT. ANN. § 32-201(A) (1976)). *Cf.* ARIZ. S. CT. R. 27(a)(1) (1973) (referring to the State Bar of Arizona as "an organization").

24. ARIZ. REV. STAT. ANN. §§ 32-232 to -242 (1976) and ARIZ. S. CT. R. 27(d)-(g) (1973 & Supp. 1980-81) vest the governance of the State Bar of Arizona in a board of governors and specify the board's powers and duties.

25. ARIZ. S. CT. R. 28(a) (Supp. 1980-81) provides that the Board of Governors recommends and the Arizona Supreme Court approves active bar members to serve on the Committee on Examinations and the Committee on Character and Fitness. The examinations committee examines applicants for admission and, after a character investigation, the Committee on Character and Fitness recommends those applicants passing the written examination for admission to practice. *Id.* The supreme court then decides whether to grant or deny the application. *Id.*

26. Both ARIZ. REV. STAT. ANN. § 32-237(2) (1976) and ARIZ. S. CT. R. 27(d)(2) (1973) provide the board of governors with the power to formulate and enforce disciplinary rules governing professional conduct, subject to supreme court approval. By its promulgation of ARIZ. S. CT. R.

the mandatory annual dues payments,[27] and to recommend suspension for nonpayment.[28]

The major purposes of the integrated State Bar of Arizona, aside from providing a mechanism for attorney admissions, licensing, and discipline, are set forth in the relevant supreme court rule.[29] The stated purposes include aiding the courts in the administration of justice,[30] providing a forum for the discussion of law reform,[31] and establishing programs for continuing legal research and education in areas of substantive and procedural law.[32] Unlike attorneys practicing under various other integration schemes,[33] attorneys duly qualified to practice in Arizona enjoy a recognized right, not merely a privilege, to practice.[34]

The stated purposes of integrated bars generally,[35] and the State Bar of Arizona specifically,[36] are arguably broad enough to allow the integrated bar to compel financial support for any conceivable bar activity. Particularly perplexing in this context are: (1) bar actions justified under broad statements of purpose, such as tending "to improve the administration of justice;"[37] and (2) the refusal by at least one court to substitute its judgment for that of the board of governors in con-

29(a) (Supp. 1980-81), the Arizona Supreme Court has adopted with slight amendment the disciplinary rules established in the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979).

27. Both ARIZ. REV. STAT. ANN. § 32-237(1) (1976) and ARIZ. S. CT. R. 27(d)(1) (1973) provide the board of governors with the power to determine, subject to approval by the supreme court, the application fee for admission to practice. Both ARIZ. REV. STAT. ANN. §§ 32-215 to -217 (1976) and ARIZ. S. CT. R. 27(c)(5)-(6) (1973 & Supp. 1980-81) provide the board of governors with the power to determine the annual dues for the various classes of membership, subject to approval by the supreme court. The classes of membership are active, retired, and honorary. ARIZ. REV. STAT. ANN. § 32-211(A) (1976); ARIZ. S. CT. R. 27(c)(1) (Supp. 1980-81). The Clients Security Fund, established by ARIZ. S. CT. R. 27(c)(7) (Supp. 1980-81), is also a mandatory annual dues assessment, but is separately assessed and accounted for. For an explanation of the function and purposes of clients' security funds, see note 18 *supra*.

28. Both ARIZ. REV. STAT. ANN. § 32-219(A) (1976) and ARIZ. S. CT. R. 27(c)(10) (Supp. 1980-81) provide for member suspension by the supreme court if two months pass after written notice of delinquency. The rule also provides for the assessment of delinquency fees for late payment in the two months between notice and mandatory suspension.

29. ARIZ. S. CT. R. 27(a)(1) (1973).

30. *Id.*

31. *Id.*

32. *Id.*

33. See text & note 21 *supra*.

34. *In re* Ronwin, 113 Ariz. 357, 358, 555 P.2d 315, 316 (1976), *cert. denied*, 430 U.S. 907 (1977), 439 U.S. 828 (1978); *In re* Klahr, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967); *In re* Burke, 87 Ariz. 336, 340, 351 P.2d 169, 172 (1960).

35. See text & notes 15-18 *supra*.

36. See text & notes 25-32 *supra*.

37. *See* Bridegroom v. State Bar, 27 Ariz. App. 47, 50, 550 P.2d 1089, 1092 (1976) (unilateral expenditure for publicizing position on voter initiative measure by board of governors of state bar funds derived in substantial part from compelled dues payments upheld as within board's purpose stated in ARIZ. S. CT. R. 27(d)(3) (1973) to improve the administration of justice); Sams v. Olah, 225 Ga. 497, 503-05, 169 S.E.2d 790, 797-99 (1969) (constitutional claim that State Bar Act illegally authorizes bar to engage in objectionable and unconstitutional political activities rejected since state bar limited in its activities to its stated purposes, which include "aiding in the efficient administration of justice," GA. CODE ANN. § 9-702 (1973)).

tested matters.[38] The discretion thereby lodged in the board of governors regarding the use of state bar funds derived from compelled dues payments has been challenged in Arizona and California. In Arizona, the battle was waged in the courtroom, while in California, the war is currently raging in the state legislature.

## B. *Recent Developments: Arizona and California*

The Board of Governors of the State Bar of Arizona is authorized by both legislative enactment and supreme court rule to control the disbursements of state bar funds, approximately $1.2 million currently.[39] Of this total, $796,965, or 66%, comes from mandatory dues collected in connection with the bar's licensing, admissions, and disciplinary functions.[40] These mandatory assessments become part of the

38. *E.g.*, *In re* Florida Bar Bd. of Governors' Action, 217 So. 2d 323, 324-25 (Fla. 1969). The holding of this case is phenomenally expansive. In upholding the Florida Bar's use of mandatory membership dues to advocate publicly the adoption of a state constitutional provision, the court announced:

> The test as to whether or not The Florida Bar should engage in a particular activity is not whether the activity is "political" in nature or directly connected with the administration of justice. The true test is whether the matter is of great public importance, and whether lawyers, because of their training and experience, are especially fitted to evaluate the same.

*Id.* at 324. If the activity authorized by the board of governors meets these tests, the Florida court stated that "this court should not second guess the position taken by the Board of Governors because to do so would substitute this Court's beliefs for that of the Board's." *Id.* at 325.

39. Both ARIZ. REV. STAT. ANN. § 32-273(4) (1976) and ARIZ. S. CT. R. 27(d)(4) (1973) provide that the board of governors shall "[m]ake appropriations and disbursements from funds of the state bar to pay necessary expenses" for effectuating the purposes of the state bar. The proposed budgeted income for the state bar's 1980 activities totals $1,205,865. STATE BAR OF ARIZONA BOARD OF GOVERNORS, PROPOSED BUDGET—1980 (on file with the *Arizona Law Review*).

40. PROPOSED BUDGET—1980, *supra* note 39. The breakdown is as follows:

| SOURCE | AMOUNT |
|---|---|
| Admissions: | |
| Examination fees | $ 88,500 |
| Investigation fees | $ 59,000 |
| Late filing fees | $ 15,000 |
| Reinstatement fees | $ -0- |
| Dues: | |
| Active (3 years and over) | $ 83,445 |
| Active (1-2 years) | $517,320 |
| Retired | $ 26,700 |
| Dues penalty | $ 7,000 |
| Discipline: | |
| Recovery of disciplinary costs | $ -0- |
| TOTAL: | $796,965 |

*Id.*

With respect to the dues category, the three membership classifications of active, retired, and honorary, see note 27 *supra*, are assessed dues as follows:

funds the board of governors may spend for state bar activities.[41]

In 1974, an addition to article 6 of the Arizona Constitution providing for "merit selection" of state appellate judges was proposed by voter initiative and passed as Proposition 108.[42] Acting within the broad authorization to aid the courts in the administration of justice,[43] the board of governors unilaterally spent $40,000 of the state bar's funds to voice "the state bar's" support of the measure.[44]

In *Bridegroom v. State Bar*,[45] Bruce Bridegroom, an active member of the State Bar of Arizona, sued the state bar and the board of governors,[46] alleging that the bar was a public corporation which could not constitutionally contribute money to influence an election.[47] He requested that the court declare null and void the electoral approval of Proposition 108 and require the board of governors to render an accounting and restitution to the State Bar of Arizona of the state bar funds expended in promoting the proposition.[48] No allegations, however, were made of any first amendment violations. The trial court granted the state bar's motion to dismiss for failure to state a claim.[49]

Bridegroom contended that the Arizona constitutional prohibition

| | CLASS | | | |
|---|---|---|---|---|
| ASSESSMENT | Active (3 years and over) | Active (1-2 years) | Retired | Honorary |
| Bar Treasury | $120 | $ 85 | $ 30 | $ 0 |
| Security Fund | $ 10 | $ 10 | $ 0 | $ 0 |
| Total Dues | $130 | $ 95 | $ 30 | $ 0 |

Letter from Eldon L. Husted, Executive Director of the State Bar of Arizona (Oct. 19, 1979) (on file with the *Arizona Law Review*). The Clients Security Fund is a separate trust fund managed by the Board of Governors to be used for indemnifying clients whose funds and property have been embezzled by unethical practitioners. ARIZ. S. CT. RS. 27(c)(7)-(8), 27(d)(9) (Supp. 1980-81). Thus, the funds going into this trust are not stated in the breakdown of the sources of state bar funds shown above. See note 18 *supra* for a more detailed discussion of clients' security funds.

In the admissions category, reinstatement fees are assessed against those attorneys suspended from practice for nonpayment of the regular membership dues. ARIZ. S. CT. RS. 27(c)(10), 40 (Supp. 1980-81). The assessment is equal to the accrued back dues that would have been required had the particular attorney not been suspended. *Id.* R. 40.

41. ARIZ. REV. STAT. ANN. § 32-219(B) (1976); ARIZ. S. CT. R. 27(c)(8) (Supp. 1980-81).

42. Bridegroom v. State Bar, 27 Ariz. App. 47, 48, 550 P.2d 1089, 1090 (1976). ARIZ. CONST. art. 6, §§ 36-40 were added as a result of the November 1974 ballot. The new sections established a nonpartisan commission on appellate court appointments to recommend to the governor persons qualified to fill vacant appellate court positions. *Id.* §§ 36-37. The names submitted are chosen "on the basis of merit alone without regard to political affiliation." *Id.* § 37. These additions collectively comprise the Arizona judicial "merit selection system."

43. ARIZ. REV. STAT. ANN. § 32-237(3) (1976); ARIZ. S. CT. R. 27(d)(3) (1973).

44. Phone interview with Bruce D. Bridegroom, an Arizona attorney, in Tucson (Apr. 10, 1980).

45. 27 Ariz. App. 47, 550 P.2d 1089 (1976).

46. *Id.* at 48, 550 P.2d at 1090.

47. *Id.* ARIZ. CONST. art. 14, § 18 provides that "[i]t shall be unlawful for any corporation, organized or doing business in this State, to make any contribution of money or anything of value for the purpose of influencing any election or official action."

48. 27 Ariz. App. at 48, 550 P.2d at 1090.

49. *Id.*

applied to the state bar since it is denominated "a public corporation" in the State Bar Act.[50] The court of appeals, however, stated that since the Arizona Supreme Court denominated the bar as "an organization" in the Supreme Court Rules promulgated in 1973,[51] the designation in the Act had no legal effect.[52] Furthermore, the court stated that even if the state bar was a "corporation," the prohibition in the Arizona Constitution against contributions did not apply to the board of governor's "expenditure" since the provision refers only to "contributions."[53] The court thus upheld the board of governor's action, finding that the unilateral expenditure was within the authority vested in the board.[54]

The *Bridegroom* court sustained patently political activity on the part of the board of governors of the State Bar of Arizona, where such activity relates in any way to its broad state-conferred authority. Consequently, in Arizona for the present at least, an attorney cannot successfully attack the bar's use of his dues payments by a claim that the board acted beyond its authority. Attorneys in states with bars that were integrated by legislative action, however, may still be able to pursue change legislatively. In fact, political activity by the State Bar of California is currently being scrutinized by that state's legislature.[55]

The California bar was integrated by legislative enactment effective July 29, 1927.[56] While the Arizona State Bar Act is patterned after that of California,[57] there is one important difference. Unlike Arizona, the board of governors of the State Bar of California is not vested with the authority to formulate a mandatory dues scheme for attorney li-

50. *Id.* at 48-49, 550 P.2d at 1090-91. See discussion of State Bar Act at text & notes 22-32 *supra*.

51. ARIZ. S. CT. R. 27(a)(1) (1973).

52. 27 Ariz. App. at 49, 550 P.2d at 1091. The *Bridegroom* court noted that since the Arizona Supreme Court had held that ARIZ. CONST. art. 14, § 2 prohibits the creation of corporations by special acts of the legislature, "the State Bar Act of 1933 has no viability and the designation of the State Bar of Arizona as a 'public corporation' has no legal efficacy." *Id.* at 48-49, 550 P.2d at 1090-91 (citing Firemen's Fund Ins. Co. v. Arizona Ins. Guar. Ass'n, 112 Ariz. 7, 536 P.2d 695 (1975)). Since the State Bar Act was in effect struck down, authority for the existence of the State Bar of Arizona was found in the "inherent power" of the Arizona Supreme Court to promulgate rules integrating the bar and to govern the conduct of the integrated bar by court rule. *Id.* at 49, 550 P.2d at 1091. Having recognized and upheld this "inherent power," the *Bridegroom* court noted that the Supreme Court Rule's designation of the state bar as "an organization" was the legally proper description. *Id.*; ARIZ. S. CT. R. 27(a)(1) (1973).

53. 27 Ariz. App. at 49, 550 P.2d at 1091. See text of ARIZ. CONST. art. 14, § 18 at note 47 *supra*.

54. 27 Ariz. App. at 49-50, 550 P.2d at 1091-92. The court relied on ARIZ. S. CT. R. 27(d)(3) (1973), which provides the board of governors with the power to "aid in the . . . improvement of the administration of justice," and on *id.* R. 27(d)(4), which provides the board with the power to use state bar funds "to pay necessary expenses for carrying out its functions."

55. CAL. BUS. & PROF. CODE § 6140.3 (West Supp. 1980) established a Special Legislative Investigating Committee on the State Bar to investigate the California State Bar Board of Governors' uses of dues payments during 1980-81. See text & notes 78-79 *infra*.

56. 1927 Cal. Stats. ch. 34, at 38-45 (codified at CAL. BUS. & PROF. CODE §§ 6000-6206 (West 1974 & Supp. 1980)).

57. ARIZ. REV. STAT. ANN. § 32-201 (1976), historical note.

censing and admissions;[58] the California legislature must pass a dues bill.[59] With budgeted fund expenditures of over $8.7 million,[60] the State Bar of California's board of governors has authority to spend the funds as necessary to effectuate the bar's purposes.[61] As in Arizona, the California board of governors may expend funds for the improvement of "the administration of justice."[62]

The permissible scope of California bar activities and the use of mandatory dues to finance those activities are currently undergoing careful scrutiny by the California legislature.[63] The current bar dues controversy stems in part from a 1975 statute directing the Governor of California to appoint six nonlawyer "public members" to serve on the state bar's twenty-two member board of governors.[64] A second source of controversy is the Conference of Delegates,[65] a body that represents the various voluntary bar associations throughout California, and which is the major source of the bills introduced into the California legislature pursuant to the State Bar's Legislative Program.[66] Essentially, the Conference of Delegates adopts resolutions derived from its membership regarding possible legislative initiatives[67] and submits them to the board of governors, which decides whether to actively lobby for such proposals in the legislature.[68]

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58. *Compare* ARIZ. REV. STAT. ANN. §§ 32-215 to -217, -237(1) (1976) and ARIZ. S. CT. R. 27(c)(5)-(6), 27(d)(1) (1973 & Supp. 1980-81) (fees established by board of governors with consent of the Arizona Supreme Court) *with* CAL. BUS. & PROF. CODE § 6140 (West 1974 & Supp. 1980) (dues prescribed by legislature).

59. *See* CAL. BUS. & PROF. CODE § 6140 (West 1974 & Supp. 1980); note 56 *supra*.

60. Davids, *Should the State Bar of California Restrict its Activities to Admissions and Discipline?: Pro*, BRIEF/CASE, July, 1979, at 6 (publication of The Bar Association of San Francisco).

61. CAL. BUS. & PROF. CODE § 6028(a) (West Supp. 1980).

62. *Id.* § 6031 (West 1974). See discussion of the Arizona state bar board's authority in this context at text & note 30 *supra*.

63. *See At Last—State Bar Has a 1980 Dues Bill*, 54 CAL. ST. B.J. 394 (1979); LEGISLATIVE ANALYST'S REPORT, *supra* note 15; ASSEMBLY COMMITTEE ON JUDICIARY, USE OF MANDATORY STATE BAR DUES (1979) [hereinafter ASSEMBLY COMMITTEE REPORT].

64. CAL. BUS. & PROF. CODE § 6013.5 (West Supp. 1980) provides in part that "six members of the board shall be members of the public who have never been members of the State Bar or admitted to practice before any court in the United States. They shall be appointed . . . by the Governor, subject to the confirmation of the Senate." *Id.* § 6011 (West Supp. 1980) provides for a 22-member board.

65. The Conference of Bar Association Delegates was established by the Board of Governors of the State Bar of California in April, 1934, as the representative body of the various voluntary California bar associations. *Conference of Bar Association Delegates—Meeting of the Executive Committee*, 10 CAL. ST. L.J. 312, 312-14 (1935); Leydorf, *The Conference of Delegates—A Reappraisal*, 52 CAL. ST. B.J. 436, 437 (1977). Since the Conference of Delegates was created by a state bar rule change adopted by the Board of Governors and not pursuant to any statutory authorization, the Conference of Delegates thus possesses no statutory mandate, sanction, or authority. Leydorf, *supra*, at 437. As of 1976, the Conference included approximately 500 delegates from 103 bar associations. *Id.*

66. Seventy to eighty percent of the bills in the State Bar's Legislative Program come directly from resolutions of the Conference of Delegates. Leydorf, *supra* note 65, at 437-38; *see* Casey, *Annual Report of the Board of Governors*, 51 CAL. ST. B.J. 549, 562-64 (1976).

67. Casey, *supra* note 66, at 564.

68. *Id.*; Leydorf, *supra* note 65, at 437. In 1977, the State Bar Rules were amended so that, after rejection of a Conference resolution by the board of governors, a subsequent readoption of

The forces representing the appointment of socially and politically active "public members" to the board and those forces representing recent Conference resolutions dealing with matters of liberal social policy have converged: recent Conference resolutions submitted to the board include proposals advocating the abolition of the death penalty and the decriminalization of prostitution;[69] the board of governors in turn has recently undertaken lobbying efforts in support of controversial legislation including the decriminalization of marijuana.[70] Members of the California bar have been critical of such actions. The critics argue that the state bar should limit its activities to the licensing and discipline of attorneys.[71] They contend that the extraneous activities provide the attorneys paying mandatory dues with little or no resulting benefit,[72] and that such activities have minimal impact upon legislation.[73]

In response to this criticism of state bar activities, the California legislature has enacted two one-year interim bar dues bills, the most recent of which is effective only through 1981.[74] This legislation provided initially for an across-the-board fee decrease of ten dollars per membership classification,[75] was revised in 1980 to provide for a slight fee increase and change in the dues assessment structure,[76] and cur-

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the same resolution by the Conference by a two-thirds vote entitles such resolution to new consideration by the board. Leydorf, *supra* note 65, at 438-39. While the state bar has historically lobbied on behalf of Conference resolutions adopted by the board of governors, in September, 1979, the board gave the Conference the authority to lobby for its own legislative proposals. *Bar Signs Contract With Lobbyists*, 55 CAL. ST. B.J. 41,41 (1980). The financing and staff support for such Conference endeavors, however, is derived from state bar funds. *Id.*

69. Leydorf, *supra* note 65, at 438.

70. *Id.* at 439.

71. Davids, *supra* note 60, at 6. Mr. Davids points out that in California, "[w]ell over half of State Bar funds are spent on matters other than licensing and discipline." *Id.*

72. Telephone interview with Allen Sumner, Assistant Legal Affairs Secretary for the Governor of California (Jan. 2, 1980); ASSEMBLY COMMITTEE REPORT, *supra* note 63, at 21 (remarks of Mr. Anthony Ruffolo, member of the California State Trial Attorneys Association).

73. Interview with Mr. Sumner, *supra* note 72.

74. 1979 Cal. Legis. Serv. ch. 1041, §§ 1-4, at 3941-43 (West) (codified at CAL. BUS. & PROF. CODE §§ 6013.5, 6140, 6140.3 (West Supp. 1980)); 1980 Cal. Legis. Serv. ch. 1363, § 1-2, at 5387-88 (West) (to be codified at CAL. BUS. & PROF. CODE §§ 6140, 6140.3 (West Supp. 1981)). The 1979 statute amends §§ 6013.5 and 6140 of the California Business and Professions Code, repeals former § 6140.3, and establishes a new § 6140.3 in its stead. 1979 Cal. Legis. Serv. ch. 1041, §§ 1-4, at 3941-43 (West) (codified at CAL. BUS. & PROF. CODE §§ 6013.5, 6140, 6140.3 (West Supp. 1980)). Both the amended § 6140 and the new § 6140.3 are repealed by their own provisions as of January 1, 1981. *Id.* §§ 2, 4, at 3943. The 1980 statute reenacts and amends § 6140, and reenacts § 6140.3. 1980 Cal. Legis. Serv. ch. 1363, §§ 1-2, at 5387-88 (West) (to be codified at CAL. BUS. & PROF. CODE §§ 6140, 6140.3 (West Supp. 1981)). Both of these sections are in effect only through 1981. *Id.* at 5388. Regarding the problems confronting the California legislature in getting the first statute passed and the specific criticisms lodged against the state bar's non-licensing and disciplinary activities, see *At Last—State Bar Has a 1980 Dues Bill*, *supra* note 63, at 394-95.

75. 1979 Cal. Legis. Serv. ch. 1041, § 2, at 3942-43 (West) (amending CAL. BUS. & PROF. CODE § 6140 (West 1974)). Section 6140 as amended in 1979 remained effective only through 1980. *Id.* § 2, at 3943.

76. 1980 Cal. Legis. Serv. ch. 1363, § 1, at 5387-88 (West), in effect only through 1981, changes the four-tier active member dues structure set forth in the prior interim statute. A two-tier arrangement is established to assess active membership dues, based on the period since initial admission to practice. *Id.* The new structure requires dues of $130 from active members who

rently permits the governor to appoint only four "public members" to the board of governors.[77] Most importantly, these statutes created the Special Legislative Investigating Committee on the State Bar.[78] This committee's function is to review the level of the mandatory membership dues and the types of activities for which dues should be spent by the state bar, and to make findings and submit recommendations to the bar's board of governors, the state supreme court, and the legislature regarding: 1) the proper level for mandatory membership dues; 2) whether the authority to set the amount of dues payments should be transferred from the legislature to the board of governors; and 3) whether and how activities financed by the mandatory dues should be expanded or restricted.[79]

The experiences of the Arizona and California bars evidence member discontent with both the authorization and the current scope of bar activities financed by compulsory dues. Clearly, absent any first amendment constraints, the board of governors may finance almost any conceivable activity through member attorney compulsory dues payments.[80] Attorneys who object to particular bar activities are often left remediless because the courts either fail or refuse to consider the individual first amendment interests, choosing instead to uphold and exalt the authority lodged in the board of governors.[81] The problems confronting the individual objecting attorney thus raise two important first amendment issues: 1) whether substantial state justification exists for compelling association in the form of compulsory membership in the state bar; and 2) whether such substantial justification extends to

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have been admitted to practice in California for three or more years, and active membership dues of $75 from those who have been admitted to practice for less than three years. *Id.* The structure established under the statute in effect during 1980 set fee assessments ranging from a high of $125 for active members who had been admitted for ten or more years, to a low of $50 for active members who had been admitted for less than two years. 1979 Cal. Legis. Serv. ch. 1041, § 2, at 3942-43 (West).

77. 1979 Cal. Legis. Serv. ch. 1041 § 1, at 3942 (West) (codified at CAL. BUS. & PROF. CODE § 6013.5 (West Supp. 1980)) (amending the former "public member" appointment statute, 1975 Cal. Stats. ch. 874, § 4, at 1952). This particular section remains in effect indefinitely. Beginning in 1983, the Senate Committee on Rules and the Speaker of the Assembly will each appoint one public member. CAL. BUS. & PROF. CODE § 6013.5 (West Supp. 1980).

78. 1979 Cal. Legis. Serv. ch. 1041, §§ 3-4, at 3943 (West) (codified at CAL. BUS. & PROF. CODE § 6140.3 (West Supp. 1980)) (effective through 1980); 1980 Cal. Legis. Serv. ch. 1363, § 2, at 5388 (West) (to be codified at CAL. BUS. & PROF. CODE § 6140.3 (West Supp. 1981)) (effective through 1981).

79. 1980 Cal. Legis. Serv. ch. 1363, § 2, at 5388 (West) (to be codified at CAL. BUS. & PROF. CODE § 6140.3(c) (West Supp. 1981)) (effective through 1981).

80. *See* Bridegroom v. State Bar, 27 Ariz. App. 47, 49-50, 550 P.2d 1089, 1091-92 (1976), discussed at text & notes 42-54 *supra*; ARIZ. REV. STAT. ANN. § 32-237(3) (1976). *See also In re* Florida Bar Bd. of Governor's Action, 217 So. 2d 323, 324-25 (Fla. 1969), discussed at note 38 *supra*. *But see* Sams v. Olah, 225 Ga. 497, 507-08, 169 S.E.2d 790, 799-800 (1969), indicating that while the state bar may spend funds derived from mandatory dues payments for activities germane to the bar's purposes, such purposes do not include the "promotion of political issues and candidates." *Id.* at 508, 169 S.E.2d at 800.

81. *See* authorities cited at note 80 *supra*.

compelling speech and ideology in the form of compulsory financial support for the state bar's political activities. Current interpretations of the first amendment clearly indicate that protected, assertable, and remediable interests exist.

## NATURE OF THE RIGHTS OF FREE SPEECH AND ASSOCIATION

The first amendment protects the freedoms of religion, speech, press, assembly, and, by implication, the freedom of association from infringement by the federal government.[82] These freedoms are fully protected against state infringement by the due process clause of the fourteenth amendment.[83] Before a state can be found to have violated the first amendment there must first be a finding of "state action."[84] The state action requirement basically subjects only those acts committed by the state itself or under some form of state authority to the strictures of the fourteenth amendment.[85] Regarding bar integration, state action is present when integration is accomplished either by the state legislature or by rule of the state supreme court.[86]

A state may not infringe first amendment rights unless it has a legitimate and compelling interest in doing so.[87] When a state is charged with violating the first amendment, the courts utilize an "exacting scrutiny" to determine if the state exhibits the requisite inter-

82. U.S. CONST. amend. I. See note 1 *supra*. For an excellent discussion of the first amendment, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-1 to 14-13, at 576-885 (1978 & Supp. 1979).

83. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925). In *De Jonge, supra*, the Court stated:

> Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. . . . The First Amendment of the Federal Constitution expressly guarantees that right against abridgement by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.

299 U.S. at 364.

84. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156, 164-65 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-51 (1974); The Civil Rights Cases, 109 U.S. 3, 11 (1883).

85. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-51 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173-77 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715, 719-24 (1961). In The Civil Rights Cases, 109 U.S. 3 (1883), the Court stated:

> In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong. . . , and may presumably be vindicated by resort to the laws of the State for redress.

*Id.* at 17.

86. *See* Lathrop v. Donohue, 367 U.S. 820, 824-27 (1961). See discussion of the three major methods of bar integration at text & notes 12-14 *supra*.

87. Wooley v. Maynard, 430 U.S. 705, 716-17 (1977); Bigelow v. Virginia, 421 U.S. 809, 826-28 (1975); NAACP v. Button, 371 U.S. 415, 438-39 (1963).

est.[88] The courts thus balance the degree of the imposition upon first amendment freedoms against the countervailing governmental interests to determine whether the government's interests are sufficiently compelling to subordinate the individual's interests.[89] In evaluating statutory infringements, courts also apply the "overbreadth" doctrine: statutes invading first amendment interests must be narrowly drawn and utilize the least restrictive means for the achievement of legitimate state purposes.[90]

Speech is one of the rights protected by the first amendment.[91] Protected "speech" includes ideology, expression, conduct, and association.[92] A significant case in the context of government-compelled speech is *Wooley v. Maynard*.[93] *Wooley* involved a Jehovah's Witness who wilfully obscured the motto "Live Free or Die" on the license plates of his automobile, in violation of a New Hampshire statute.[94] The statute effectively forced Mr. Maynard to display a state-compelled ideological message on his private property.[95] The Court found that New Hampshire's interests were insufficient to justify the infringement of Maynard's first amendment rights.[96] In its analysis, the Court reaffirmed that the first amendment speech protections also support converse protections regarding the right *not* to speak.[97] Whether this

88. Buckley v. Valeo, 424 U.S. 1, 16-17 (1976).

89. Wooley v. Maynard, 430 U.S. 705, 717 (1977); Bigelow v. Virginia, 421 U.S. 809, 826-27 (1975); NAACP v. Button, 371 U.S. 415, 438-39 (1963). *But cf.* Lathrop v. Donohue, 367 U.S. 820, 872-74 (Black, J., dissenting).

> [A]s stated many times before, I do not subscribe to the theory that abridgments of First Amendment freedoms can ever be permitted on a "balancing" basis. I reiterate my belief that the unequivocal language of the First Amendment was intended to mean and does mean that the Framers of the Bill of Rights did all of the "balancing" that was to be done in this area.

*Id.* at 873 (footnote omitted). For a more detailed discussion of the "absolutist"-"balancing" distinction of first amendment judicial review, *see* L. TRIBE, *supra* note 82, § 12-2, at 582-83. *See also* Note, *Freedom of Speech and Association—Government Employees—Elrod v. Burns*, 18 BOST. COL. IND. & COM. L. REV. 782, 792 (1977).

90. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); Shelton v. Tucker, 364 U.S. 479, 488 (1960); *see* Wooley v. Maynard, 430 U.S. 705, 716-17 (1977). Thus, since court-ordered integration schemes possess "the characteristics of legislation," Lathrop v. Donohue, 367 U.S. 820, 827 (1961), it would seem that the overbreadth doctrine applies to first amendment attacks on state bar integration by state supreme court order as well as to integration by statute.

91. U.S. CONST. amend. I. See note 1 *supra*.

92. Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (ideology); Cohen v. California, 403 U.S. 15, 24, 26 (1971) (expression); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (conduct); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958) (association/expression). See text & notes 98-105 *infra* for a discussion of the implied freedom of association.

93. 430 U.S. 705 (1977).

94. *Id.* at 707-08. N.H. REV. STAT. ANN. § 263:1 (Supp. 1979-80) currently provides "that number plates for passenger vehicles shall have the state motto 'live free or die' written thereon." Section 262:27-c imposes a penalty for obstructing license plate numbers or letters.

95. 430 U.S. at 715.

96. *Id.* at 715-17.

97. *Id.* at 714 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34, 637 (1943)). The Court noted that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* (citation omitted).

doctrine of converse protection applies in the context of freedom of association to support a right *not* to associate is unclear.

While the first amendment purportedly supports an independent right of association, this right is generally regarded as being derived from the explicit rights set forth in that amendment.[98] Generally, freedom of association protects one's right to engage in lawful group activities if the participant's goals have independent first amendment significance.[99] Since the speech protections of the first amendment are very broad, encompassing thought and expressive conduct as well as "pure speech,"[100] it would seem that the protections afforded associations should be equally as broad.[101]

The *Wooley* Court found a concomitant right against compelled thought in the freedoms of thought and belief derived from the first amendment's explicit freedom of speech.[102] Since the right of association is likewise implied in the explicit protections of the first amendment, the converse right of nonassociation would seem to warrant recognition.[103] Although the Supreme Court has yet to explicitly recognize such a converse right,[104] several lower courts have.[105]

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98. Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 1, 11 (1977); L. TRIBE, *supra* note 82, § 12-23, at 700-01. *But see* Lathrop v. Donohue, 367 U.S. 820 (1961), where the plurality analyzed the associational issue, *id.* at 827-28, 843, separately and distinctly from the free speech issue, *id.* at 844-45. In his concurring opinion, Justice Harlan attacked the plurality's "association"-"speech" distinction. *Id.* at 850.

99. L. TRIBE, *supra* note 82, § 12-23, at 701-02.

> But the doctrine . . . that 'whatever action a person can lawfully pursue as an individual, freedom of association must ensure he can pursue with others'—has not emerged in our constitutional law. On the contrary, the Supreme Court has quite consistently regarded arguments about freedom of association as reducible not to the broad question of whether those who act in concert are merely seeking together a goal they would be privileged to seek separately, but to the much narrower question of whether the actors are seeking a goal independently protected by the first amendment.

*Id.* (footnotes omitted). Thus, the Court limits its protection of the right of association. If a person's speech is protected, he may likewise speak through participation in organized group activity; if a person is free to petition the government, he may likewise associate to so petition. Raggi, *supra* note 98, at 10-11. By this analysis, the freedom of association is not a separate and distinct right. *Id.* at 1; *see* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (explicit linkage of association to expression).

100. *See* Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Shelton v. Tucker, 364 U.S. 479, 485-87 (1960); Winters v. New York, 333 U.S. 507, 509-10 (1948); cases cited note 92 *supra*.

101. *See* NAACP v. Button, 371 U.S. 415, 444-45 (1963).

102. 430 U.S. at 714. See discussion at text & notes 93-97 *supra*.

103. *See* Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1379 (1963). In his Article, Justice Douglas stated:

> Under the First Amendment it would seem that a lawful voluntary organization can no more be held responsible for the perverse views of one of its members than a member of a mandatory organization can be held responsible for the organization's views which transcend the justification for its mandatory character.

*Id. See also* Comment, *Freedom From Political Association: The Street and Lathrop Decisions*, 56 NW. U.L. REV. 777, 778 (1962).

104. See discussion at text & notes 164-69 *infra*.

105. Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546 (E.D.N.Y. 1977); Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973); Young Americans For Freedom v. Gorton, 91 Wash. 2d 204, 588 P.2d 195 (1978); Good v. Associated Students, 86 Wash. 2d 94, 542 P.2d 762 (1975).

In *Good v. Associated Students*,[106] the Supreme Court of Washington considered a first amendment claim by three students of the University of Washington challenging the required membership and financial support of the Associated Students of the University of Washington [ASUW].[107] Specifically, the students objected to the use of their mandatory activities fees, a portion of which funded the ASUW, for controversial public political stands by the ASUW.[108] The court explicitly found a first amendment right not to associate in this context,[109] and held that the state university could not compel the students to join the ASUW.[110] With respect to the students' demand for a refund of their mandatory activity fee payments, however, the court attempted to balance the first amendment rights of the students not to espouse a particular ideology with the state university's interest in providing an atmosphere of discussion and debate.[111] The court found the record incomplete as to whether the board of regents had exceeded its discretion under state statutes and guidelines mandating regent supervision and control over student fee distribution and the ASUW.[112] Consequently, the balancing process was remanded to the trial court.[113]

Two recent federal district court cases have also considered the existence of a right not to associate. Both *Cullen v. New York State Civil Service Commission*[114] and *Bond v. County of Delaware*[115] concerned public employment and coerced political contributions. Coerced contributions to a county Republican party were examined as a condition to retaining public employment in *Bond* and as a condition to advancement in public employment in *Cullen*.[116] Each holding turned on a finding of severe infringement of employees' first amend-

106. 86 Wash. 2d 94, 542 P.2d 762 (1975).

107. *Id.* at 95-96, 542 P.2d at 763-64.

108. *Id.* The plaintiffs objected to ASUW resolutions opposing the invasion of Laos and the shipment of nerve gas through the state, and to ASUW contributions to assist the California lettuce boycott and to reimburse certain speakers at a war moratorium meeting. *Id.* at 96, 542 P.2d at 764.

109. *Id.* at 100, 542 P.2d at 766. "Freedom to associate carries with it a corresponding right to not associate." *Id.*

110. *Id.* at 104, 542 P.2d at 768. "[T]he State, through the university, may not compel membership in an association, such as the ASUW, which purports to represent *all* the students at the university, including these plaintiffs." *Id.* (emphasis in original).

111. *Id.* at 104-05, 542 P.2d at 768.

112. *Id.* at 105-07, 542 P.2d at 769-70. An interesting case in the wake of *Good* is Young Americans For Freedom v. Gorton, 91 Wash. 2d 204, 588 P.2d 195 (1978). Washington citizens sued their attorney general because they objected to his use of state funds in filing an amicus curiae brief with the United States Supreme court in connection with Regents of the University of California v. Bakke, 438 U.S. 265 (1978). *Id.* at 205-06, 588 P.2d at 196. The court distinguished *Good*, finding that citizenship is voluntary, not compelled, and that citizenship is not akin to membership in a group or association. *Id.* at 213-14, 588 P.2d at 200-01.

113. 86 Wash. 2d at 107-08, 542 P.2d at 770.

114. 435 F. Supp. 546 (E.D.N.Y. 1977).

115. 368 F. Supp. 618 (E.D. Pa. 1973).

116. Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. at 550-51; Bond v. County of Delaware, 368 F. Supp. at 619-20.

ment freedom of association.[117] Unlike *Bond*, the *Cullen* court explicitly recognized a right not to associate and a right to withhold support of disagreeable political views.[118]

Since *Lathrop v. Donohue*,[119] the United States Supreme Court has not explicitly considered and decided first amendment issues relating to compelled membership in and financial support of the integrated bar.[120] Compulsory labor union membership and dues payments as they relate to the first amendment rights of individual union members have, however, been rather extensively scrutinized by the Court. The holdings and rationale of these recent Supreme Court labor law decisions are directly applicable to the first amendment analysis of the integrated bar.

## UNION ORGANIZATION, MANDATORY DUES, AND THE FIRST AMENDMENT

Certain characteristics of union organization and integrated bar organization make these two entities particularly susceptible to first amendment scrutiny. In each organization actual membership and/or compulsory financial support are required for continued employment in the particular field.[121] Such compulsion is authorized by the state with respect to union agreements and established directly by state action regarding bar integration.[122] Also, political and legislative activities are widespread in both entities.[123]

The United States Supreme Court has dealt with the first amendment and bar integration on only one occasion.[124] In the area of union organization, however, the Court has decided first amendment issues in a rather well-defined line of decisions. Because of the similarities between labor union and integrated bar organization and activities, an exploration of these decisions makes possible an analogy to the circumstances of the integrated bar.

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117. Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. at 551-52; Bond v. County of Delaware, 368 F. Supp. at 625-27. The *Cullen* court noted that to deny employment or promotion on the basis of monetary contributions to a political party "is a severe and intolerable infringement of the right of association." 435 F. Supp. at 552. In *Bond*, the court stated that "the loss of employment for refusing to contribute to a particular political regime operates as a substantial restraint on the freedom to associate with the party of one's choice." 368 F. Supp. at 627.

118. 435 F. Supp. at 551. The court observed that "[a]t the core of the present case is the . . . basic principle that the right to associate includes the right of affiliation with the political party of one's choice or the right not to affiliate with a political party at all." *Id.*

119. 367 U.S. 820 (1961).

120. See discussion at text & notes 4-7 *supra.*

121. Comment, *The Compelled Contribution in the Integrated Bar and the All Union Shop*, 1962 WIS. L. REV. 138, 148.

122. *Id.*

123. *Id.*

124. Lathrop v. Donohue, 367 U.S. 820 (1961). See discussion at text & note 156-79 *infra.*

In *Railway Employes' Department v. Hanson*,[125] the Court upheld the constitutionality of the union shop provisions of the 1951 amendments to the Railway Labor Act.[126] The federal statute at issue authorized carriers to agree with the employees' designated labor union to require membership in the labor union within sixty days of hiring and mandatory payment of dues as a condition to continued employment.[127] The Nebraska Supreme Court had held that such union shop agreements violated employees' first amendment freedom of association.[128] In light of this infringement and the Nebraska constitutional "right to work" provision,[129] the Nebraska court held that Congress lacked the power to authorize union shop contracts regarding railroad employees in Nebraska.[130] On appeal to the United States Supreme Court, the statute's interference with the first amendment rights of free speech and association were evaluated.[131] In so doing, the Court weighed the individual first amendment interests against the governmental interests in encouraging the amicable resolution of labor conflicts[132] and in eliminating the "free rider," the nonunion employee who benefits from union collective bargaining activity without sharing in the costs.[133] The Court held that Congress can constitutionally authorize a contractual requirement that all beneficiaries of collective bargaining activities financially support the labor bargaining agency.[134]

The *Hanson* Court did not directly address the issue of whether compelled membership per se violated the employee's interests in free association.[135] The Court explicitly stated that its holding decided only the narrow issue of whether the statute, in authorizing compelled financial support for the benefits of bargaining representation, violated the first amendment.[136] The Court explicitly reserved judgment on whether the funds derived from the compulsory support could properly

125. 351 U.S. 225 (1956).

126. *Id.* at 238. The 1951 Railway Labor Act amendments are found at 45 U.S.C. § 152, Eleventh (1976).

127. 45 U.S.C. §§ 152, Eleventh (a) - (b) (1976). As to the general definition of "union shop," *see* Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 185 n.16 (1975).

128. Hanson v. Union Pacific R.R. Co., 160 Neb. 669, 695-97, 71 N.W.2d 526, 545-46 (1955).

129. NEB. CONST. art. 15, § 13 makes it illegal for a person to be denied employment because of membership in or expulsion from a labor organization, and further renders illegal those management-labor contracts that condition employment on union membership or nonmembership status.

130. 160 Neb. at 697, 71 N.W.2d at 546.

131. 351 U.S. at 236-38.

132. *Id.* at 233-34.

133. *Id.* at 235.

134. *Id.* at 238.

135. The Court in Lathrop v. Donohue, 367 U.S. 820 (1961), misconceived the import of this point. See discussion at text & notes 165-69 *infra*.

136. 351 U.S. 236-38.

be used for purposes unrelated to collective bargaining.[137] In making this reservation, the *Hanson* Court indicated that "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case."[138]

The opportunity to decide this issue was presented in *International Association of Machinists v. Street*.[139] As in *Hanson*, at issue was the union shop provision in the Railway Labor Act.[140] In *Street*, the union used funds from mandatory dues payments to make contributions to candidates for political office and to take public positions on various political issues.[141] The Court reiterated that *Hanson* did not decide the first amendment association and broader free speech issues.[142] The *Street* Court, however, declined to decide the constitutional issues squarely presented.[143] Basing the decision on a strained statutory interpretation, the Court held that the history of the union shop statute indicated a congressional intent to deny unions the power to use an employee's mandatory dues for political purposes objectionable to that employee.[144]

In *Abood v. Detroit Board of Education*,[145] the Court faced the issues it avoided in *Street*. The *Abood* Court examined the constitutionality of a union's use of mandatory employee fee payments for purposes unrelated to collective bargaining[146] pursuant to Michigan's statutorily authorized "agency shop" scheme.[147] The agency shop authorization provided that nonunion employees could select a bargaining representative[148] and that, pursuant to an agreement between the representative and the employer, all nonunion employees would be required to pay a "service charge" equal to the regular membership dues.[149] The Court declined to decide the first amendment free associa-

137. *Id.* at 235. "If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." *Id.* (footnote omitted).
138. *Id.* at 238.
139. 367 U.S. 740 (1961).
140. 45 U.S.C. § 152, Eleventh (a) (1976). See text & notes 126-27 *supra*.
141. 367 U.S. at 742-45, 744 n.2.
142. *Id.* at 748-49.
143. Justice Black in dissent argued vehemently against the plurality's avoidance of the constitutional issues duly presented. *Id.* at 780, 784-85. He stated that "no one has suggested that the Court's statutory construction of § 2, Eleventh could possibly be supported without the crutch of its fear of unconstitutionality." *Id.* at 786.
144. *Id.* at 768-69.
145. 431 U.S. 209 (1977).
146. *Id.* at 212-13, 217.
147. MICH. COMP. LAWS § 423.211 (MICH. STAT. ANN. § 17.455 (11) (Callaghan 1975)). "In an agency shop, the employer and union agree that employees are free to refrain from union membership, but that all nonunion employees must pay to the union an amount equal to union dues and fees as a condition of employment." Blair, *supra* note 127, at 185 n.17.
148. MICH. COMP. LAWS § 423.211 (MICH. STAT. ANN. § 17.455(11) (Callaghan 1975)).
149. 431 U.S. at 212.

tion issue, noting that the agency shop clause did not require formal membership.[150] The Court also stated that *Hanson* did not decide the association issue even in the context of the compelled-membership union shop.[151] In balancing the governmental interests in maintaining labor peace and in eliminating the "free rider" with the individual interests involved in the compulsory financial support issue, *Hanson* and *Street* were reaffirmed.[152] Requiring financial support for collective bargaining, contract administration, and grievance adjustment does not violate an employee's first amendment free expression rights.[153] Most importantly, the Court held that the first amendment speech protections prohibit the bargaining representative from using the mandatory fees of objecting employees to fund its political activities.[154]

The preceding line of Supreme Court pronouncements establishes that government-compelled and authorized organization and financial support impinges upon protected individual liberties under the first amendment. *Abood*, a landmark decision in this area, is important when its rationale is applied to other government-compelled relationships, most notably the integrated bar. Union and agency shop arrangements are substantially similar to the integration of the bar.[155] In both cases, compulsory payments are required as a condition of continued employment in the particular field. In the union shop and integrated bar, actual membership in the organization is also a prerequisite to continued employment. Also, both types of organizations engage in substantial activity beyond their primary justification. In the labor union context, political activities are undertaken which are often unrelated to collective bargaining. In the integrated bar context, the legislative lobbying and substantive law reform activities are not related to attorney admissions, licensing, and discipline. Thus, because of the similarities between union and integrated bar organization, the inte-

150. *Id.* at 211-12, 217 n.10.

151. *Id.* at 217 n.10. The Court stated:

> *Hanson* was concerned simply with the requirement of financial support for the union, and did not focus on the question whether the additional requirement of a union-shop arrangement that each employee formally join the union is constitutionally permissible. . . . As the agency shop before us does not impose that additional requirement, we have no occasion to address that question.

*Id.* This language in *Abood* is a very recent reaffirmation, also noted in *Street*, *see* text & note 142 *supra*, that *Hanson* did not decide this associational issue. The Court on only one prior occasion indicated otherwise in the context of similar allegations of unconstitutional state compulsion: Lathrop v. Donohue, 367 U.S. 820, 828 (1961), discussed at text & notes 156-79 *infra*. Thus, since *Lathrop* is but a single isolated case in the midst of the language found in *Abood*, *Street*, and *Hanson*, one can only conclude that the *Abood* Court has rejected the *Lathrop* interpretation.

152. 431 U.S. at 222-26. See discussion at text & notes 132-33 *supra*.

153. *Id.*

154. *Id.* at 235-36.

155. See discussion at text & notes 121-23 *supra*.

grated bar can be analyzed in terms of the first amendment analysis in the *Hanson*, *Street*, and *Abood* labor cases.

## THE *LATHROP* DECISION

*Lathrop v. Donohue*,[156] decided the same day as *Street*, considered the integration of the bar and its relation to individual rights under the first amendment. The judicial confusion which is manifest in the Court's analysis provides a strong argument for a re-examination of the *Lathrop* holding.[157]

The *Lathrop* Court was presented with allegations from a Wisconsin attorney that the State Bar of Wisconsin had compelled his membership and financial support and had used portions of his mandatory dues payments for political purposes in violation of the first amendment.[158] A majority of the Justices could agree on no single opinion. The plurality opinion, written by Justice Brennan,[159] upheld the constitutionality of compulsory membership and financial support against Lathrop's freedom of association claim.[160] The Court construed *Hanson* as equating compelled membership with compulsory financial support of organized activity.[161] After a quite lengthy discussion of the activities and structure of the Wisconsin bar,[162] the plurality found improving both ethical standards and the quality of professional services to be legitimate state interests regarding integration.[163] In addressing the first amendment free association issue, the plurality did not consider Lathrop's countervailing interests. Citing the *Hanson* rationale, the plurality held that the state bar could constitutionally require that the costs of improving the profession be shared by those in practice.[164] Thus, the plurality was unable to find an infringement of Lathrop's

156. 367 U.S. 820 (1961).

157. Directly in the wake of *Lathrop*, a number of rather divergent interpretations of the import and ultimate effect of the plurality's holding emerged. *See generally* Note, *The Integrated Bar After Lathrop v. Donohue—Integration or Disintegration?*, 11 CATH. U. L. REV. 85 (1962); Note, *Freedom From Political Association: The Street and Lathrop Decisions*, 56 NW. U. L. REV. 777 (1962); Note, *Impact of Lathrop v. Donohue and International Ass'n of Machinists v. Street Upon the Expenditures of Associations*, 10 U.C.L.A. L. REV. 390 (1963); Comment, 26 ALB. L. REV. 86 (1962); Comment, 13 SYRACUSE L. REV. 150 (1961); Comment, 110 U. PA. L. REV. 757 (1962).

158. 367 U.S. at 822-23.

159. Chief Justice Warren and Justices Clark and Stewart joined in the plurality opinion. *Id.* at 821.

160. *Id.* at 843.

161. *Id.* at 828. "We therefore are confronted, as we were in [*Hanson*], only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." *Id.* Directly prior to this conclusion, the plurality stated that compulsory membership "imposes only the duty to pay dues." *Id.* at 827-28. Thus, it is unclear whether the plurality thought that compelled membership per se was not an issue altogether, or whether it was subsumed into the issue of compelled financial support.

162. *Id.* at 828-41.

163. *Id.* at 843.

164. *Id.*

rights of association, since its analysis regarded membership as the functional equivalent of compulsory payment of dues.[165] Justice Harlan joined by Justice Frankfurter concurred with the plurality on this particular holding.[166]

The Court's decision on this point is an unfortunate misconstruction of *Hanson*. The *Hanson* Court did not hold that a person may constitutionally be compelled to become a member of a government-authorized organization.[167] The *Hanson* Court explicitly narrowed its decision to the issue of compelled financial support by those benefitting from union collective bargaining activity.[168] Indeed, the Court in *Abood* recognized this when it stated that "*Hanson* . . . did not focus on the question whether the additional requirement of a union-shop agreement that each employee formally join the union is constitutionally permissible."[169] Thus, since the *Lathrop* Court's analysis of *Hanson* was not followed in subsequent cases, and since neither *Hanson* nor *Lathrop* actually discussed compelled formal membership, either the compulsory membership issue must be considered unresolved or the *Lathrop* holding thereon must be considered reversed *sub silentio* by *Abood*.

Also of questionable propriety was the *Lathrop* plurality's division of the first amendment free association and free speech analyses.[170] This resulted in a division of the compulsory financial support per se and compulsory support for political activities analyses. The four Justices of the plurality held that the record was insufficient to decide whether Lathrop's free speech interests were violated by the Wisconsin bar's alleged use of dues for political purposes.[171] Justice Harlan, joined by Justice Frankfurter, ultimately concurred,[172] but believed the record adequate to decide the free speech issue against Mr. Lathrop.[173] Justice Black, in dissent,[174] likewise believed the record adequate, but would have upheld the free speech contentions of Mr. Lathrop.[175] Jus-

165. *Id.* The plurality stated that "in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." *Id.*

166. *Id.* at 848, 849-50.

167. 351 U.S. at 236-38. See discussion at text & notes 135-37 *supra*. This point was also noted in Abood v. Detroit Bd. of Educ., 431 U.S. 209, 217 n.10 (1977). *See* text & note 151 *supra*.

168. 351 U.S. at 238. See discussion at text & notes 135-38 *supra*.

169. 431 U.S. at 217 n.10.

170. This division runs counter to the usual Supreme Court practice of considering the first amendment right to associate as protecting one's right to engage in lawful group activity where the goals of such activity have independent first amendment significance. See discussion at text & notes 98-101 *supra*. That is, the Court recognizes no independent right of free association.

171. 367 U.S. at 845.

172. *Id.* at 848.

173. *Id.* at 850-51.

174. *Id.* at 865.

175. *Id.* at 868-69.

tice Douglas in a separate dissent expressed views on this issue similar to those of Justice Black.[176] Although Justice Whittaker did not indicate as much in his one-sentence concurring opinion,[177] the plurality assumed that he, too, thought the record adequate.[178] Utilizing the plurality's assumption regarding Justice Whittaker's concurrence, five Justices thought the record on the free speech issue was adequate. Thus, one is confronted with the bizarre result that the plurality opinion, in not considering the free speech issue, decided *Lathrop* on a ground rejected by five Justices—a majority of the Court.[179]

*Lathrop*, therefore, stands only as a reaffirmation of the *Hanson* doctrine that one may be compelled to financially support government-authorized and compelled organizations to the extent of the benefit derived. *Lathrop* cannot be considered to mean anything more. The issues *Lathrop* failed to decide, *i.e.*, the constitutionality of compulsory formal membership and the constitutionality of the integrated bar's use of mandatory dues for political purposes, however, may be analyzed by means of Supreme Court decisions in the labor area. From this analysis emerges the inescapable conclusion that the *Lathrop* Court arrived at an incorrect result.

## CONSTITUTIONAL ANALYSIS

This analysis considers the first amendment rights assertable by member attorneys against bar integration and ongoing bar operation. First, the integration of the state bar is subject to constitutional scrutiny because of the applicability of the fourteenth amendment to state action.[180] In alleging a governmental infringement of first amendment

176. *Id.* at 877-78.

177. *Id.* at 865. Justice Whittaker stated:

> Believing that the State's requirement that a lawyer pay to its designee an annual fee of $15 as a condition of its grant, or of continuing its grant, to him of the *special privilege* (which is what it is) of practicing law in the State—which is really all that is involved here— does not violate any provision of the United States Constitution, I concur in the judgment.

*Id.* (emphasis in original).

178. *Id.* at 848. The plurality stated: "Upon this understanding [that the plurality opinion reserved judgment on the free speech issue] we four vote to affirm. Since three of our colleagues [Harlan, Frankfurter, and Whittaker, J.J.] are of the view that the claim which we do not decide is properly here and has no merit, and on that ground vote to affirm, the judgment of the Wisconsin Supreme Court is *Affirmed*." *Id.* (emphasis in original).

179. *See The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 133, 134-35 (1961).

180. See discussion at text & notes 84-86 *supra*. Bar integration is accomplished either through direct legislative enactment, state supreme court rule, or a combination of the two. See discussion at text & notes 12-14 *supra*. With respect to action by the legislature, this is state action in its purest form. The United States Supreme Court treats integration by court rule as legislation, having the force of law. Lathrop v. Donohue, 367 U.S. 820, 824, 827 (1961). Indeed, in Parker v. Brown, 317 U.S. 341 (1943), the Court exempted certain state action from the reach of the antitrust provisions of the Sherman Act. *Id.* at 350-52. The *Parker v. Brown* doctrine was applied to the promulgation of a state supreme court disciplinary rule that restricted attorney advertising and was enforced by an integrated bar. Bates v. State Bar of Arizona, 433 U.S. 350, 359 (1977). In

rights which are fully applicable to this action via the fourteenth amendment, the objecting attorney is entitled to a "strict scrutiny" standard of review.[181] The courts must balance any compelling legitimate interests justifying the governmental intrusion with the degree of imposition upon protected individual interests.[182] Proceeding upon these premises, the following analysis considers the various interests of the state in integrating its bar and weighs them against the freedom of the individual.

### A. *The Integrated Bar May Not Compel Membership*

Integration conditions the practice of law on membership in the state bar and compulsory dues payments.[183] As noted above, state and lower federal courts have explicitly held that an individual's right not to become a member of a political or state-created organization is a protected right under the first amendment.[184] The Supreme Court, however, has not yet specifically addressed this issue.[185] This subsection examines the relevant conflict of interests inherent in this issue, undertakes a balancing of these interests, and proposes an appropriate resolution of the conflict sufficient to withstand strict constitutional scrutiny.

The state has no legitimate interest in compelling attorneys to become actual members of the integrated bar. The legitimate interests of the state in attorney licensing and discipline[186] bear no relation to a requirement of actual membership. A state may further its legitimate interests by granting, suspending, or revoking an attorney's license to practice, or by other means where necessary. An attorney who must be licensed to practice and who is subject to ethical restraints need not become an actual member of the licensing and regulatory body in order for the legitimate state interests to have full effect.

On the other hand, the individual attorney has a basic right to be free to choose his associations, be they professional, social, or otherwise. This individual right was recognized explicitly in *Good v. Associated Students*,[187] where the court upheld the rights of individual students to refuse to become members of a compulsory student associa-

*Bates*, the Court treated the advertising restraint of the Arizona Supreme Court as an exercise of sovereign power. *Id.* at 360.

181. See text & notes 87-90 *supra*.

182. See text & note 89 *supra*.

183. See text & notes 9-11, 24-28 *supra*.

184. Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546, 551 (E.D.N.Y. 1977) (political party), discussed at text & notes 114-18 *supra*; Good v. Associated Students, 86 Wash. 2d 94, 104, 542 P.2d 762, 768 (1975) (student association), discussed at text & notes 106-13 *supra*.

185. See discussion at text & notes 167-69 *supra*.

186. See discussion at text & note 15 *supra*.

187. 86 Wash. 2d 94, 542 P.2d 762 (1975). See text & notes 106-13 *supra*.

tion.[188] Regarding the politically-active integrated bar, even if objecting members are allowed to refuse to contribute to the bar's political activities,[189] the objectors are still forced to be members of an organization which publicly endorses political positions contrary to their own. Consequently, an attorney may be linked publicly to positions repugnant to his own beliefs.

In this context, compulsory membership is similar to the compulsory display of "Live Free or Die" on automobile license plates that was struck down in *Wooley v. Maynard*.[190] Allowing objective attorneys to refuse to make political contributions but not allowing them to withdraw from formal membership is nevertheless violative of their first amendment rights. By analogy to *Wooley*, the objecting attorney knows that he is not responsible for the content of the ideological message, but the public display of the message nonetheless attaches to him. Thus, on strict scrutiny the interests of the individual in maintaining his ideological and associational integrity far outweigh the minimal, if any, interests of the state in compelling actual membership in the integrated bar. Therefore, a state may not constitutionally compel membership in the integrated bar.

### B. *The Integrated Bar May Compel Financial Support for Attorney Licensing and Discipline*

Under the rationale of *Hanson* and *Abood*, a state may compel financial support of organized group activity provided that such compulsion is supported by a legitimate interest not outweighed by individual freedoms.[191] The state has a legitimate interest in regulating the practice of law.[192] Certain educational and moral standards must be met prior to admission to practice for the benefit and protection of the public.[193] The state has an obligation to protect the public from incom-

188. 86 Wash. 2d at 104, 542 P.2d at 768.

189. See discussion of possible remedies at text & notes 208-21 *infra*.

190. 430 U.S. 705 (1977). See text & notes 93-97 *supra*.

191. Railway Employes' Dep't v. Hanson, 351 U.S. 225, 233-38 (1956), discussed at text & notes 125-38 *supra*; Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222-26 (1977), discussed at text & notes 145-54 *supra*.

192. Petition for Rule of Court, 199 Tenn. 78, 83, 282 S.W.2d 782, 784 (1955); Lamb v. Whitaker, 171 Tenn. 485, 490, 105 S.W.2d 105, 107 (1937). In the Tennessee *Petition* case the state interest in regulating the practice of law is eloquently described:

> The property rights, liberties and lives of people are continuously entrusted to lawyers. So, the State is vitally interested in the qualifications and integrity of those into whose hands such vital trusts are continuously placed. Thus, a legislative requirement that individuals who would practice this profession must first meet certain reasonable conditions and qualifications is only the exercise by the Legislature of the police power with which that department of our government is vested.

199 Tenn. at 83, 282 S.W.2d at 784.

193. Petition for Rule of Court, 199 Tenn. 78, 83, 282 S.W.2d 782, 784 (1955); Atwood, *Objectives and Methods of Bar Integration*, 20 A.B.A.J. 203, 204-06 (1934).

petent and unethical practitioners.[194] The legal profession also benefits from these regulatory mechanisms because the integrity and competence of the profession are maintained.[195]

Indeed, by compelling financial support for such regulatory activities, the state asserts its interests over individual attorneys as professionals. By establishing the integrated bar as a self-regulating body, the state recognizes the public interests connected with attorney competence and integrity, and the special competence possessed by attorneys in establishing their own standards of conduct. Thus, in asserting limited regulatory power over these professionals, the state compels support from those uniquely equipped to decide the manner and extent of the regulation of the legal profession in return for the right to practice law. Individual ideological compulsion, if it exists at all in this context, is justified in light of the state's interest in maintaining the competency and integrity of those allowed to practice law within its borders.

There are few if any countervailing first amendment interests on the part of individual attorneys in being free from compulsory assessments for licensing and discipline. There exists no recognized first amendment right to be free from justified state regulation that compels contributions for activities related to such regulation.[196] Mandatory assessments in this form do not directly impinge upon protected first amendment freedoms relating to free speech.[197] The individual attorney is not thereby compelled to subscribe to repugnant ideologies, beliefs, or conduct. On balance, the state may compel attorneys to finance activities related to licensing and discipline, because the state has legitimate interests in protecting the public and the integrity of the legal profession, and because an individual attorney's first amendment rights are at best only speculatively impinged upon.

### C. *The Integrated Bar May Not Compel Financial Support for Certain Political Activities Unrelated to Licensing and Discipline*

As the Court held in *Abood*, the first amendment interests of an individual in being free from compulsion to embrace particular ideologies prohibit the state from compelling financial support for a particu-

194. *See* Petition of Tennessee Bar Ass'n, 532 S.W.2d 224, 229-30 (Tenn. 1975). *See also* discussion of clients' security funds at note 18 *supra*.

195. Atwood, *supra* note 193, at 203, 204-05. *See generally* Webber, *Origin and Uses of Bar Associations*, 7 A.B.A.J. 297 (1921).

196. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222-26 (1977), discussed at text & notes 145-54 *supra*; Railway Employes' Dep't v. Hanson, 351 U.S. 225, 233-38 (1956), discussed at text & notes 125-38 *supra*.

197. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222-26 (1977); text & notes 145-54 *supra*.

lar political statement that is objectionable to the individual.[198] The *Hanson* and *Abood* decisions also suggest that an individual may not be compelled to financially support organized group activities unrelated to the organization's primary purposes.[199] Given the unwillingness of the courts to construe the broad statements of purpose in the various bar integration schemes as limiting the scope of bar activities,[200] it is doubtful whether the nonconstitutional integrated bar jurisprudence can arrive at a consistent interpretation of the primary purposes of the integrated bar. Irrespective of any such classification of purpose as "primary" or "secondary," however, the political and ideological activities of the integrated bar are particularly amenable to first amendment analysis.

As noted above, the vague purpose of "aid[ing] in the improvement of justice"[201] has been used to justify the state bar's use of mandatory dues in support of public political positions[202] and legislative activities.[203] While the interest of the state in improving the administration of justice may indeed be compelling, this purpose is not drawn sufficiently narrowly to respect the individual attorney's right to be free from compelled support of a particular ideology.[204] The very phrase "improve the administration of justice" is inherently political in that it relates primarily to changes in one of the branches of government, the judicial system. Moreover, this particular purpose is susceptible to a broad range of interpretations regarding the wisest course to "improve justice." For the integrated bar to enter a course of political conduct in this area that is objectionable to one or more of its members is to compel the objector(s) to embrace a repugnant political ideology. This result is particularly true if provision is not made for the objecting attorneys to refuse financial support. Even if such provision is made, the repugnant ideology is nonetheless wrongly attributed to the objector by the fact of his compelled membership.[205]

198. 431 U.S. at 235-36. See text & notes 145-54 *supra*.

199. *See* notes 137-38 *supra*. The *Abood* Court noted in connection with the agency shop clause at issue in the case that "*insofar as* the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, [the *Hanson* and *Street*] decisions . . . appear to require validation of the agency-shop agreement before us." 431 U.S. at 225-26 (emphasis added).

200. *See, e.g.*, Bridegroom v. State Bar, 27 Ariz. App. 47, 550 P.2d 1089 (1976), discussed at text & notes 42-54 *supra*. See discussion at text & notes 35-38 *supra*.

201. See discussion at text & note 15, 35-38 *supra*.

202. Bridegroom v. State Bar, 27 Ariz. App. 47, 49-50, 550 P.2d 1089, 1091-92, (1976), discussed at text & notes 42-54 *supra*; *In re* Florida Bar Bd. of Governors' Action, 217 So. 2d 323, 324-25 (Fla. 1969), discussed at note 38 *supra*.

203. See discussion of legislative activities of the California State Bar at text & notes 67-73 *supra*.

204. The applicability of the "overbreadth" doctrine to this first amendment analysis is noted at text & note 90 *supra*.

205. *See* discussion at text & notes 189-90 *supra*.

A primary justification for the integration of the bar is to provide a central mechanism for attorney licensing and discipline.[206] Insofar as the integrated bar moves away from these purposes and strays into political and ideological activities, the state interest in compelling financial support must yield to the higher interests of the individual.

Unlike the state's interests in licensing and discipline, which involve attorneys in their professional capacities, its interest in compelling financial support for political activities involves attorneys as individual citizens. As a citizen, each attorney's public obligation is to act according to his own conscience and self-interest. Indeed, the state effectively perverts the political process when it requires certain of its citizens to finance political endeavors when they have no choice and may disagree.

While the state bar cannot be required to abstain totally from political activities without changing its statutory or court-ordered authorization,[207] the only constitutionally permissible method of financing such activities is through the funds of nonobjectors. Furthermore, when the state's justification for compelling financial support by objectors fails, the objectors are entitled to relief.

## REMEDIES

### A. *Individual Relief*

Prior to *Abood* the Supreme Court required a party to actually register an objection to the political use of mandatory dues as a condition to relief. After holding that the Railway Labor Act does not contemplate the use of mandatory dues for objectionable political purposes on the part of the collective bargaining representative,[208] the *Street* Court fashioned remedies available only to those employees who actually registered objections with union officials about specific union political expenditures.[209] The Court stated that "dissent is not to be presumed."[210]

The *Abood* Court, after finding unconstitutional a collective bargaining representative's use of mandatory dues for objectionable political purposes,[211] held that an employee need only manifest opposition to any or all union political activities funded through mandatory dues in

206. *See* discussion at note 15 *supra*.
207. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977).
208. International Ass'n of Machinists v. Street, 367 U.S. 740, 768-69 (1961). See discussion at text & notes 139-44 *supra*.
209. 367 U.S. at 774. The Court stated that "[a]ny remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *Id.*
210. *Id.*
211. 431 U.S. at 235-36. See discussion at text & notes 145-54 *supra*.

order to be entitled to relief.[212] The Court stated that further employee elaboration would confront the employee with a choice between surrendering his right against compulsory support of organized political activity and his right to withhold public disclosure of his beliefs.[213]

By analogy to *Abood*, attorneys may rightfully object generally to compelled financial support of the political activities of the integrated bar. Also, because many activities of the integrated bar extend outside the justifiable licensing and disciplinary activities, an attorney may also assert his right not to support activities not directly related or necessarily incidental to licensing and discipline. As one possible remedy, a state supreme court, state legislature, or integrated bar may wish to restrict all state bar activities to those connected with licensing and discipline. The activities relevant to the improvement of the administration of justice and law reform would thus properly be left to voluntary city, county, and state bar associations, other interest groups, and individual attorneys and citizens.

Two other potential remedies available to the objecting attorney were established by the *Street* plurality[214] and reaffirmed in *Abood*.[215] The first is injunction. Using this remedy, the organization would be enjoined from spending that portion of the objecting individual attorney's mandatory dues that equals the proportion of the organization's total expenditures on the objectionable political activities to the total organization budget.[216]

This remedy, however, only prevents the organization from spend-

212. 431 U.S. at 239, 241-42. The *Abood* Court followed the objection requirements established in Brotherhood of Railway Clerks v. Allen, 373 U.S. 113, 118-19 (1963).

213. 431 U.S. at 241.

214. International Ass'n of Machinists v. Street, 367 U.S. at 774-75.

215. 431 U.S. at 240-42.

216. International Ass'n of Machinists v. Street, 367 U.S. at 774-75. This injunctive remedy may be presented mathematically as follows:

Where

$X_i$ = total mandatory dues payment by the "ith" attorney,

$Y_i$ = that portion of the "ith" attorney's dues going into objectionable political activity,

$n$ = number of attorneys objecting, and

$m$ = total number of attorneys who are members of the state bar;

$$X^* = \sum_{i=1}^{m} X_i = \text{total state bar budget,}$$

$$Y^* = \sum_{i=1}^{m} Y_i = \text{total state bar expenditures for objectionable political activities, and therefore}$$

ing mandatory dues in certain areas. The individual objector thus receives no refund and must rest secure in the knowledge that his constitutional rights have been vindicated. Thus, injunctive relief is theoretically flawed in two important respects. First, if the enjoined expenditures are put into the fund that covers the costs of licensing and discipline, the objecting attorneys are forced to contribute disproportionately to the costs of activities intended to be financed equally by all attorneys.[217] Second, if the enjoined expenditures are put into other political activities to which the attorney has no objection, the attorney is in effect compelled to contribute more to these causes than he might otherwise have initially consented to contribute, as well as more than his equal share.

The second and preferable remedy is restitution. Under this remedy the integrated bar would return to the objector that portion of the mandatory dues payment which the bar expended, or intends to expend, for the objectionable political purposes.[218] Restitution is preferable because the attorney in effect excludes from his mandatory dues payments that monetary sum which the state bar uses, or intends to use, for objectionable political activity. By contrast, the injunction remedy permits the state bar to keep all of the objecting attorney's dues, resulting in the above-described disproportionate contribution to other political or nonpolitical activities.[219]

Once it is decided that the integrated bar cannot use mandatory bar dues payments for purposes unrelated to licensing and discipline, the bar will be confronted with a major choice. It can limit its activities to licensing and discipline or continue to engage in political and ideological activities. In the absence of restrictions created by legislative enactment or court rule, there is no per se prohibition regarding integrated bar political activities.[220] If the integrated bar chooses to continue its political activities, however, it is constitutionally prohibited from funding these activities by the compulsory dues of objecting attor-

$$\sum_{i=1}^{n} \frac{Y^*}{X^*} \cdot (X_i) = \text{Total Amount Enjoined.}$$

217. *See* International Ass'n of Machinists v. Street, 367 U.S. at 775.

218. *See id.* The restitution remedy may be presented mathematically as follows:

Where

$X$ = one attorney's restitution recovery,

$$\frac{X}{\text{total dues paid by the attorney}} = \frac{\text{bar funds earmarked for advisedly objectionable political purposes}}{\text{total state bar budget}}$$

219. *See* text & note 217 *supra*.

220. *See* Abood v. Detroit Bd. of Educ., 431 U.S. at 235-36.

neys.[221] Two suggested remedies of restitution and injunction which the politically active integrated bar may adopt have been presented here. Ultimately, the courts, legislatures, and integrated bars must devise schemes that protect attorneys' first amendment rights. An excellent model for an administrative mechanism to solve this problem can be found in the British trade union experience.

## B. *The Administrative Mechanism*

Since 1900,[222] the British trade unions have been the primary source of funds for the activities of the British Labour Party.[223] Since Labour Party financing is ultimately derived from union membership dues,[224] the right of dissenters not to pay have been recognized, and a simple administrative mechanism currently exists to protect that right. Because various methods have been applied, discarded, and reapplied since 1913,[225] the experience of the British labor movement warrants consideration in the context of mandatory bar dues schemes.

By way of introduction to the first British legislation, the Trade Union Act of 1871,[226] as amended by the Trade Union Act Amendment Act of 1876,[227] granted statutory recognition to British trade unions, provided for their registration, and prescribed their powers. The Acts defined trade unions,[228] established the powers of the union trustees and officers,[229] and provided sanctions against trustee misconduct.[230] By these Acts, trade unions were authorized to establish[231] and

221. *See* discussion at text & notes 198-207 *supra.*

222. F. BEALEY & H. PELLING, LABOUR AND POLITICS 1900-1906 24 (1958) (The British Labour Party came into existence in 1900).

223. M. HARRISON, TRADE UNIONS AND THE LABOUR PARTY SINCE 1945 21-22 (1960); D. MACDONALD, THE STATE AND THE TRADE UNIONS 63 (2d ed. 1976).

224. *See* text & notes 250-51 *infra.*

225. *See* discussion of the Trade Union Act, 1913, 2 & 3 Geo. 5, c. 30, §§ 1-8 and sched., at 115-19, and its application throughout this century at text & notes 236-47 *infra.*

226. 34 & 35 Vict., c. 31, §§ 1-24 and sched. 1-2, at 198-208, *as amended by* Trade Union Act Amendment Act, 1876, 39 & 40 Vict., c. 22, Industrial Relations Act, 1971, c. 72, Trade Union and Labour Relations Act, 1974, c. 52.

227. 39 & 40 Vict., c. 22, §§ 1-16, *as amended by* Industrial Relations Act, 1971, c. 72, Trade Union and Labour Relations Act, 1974, c. 52.

228. Trade Union Act, 1871, 34 & 35 Vict., c. 31, § 23, at 206-07, *as amended by* Trade Union Act Amendment Act, 1876, 39 & 40 Vict., c. 22, § 16, at 144.

229. Trade Union Act, 1871, 34 & 35 Vict., c. 31, §§ 2-3, 8-9, at 199, 200-01, *as amended by* Trade Union Act Amendment Act, 1876, 39 & 40 Vict., c. 22, § 3, at 141. *See generally* Trade Union Act, 1871, 34 & 35 Vict., c. 31, §§ 6-12, at 200-02.

230. Trade Union Act, 1871, 34 & 35 Vict., c. 31, § 12, at 201-02, authorizes a member to sue on behalf of the union for the return of funds illegally withheld by trustees. Also, § 18 makes it a misdemeanor to distribute fraudulent copies of the union rules with the intent to mislead. The Act provides for summary enforcement proceedings and an appeal process. *Id.* §§ 19-21, at 204-06. The Trade Union Act Amendment Act, 1876, 39 & 40 Vict., c. 22, § 5, at 142, establishes the jurisdiction for the summary proceedings.

231. Trade Union Act, 1871, 34 & 35 Vict., c. 31, § 14(1), sched. 1, at 203, 207-08; Trade Union Act Amendment Act, 1876, 39 & 40 Vict., c. 22, § 14, at 144.

register[232] rules governing the management and affairs of the union and its funds.

Prior to the establishment of the British Labour Party in 1900, trade unions had adopted the practice of subsidizing labor candidates and labor members of Parliament.[233] This practice was struck down in 1909 in *Amalgamated Society of Railway Servants v. Osborne*,[234] where the House of Lords held that the union practice of using membership dues to support and subsidize parliamentary representation was ultra vires.[235] Parliament responded by overruling *Osborne* with the passage of the Trade Union Act of 1913.[236] This Act provides the trade unions with explicit power to apply union funds to political activities.[237] Any political expenditures, however, must be made from a separate "political fund,"[238] established pursuant to the Act by a change in the registered union rules[239] approved by a majority of the union members.[240] Most importantly, the Act provides for the protection of members who object to the union's political activities. By filling out a simple form,[241] members may object to all union political activity and "contract out" of their share of the political levy.[242]

In 1927, Parliament passed the Trade Disputes and Trade Unions Act.[243] This Act amended the Trade Union Act of 1913 most significantly by providing for "contracting in" to the political fund, rather

232. Trade Union Act, 1871, 34 & 35 Vict., c. 31, §§ 13-18, at 202-04.
233. D. MACDONALD, *supra* note 223, at 63.
234. [1910] A.C. 87.
235. *Id.* at 93-94 (opinion of Earl of Halsbury), 97 (opinion of Lord Macnaughten), 99 (opinion of Lord James of Hereford), 105-06 (opinion of Lord Atkinson).
236. 2 & 3 Geo. 5, c. 30, §§ 1-8 and sched., at 115-19, *as amended by* Industrial Relations Act, 1971, c. 72, Trade Union and Labour Relations Act, 1974, c. 52.
237. Trade Union Act, 1913, 2 & 3 Geo. 5, c. 30, § 1(1), at 115. The political activities embraced by the Act are defined in § 3(3)(a)-(e), at 117, and include the maintenance and support of a candidate or member of Parliament, the holding of political meetings, and the distribution of political literature.
238. *Id.* § 3(1)(a), at 116.
239. *Id.* § 3(4), at 117.
240. *Id.* §§ 3(1), 4, at 116, 118.
241. *Id.* § 5, sched. 1, at 119 provides:

FORM OF EXEMPTION NOTICE

Name of Trade Union _____

POLITICAL FUND (EXEMPTION NOTICE).

I hereby give notice that I object to contribute to the Political Fund of the _____ Union, and am in consequence exempt, in manner provided by the Trade Union Act, 1913, from contributing to that fund.

A.B. _____

Address _____

____ day of ____ 19__.

This form and the one provided in note 245 provide a graphic illustration of the ease of administering this type of remedy.
242. *Id.* §§ 5-6, at 118-19.
243. 17 & 18 Geo. 5, c. 22, §§ 1-8 and sched. 1-2, at 328-39 (repealed by Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. 6, c. 52, § 1, at 368); *see* D. MCDONALD, *supra* note 223, at 105-10.

than "contracting out."[244] In so doing, the 1927 Act in effect imposed a presumptive member objection. Thus, members could make political contributions only by notifying union officials of such intent by the use of a simple form.[245] One effect of the "contracting in" scheme is illustrated by the fact that 77% of union members contributed to union political funds in 1926, while only 42% did so in 1943.[246]

The 1927 Act was repealed and the Trade Union Act of 1913 was resurrected by the passage of the Trade Disputes and Trade Unions Act of 1946.[247] "Contracting out" was reinstated.[248] As a result, the percentage of union members paying the political levy sharply increased.[249] Indeed, in early 1978 the British Labour Party boasted 59 trade union affiliates comprising 5,913,159 union members,[250] which contributed 88% of the Labour Party's funds.[251]

Either the "contracting out" or the "contracting in" method of ad-

244. 17 & 18 Geo. 5, c. 22, § 4, at 332-34.

245. *Id.* § 4(1), at 332. The form of the contribution notice is also set forth in the Act:

FORM OF POLITICAL FUND CONTRIBUTION NOTICE.

Name of Trade Union _____

Name of member's branch (if any) _____

POLITICAL FUND (CONTRIBUTION NOTICE).

I HEREBY give notice that I am willing, and agree, to contribute to the Political Fund of the _____ Union and I understand that I shall, in consequence, be liable to contribute to that Fund and shall continue to be so liable unless I deliver at the head office, or some branch office, of the Union a written notice of withdrawal: I also understand that after delivering such a notice of withdrawal I shall still continue to be liable to contribute to the political fund until the next following first day of January.

A.B. _____

Address _____

Membership number (if any) _____

____ day of _____ 19__

*Id.* § 4, sched. 1, at 338.

246. D. MACDONALD, *supra* note 223, at 110.

247. 9 & 10 Geo. 6, c. 52, §§ 1-2 and sched. 1, at 368-69, *as amended by* Statute Law (Repeals) Act, 1973, c. 39, § 1(1), sched. 1, at 1048.

248. Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. 6, c. 52, § 1, sched. 1(2), at 369 (repealed by Statute Law (Repeals) Act, 1973, c. 39, § 1(1), sched. 1, at 1048).

249. M. HARRISON, *supra* note 223, at 32-33; D. MCDONALD, *supra* note 223, at 110-11. The dramatic rise was as follows:

| Year | Absolute Membership Paying Levy | Percent of Total Membership Paying Levy |
|---|---|---|
| 1945 | 2,917,000 | 48.0 |
| 1946 | * * * | * * |
| 1947 | 5,613,000 | 75.6 |
| 1948 | 5,773,000 | 76.8 |

M. HARRISON, *supra* note 223, at 32-33.

250. REPORT OF THE SEVENTYSEVENTH ANNUAL CONFERENCE OF THE LABOUR PARTY 89-90 (1978).

251. *Id.* at 65. In absolute monetary figures, trade unions contributed £1,267,796 toward the Labour Party's 1977 total income of £1,429,046. *Id.* Trade union affiliates must accept the policy of the Labour Party, LABOUR PARTY CONST. cl. III, § 1(a), and for 1980 must pay an affiliation fee of 32p per union member. *Id.* cl. X, § 1.

ministration of individual relief[252] would be an effective means of funding political activities of a state bar while giving due recognition to first amendment rights of objecting attorneys. Depending upon how the state wishes to give effect to those rights, one of the two types of forms would be sent to each member with the annual dues assessment. The individual attorney then would, depending upon the chosen scheme, either contract out, and be entitled to a reduction in his assessment, or contract in, and enclose payment for the political levy as part of his dues payment. Indeed, this mechanism comports with the objection requirements set forth in *Abood*.[253]

Since much of the integrated bar's political activity is undertaken by the board of governors without explicit membership consent,[254] a "contracting in" procedure would in effect manifest such membership consent and would best protect the individual attorney's rights. "Contracting out," however, would be the least disruptive means for providing a direct assertion of personal dissent, because the procedure preserves the current status quo by assessing both the politically-minded and the apathetic attorneys and by reimbursing only those registering a general objection.[255]

With respect to the politically active integrated bar and the objecting attorney, either the contracting in or the contracting out procedures comply with *Abood* as a means of restitution to attorneys who pay under protest. From among all of these basic remedial devices, the state legislature, the state supreme court, and the membership of the bar must indicate a preference for the desirable scope of bar activities, and proceed to weigh the competing values, giving due regard to the first amendment interests of individual attorneys.

## CONCLUSION

Individual attorneys possess first amendment rights that are implicated by the actions of a politically active state bar. The first amendment prohibits compulsory membership in the state bar. State interests in compelling financial support for bar activities other than licensing and discipline are insufficient to justify such financial support over the objections of individual attorneys. The state should protect the individual attorney either by removing the authority of the state bar to un-

252. The "contracting out" form is set forth in note 241 *supra*. The "contracting in" form is set forth in note 245 *supra*.

253. 431 U.S. at 239-41. See discussion at text & notes 212-13 *supra*.

254. *See* Bridegroom v. State Bar, 27 Ariz. App. 47, 550 P.2d 1089 (1976); *In re* Florida Bar Bd. of Governors' Action, 217 So. 2d 323 (Fla. 1969).

255. The fact that the politically active and the apathetic membership tend to outnumber those lodging objection is graphically shown, regarding the British trade union experience, at text & note 249 *supra*.

dertake activities other than licensing and discipline, by enjoining the state bar from using objectors' dues for such purposes, or by providing a mechanism for restitution to objecting attorneys. Either a "contracting in" or "contracting out" scheme would provide a reimbursement mechanism sufficient to protect first amendment interests and withstand constitutional scrutiny. The ultimate solution properly rests with the individual state authorities, possessing knowledge of the particular circumstances of their integrated bar.