Integrated Bar and the Freedom of Nonassociation—Continuing Seige

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The Integrated Bar and the Freedom of Nonassociation—Continuing Siege

I. INTRODUCTION

The controversy surrounding the propriety, efficacy, and constitutionality of the integrated bar association has been raging for almost seventy years.1 Much of the controversy and a substantial basis for a constitutional challenge to the integrated bar was supposedly eliminated over twenty years ago in Lathrop v. Donohue.2 In Lathrop, seven members of the United States Supreme Court agreed that a state may require an attorney to pay reasonable annual dues to an integrated bar association in order to practice law within a state without infringing on that attorney's freedom of association.3 Lathrop has been interpreted as also supporting the proposition that a state supreme court may integrate its bar association by court order.4 However, it has been widely recognized that Lathrop did not decide whether an attorney can be forced to provide financial support for integrated bar political activities with which that attorney disagrees.5

1. The integrated bar, also referred to in some states as the unified, organized, state, or incorporated bar, can be broadly defined as an official state organization to which all attorneys must belong and pay dues as a precondition to the practice of law within a state. See In re Unification of New Hampshire Bar, 248 A.2d 709, 711 (N.H. 1968); D. McKEAN, THE INTEGRATED BAR 22 (1963); Comment, The Integrated Bar Association, 30 Fordham L. Rev. 477 (1962). At the present time thirty-one states have bar associations which have been at least partially integrated either by court rule, legislative act, or a combination of the two. Winter, Challenged on Lobbying, Bars Mull Dues Rebates, 68 A.B.A. J. 1550 (1982).
3. Id. at 843.
4. D. McKEAN, supra note 1, at 85.
5. See 367 U.S. at 870 (Black, J., dissenting); D. McKEAN, supra note 1, at 84-111; The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 134; Comment, Freedom From Political Association: The Street and Lathrop Decisions, 56 Nw. U.L. Rev. 777, 786 (1962); Comment, The Integrated Bar After Lathrop v. Donohue—
Despite *Lathrop*, attacks on the integrated bar based on statutory and other constitutional grounds have continued.\(^6\) Recently the controversy has intensified, and challenges to the integrated bar have been brought with renewed fervor.\(^7\) Although the underlying cause of recent rebellions against the integrated bar—arguably the inherent repulsiveness of any type of regimentation or forced association—is probably the same as that which sparked early resistance to bar unification,\(^8\) recent challenges have been spurred by what many lawyers see as "runaway" mandatory dues and bar association activities.\(^9\)

In 1978, 400 members of the Wisconsin State Bar who opposed bar association policies and activities attempted to institute a referendum whereby members would be able to vote to return to a voluntary state bar association.\(^10\) After this attempt failed, some of

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\(^6\) See, e.g., *Swanson v. Florida Bar*, 381 F.2d 730 (5th Cir. 1967) (challenge to Florida Supreme Court integration rule did not present a substantial federal constitutional question); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969) (court rejected several constitutional challenges to act and court rules establishing unified bar, including arguments that it created an unlawful tax, deprived an attorney of due process, violated separation of powers, and deprived an attorney of free speech); *Wallace v. Wallace*, 225 Ga. 102, 166 S.E.2d 718 (1969) (court held that supreme court rule integrating the state bar was not an unconstitutional exercise of unlawfully delegated legislative power under Georgia Constitution, but rather an exercise of inherent judicial power); *Ford v. Board of Tax-Roll Corrections*, 431 P.2d 423 (Okla. 1967) (court rejected challenge to integrated bar's tax exemption and held that court's action integrating the State Bar was exercise of police power vested in court); *Button v. Day*, 204 Va. 547, 132 S.E.2d 292 (1963) (court upheld state bar's ability to participate in continuing legal education, to publish Bar news, and to hire counsel to prosecute unauthorized practice suits); *State ex rel. Schwab v. Washington State Bar Ass'n*, 80 Wash. 2d 266, 493 P.2d 1237 (1972) (court upheld state constitutional challenge to authority of the state bar association to discipline attorney who failed to pay dues on the grounds that the court is constitutionally authorized to delegate such authority); *Axel v. State Bar of Wis.*, 21 Wis. 2d 661, 124 N.W.2d 671 (1963) (court rejected challenge to legality of publication of lawyer poll by bar association concerning qualifications of a particular judge).


\(^9\) *Pike, supra* note 7, at 1, col. 4; *see also Smith, supra* note 7, at 111; *Woytash, supra* note 7, at 33; *What's Happening, supra* note 7, at 4.

the same attorneys filed a petition with the Supreme Court of Wisconsin to change the integrated bar to a voluntary bar association.\footnote{In re Discontinuation of State Bar, 93 Wis. 2d 385, 286 N.W.2d 601 (1980).} The petitioners argued that a poll of the active members of the bar indicated widespread opposition to the integrated bar, that the original reasons for integrating the bar, i.e., supervise admission, promote continuing competency, and enforce discipline, were no longer extant because these functions were being performed by other independent state boards, and that the state bar was engaged in political and legislative activities of which the petitioners did not approve.\footnote{Id. at 386-87, 286 N.W.2d at 602.} The Wisconsin Supreme Court found their arguments unpersuasive.\footnote{The Wisconsin Supreme Court is currently considering a bar review committee recommendation that dissident bar members be given a refund of the portion of their mandatory dues which is used to support bar lobbying activities with which the members disagree. Winter, supra note 1, at 1550.}

In 1980, however, the members of the unified bar of the District of Columbia, through referendum, successfully placed a $75 per year ceiling on mandatory bar dues and limited the activities to which the unified bar could apply the fees to the “admission of attorneys; their continued registration; discipline of attorneys; and [the] client security fund.”\footnote{District of Columbia Bar, Press Release (Dec. 18, 1980), reported in 5 Nat’l Center For Prof. Resp. Adv. Sh. 16 (1981). For a more detailed discussion of the District of Columbia referendum, see Pike, supra note 7, passim.} Furthermore, the members limited the activities to which voluntary contributions could be applied by the association to lawyer referral services, publications, continuing legal education, and certain bar committees. The District of Columbia Court of Appeals, which has the final word on bar matters, upheld the limits placed upon the bar association.\footnote{See Winter, Does D.C. Revolt Bode Ill For Unified Bars?, 67 A.B.A.J. 830 (1981).}

In light of the lack of success that critics have had in attacking the integrated bar in the courts over the past thirty years, the question arises as to whether there are any grounds upon which a successful constitutional challenge might be made to integrated bar association activities and compulsory dues. A number of attorneys and commentators believe that \textit{Abood v. Detroit Board of Education}\footnote{431 U.S. 209 (1977).} fills the gap left by \textit{Lathrop}, and creates the foundation for a successful attack, based on the first amendment right of nonassociation, on the use of compulsory bar dues for many bar association activities.\footnote{See, e.g., Gonser, The State Bar Foundation: A Modern Renaissance, 64 A.B.A. J. 1886, 1887 (1978); Pike, supra note 7, at 8, col. 2; Reynolds, Compulsory Bar Dues in Montana: Two (And A Half) Challenges, 39 Mont. L. Rev. 265, 287} In \textit{Abood}, the Supreme Court upheld the
constitutionality of an agency shop agreement for public school teachers under which all employees were required to pay a service fee to the union as a condition of continued employment. 19 However, the Court also established that under the first amendment, union expenditures of these fees "for the expression of political views, on behalf of political candidates or towards the advancement of other ideological causes not germane to its duties as collective bargaining representative" must be "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." 20

Despite the fact that it has been assumed, almost tacitly, that Abood applies analogously to the integrated bar, 21 and the fact that the unconstitutionality of integrated bar expenditures on political or ideological activities against the wishes of a member has been raised several times in the past, 22 the applicability of the principles and holding of Abood to the integrated bar remains an open question which only recently has been addressed by the courts. 23 The
purpose of this article is: (1) to analyze the question of whether the first amendment right to freedom of nonassociation recognized in \textit{Abood} applies to activities of integrated bar associations; (2) to attempt to determine the effect such an application would have on specific bar association activities such as lobbying, publications, and social activities; and (3) to analyze the effect that the extension of the principles of \textit{Abood} would have on the integrated bar in general. The article will conclude that once unified bar associations are limited to only those activities allowed under the principles of \textit{Abood} they may cease to exist. Before the constitutional and practical issues engendered by \textit{Abood} and \textit{Lathrop} are addressed, however, this article will first review briefly the history of the integrated bar.\textsuperscript{24}

\section*{II. HISTORICAL BACKGROUND}

\subsection{A. The Debate over Integration}

Herbert Harley, founder of the American Judicature Society, is considered to have officially initiated the bar integration movement in the United States with a speech he delivered to the Lancaster County Bar Association in Lincoln, Nebraska, on December 28, 1914.\textsuperscript{25} Starting with the premise that a lawyer's "duty to himself and to his family, his duty to make tongue and buckle meet, is paramount and not at variance with his public duty with respect to the administration of justice,"\textsuperscript{26} Harley asserted that the voluntary bar association "is entirely inadequate to the needs of the lawyer from either the standpoint of self-interest or from the standpoint of public service."\textsuperscript{27} He believed that bar associations should serve the following purposes: "the reasonable need for social intercourse," political influence by the bar in "statecraft," and "the need for edu-

\footnotesize{\textsuperscript{24} For additional discussion of the history of the integrated bar, see J. Hurst, \textit{The Growth of American Law} \textbf{291} \textup{(1950)}; D. McKean, \textit{supra} note 1, \textit{passim}; J. Parness, \textit{Citation and Bibliography on the Unified Bar in the United States} \textbf{(1973)}; Comment, \textit{supra} note 5, at 85. For a discussion of the integration of the Nebraska Bar Association by court rule, see Kalish, \textit{The Nebraska Supreme Court, the Practice of Law and the Regulation of Attorneys}, \textbf{59} \textit{Neb. L. Rev.} 555 \textup{(1979)}; J. Quinlan, An Historical View of Integration of the Nebraska State Bar Association \textup{(Apr. 6, 1976)} \textup{(unpublished paper on file with the author).}

\textsuperscript{25} See D. McKean, \textit{supra} note 1, at 30-37; J. Parness, \textit{supra} note 24, at 3; Kalish, \textit{supra} note 24, at 587 n.120. For the text of Harley's speech see Harley, \textit{A Lawyer's Trust}, \textbf{29} \textit{Jud. 50} \textup{(1945)}.

\textsuperscript{26} Harley, \textit{supra} note 25, at 50.

\textsuperscript{27} Id. at 51.}
cation of the bar, for its proper discipline, and for the conduct of its business. His suggested course for the full achievement of these goals was bar integration—"welding all the lawyers of a state into one closely knit organization."

The bar integration movement did not enjoy immediate success. The first state to integrate, North Dakota, did so by statute in 1921. Integration next occurred in Alabama in 1923 and Idaho in 1925. By 1940 twenty states had adopted integrated bar associations by either statute or court rule. Perhaps because of the relative ease with which integration could be achieved by court order in comparison to integration by statute, where lobbying resistance was encountered, the use of legislation to integrate all but ceased after 1939. By 1973 another nine states had joined the integration movement, and by 1982 a total of thirty-one states had integrated bar associations.

When one examines the extensive literature concerning the bar integration movement, there is a tendency to conclude that all but a few "die-hard" individuals were in favor of bar unification. However, the coverage of the pro-integration and the anti-integration arguments in periodicals cannot be considered balanced. Articles published during the days of the heaviest bar unification pressure, purportedly written objectively, often presented a pro-integration perspective. This state of the literature is not all that surprising in light of the fact that the great majority of bar integration articles appeared in voluntary bar association journals. It was these voluntary bar associations which had the most to gain from unification of the bar, by bolstering memberships, finances, and influence, and

28. Id. at 51-52.
29. Id. at 56.
30. For example, it took 22 years of effort and several failures before the Nebraska bar was integrated. See Harley, Does $3 a Year Mean Regimentation, 13 FLA. L.J. 41 (1939); see also Kalish, supra note 24, at 587 n.120.
31. J. PARNESS, supra note 24, at 3.
32. D. MCKEAN, supra note 1, at 44. Actually Idaho was first integrated in 1923 by a statute that was held to be void. Id.
33. Harley, supra note 25, at 41.
34. D. MCKEAN, supra note 1, at 49.
35. See J. PARNESS, supra note 24, at 3-4.
36. Id.
37. It should be noted that there is substantial variability in the degree of integration. For example, some of the states which are recognized as having a unified bar, e.g., Virginia, South Carolina, and West Virginia, limit their function to admission and disciplinary matters. J. PARNESS, supra note 24, at 4.
38. See id. at 21-32.
40. See Essery, Bar Integration, 19 JUD. 174, 176 (1936) (discussion of the weak-
which were actively lobbying for bar integration.41 It has been said that "[u]p to 1950 the only thoroughgoing activity of the organized profession with reference to its own housekeeping was the drive for the 'integrated bar.'"42

The arguments made in favor of and in opposition to the integrated bar have changed little over the past fifty years.43 Arguments frequently made in support of the integrated bar based primarily on the public interest have included, inter alia: (1) voluntary bar associations are ineffective in improving the competency, standards, and image of the profession;44 (2) bar integration assures effective discipline and enforcement of ethical standards;45 (3) improvements in the administration of justice will result from bar integration;46 (4) the integrated bar can better protect the public interest by monitoring legislation;47 and (5) judicial reform legislation can be more effectively promoted by the integrated bar.48

Other arguments offered to support bar integration have primarily addressed the interests of bar associations and lawyers, although, arguably, the public interest might also be involved. These arguments include: (1) the integration of the bar will increase membership in the bar and will improve financial resources;49 (2) better "participation, diversity of viewpoints, and quality of work will result";50 (3) bar integration will lead to improved educa-

41. See, e.g., Kalish, supra note 24, at 587 n.120. Activities beyond simple lobbying have been attributed to bar integration advocates. One integrated bar opponent charged that "integrators" waited until the majority of attorneys were away at war before putting the pressure on and that there was evidence of deceitful practices. See Vogl, supra note 8, at 64.

42. J. HURST, supra note 24, at 365.

43. Compare In re Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937) and Essery, supra note 40 with In re President of Mont. Bar Ass'n, 163 Mont. 523, 518 P.2d 32 (1974); Nixon & Brown, Brief in Support of Unification of New Hampshire Bar, 11 N.H. Bar J. 8 (1968); and Struckhoff, Comments by a Member of the Bar in Opposition to Integration, 11 N.H.B. J. 39 (1968).


45. E.g., In re President of Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 32, 33 (1974); In re Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 284, 275 N.W. 265, 267 (1937); Nixon & Brown, supra note 43, at 27; Comment, supra note 1, at 481.

46. E.g., Nixon & Brown, supra note 43, at 28; Comment, supra note 1, at 482.

47. E.g., Essery, supra note 40, at 175; Nixon & Brown, supra note 43, at 34.

48. E.g., In re President of Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 32, 33 (1974); Nixon & Brown, supra note 43, at 27.


50. In re President of Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 32, 33 (1974); J. Parness, supra note 34, at 3.
(4) membership in the integrated bar will be open to all without regard to sex, race, or religion; (5) integration of the bar will eliminate clique control common in voluntary bar associations; (6) the public will view attorneys more positively under an integrated bar system; (7) bar integration will improve the economic position of lawyers through the institution of minimum fee schedules; (8) the integration of the bar will actually be beneficial to local voluntary bar associations; (9) self-government and self-discipline by the legal profession are promoted by bar unification; (10) the bar has many duties of public responsibility (e.g., client security funds, making legal services available), and bar integration eliminates "freeloaders" in the profession, i.e., lawyers who do not fulfill their public responsibilities; (11) bar integration provides the mechanism by which lawyers can speak with one voice on important public and social issues; and (12) the integrated bar will protect lawyers by providing a mechanism to monitor legislation that may affect their professional interests.

A review of these pro-unification arguments reveals two interesting and important points concerning the integration movement. First, it would appear that historically the integration controversy, at least from the proponents' perspective, was conceptualized as one in which an integrated bar association or a voluntary bar association were the only alternatives. The proponents of bar unification did not seem to acknowledge or address the fact that the state could accomplish the goals of regulating discipline, bar admission

51. E.g., Essery, supra note 40, at 174; Nixon & Brown, supra note 43, at 32.
52. E.g., J. Parness, supra note 24, at 3.
54. E.g., In re Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 284, 275 N.W. 265, 266 (1937); Nixon & Brown, supra note 43, at 32.
55. E.g., Nixon & Brown, supra note 43, at 34; see D. McKean, supra note 1, at 67.
56. E.g., In re President of Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 33 (1974); Curtis, supra note 39, at 106.
57. E.g., Editorial, supra note 53, at 101.
58. E.g., In re President of Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 32, 33 (1974); Curtis, supra note 39, at 105; Hennessey, supra note 49, at 10.
59. E.g., Hennessey, supra note 49, at 9; Nixon & Brown, supra note 43, at 32, 34; Comment, supra note 1, at 482.
60. E.g., Nixon & Brown, supra note 43, at 34; see also Curtis, supra note 39, at 106; McMullin, In Behalf of a Unified State Bar, 13 Dicta 61, 65 (1936).
61. Perhaps somewhat illustrative of this attitude, as well as a dated attitude toward women, is a comment in an editorial arguing why the integrated bar should be adopted even if the voluntary bar association is thriving: "Any housewife knows better than to take the second best head of lettuce when the largest, firmest and freshest one in the pile is hers at the same price. Are lawyers to show less intelligence, and refuse the best merely because they have the second best?" Who Are the Opponents of Bar Integration? 26 Jud. 112 (1942).
requirements, ethical standards, and lawyer registration, through statute or court rule without integrating an existing bar association.62 The second point that emerges is that the majority of reasons offered for integrating the bar would benefit primarily lawyers and bar associations.63 Furthermore, many of the reasons offered to support unification of the bar have become publicly unacceptable. For example, the use of the integrated bar to fix minimum fees that will improve the legal profession's economic position, although probably legal,64 would undoubtedly prove publicly embarrassing. Similarly, the use of bar integration to increase the general lobbying effectiveness of the legal profession has not only been heavily criticized over the years,65 but has also been subjected to legal challenge based on a lack of service to the public interest66 and constitutional challenge based on freedom of association.67 These points are important to keep in mind when considering the continuing viability of the integrated bar.68

Because publicly the proponents of bar unification usually couched their arguments in terms of better serving the public interest,69 opponents found themselves in a rather awkward position. Their obvious response was to argue that the integration of a bar association was not necessary either because (1) the voluntary association could adequately serve the public interest in integrity and quality of the profession, or (2) there was an alternative to bar unification in the form of state regulation. The problem was that the first contention was not very believable70 and that the second was


63. See J. STONE, LEGAL EDUCATION & PUBLIC RESPONSIBILITY 229 (1959).


66. See, e.g., In re Discontinuation of Wisconsin State Bar, 93 Wis. 2d 385, 386, 286 N.W.2d 601, 602 (1980); Armstrong v. Board of Governors of State Bar, 86 Wis. 2d 746, 747, 723 N.W.2d 356, 358 (1979).

67. See infra section III-C of text.

68. See infra section IV of text.

69. Better ethical standards, disciplinary procedures, administration of justice, and legal reform were justifications commonly cited by courts as they ordered integration. See, e.g., In re Integration of the Nebraska State Bar Ass'n, 133 Neb. 283, 284, 275 N.W. 365, 365 (1937); In re President of Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 32, 33 (1974).

70. See J. Hurst, supra note 24, at 384-86.
quite unpopular among lawyers and could clearly be viewed as contrary to the self-interest of the legal profession. Thus, although both arguments were made, opponents of bar unification more frequently put forth arguments grounded in law or individualism or attacked supporters of integration as being motivated by self-interest. It was asserted that: (1) compulsory membership in the bar deprived attorneys of the fundamental liberty of freedom of choice; (2) integration was the equivalent of regimentation; (3) integration of the bar increased bureaucracy and the tax burden; (4) bar integration deprived attorneys of property without due process and imposed a form of involuntary servitude; (5) free speech rights were infringed under the integrated bar; (6) the integrated bar was like a "closed shop"; (7) bar integration could cause obsequiousness on the part of attorneys in the face of judicial control; (8) integration was motivated by economic self-interest and guildism; (9) integration gave state power to a private interest group which advocated legal reform carrying broad social implications; (10) even if the integrated bar was limited to lobbying activities related to the administration of justice, it was often impossible to distinguish administration of justice from broad public policy; (11) the integrated bar was not responsive to captive members' desires and needs; (12) excessive influence by specialized minority interests or a power clique would result from bar integration; (13) compulsion would not cure attorney apathy; and (14) bar integration would cause rigidity in the legal profession.

The results of the debate between pro-integrationists and anti-

71. See, e.g., Vogl, supra note 8, at 66-67; Haberman, supra note 62, at 257.
72. E.g., In re President of Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 32, 33 (1974); Struckhoff, supra note 40, at 43, 45; Vogl, supra note 8, at 64; Comment, supra note 1, at 463.
73. In re President of Montana Bar Ass'n, 163 Mont. 523, 524, 518 P.2d 32, 33; Struckhoff, supra note 43, at 46.
74. E.g., Hannigan, supra note 8, at 18; Vogl, supra note 8, at 67; see Struckhoff, supra note 43, at 45.
75. Vogl, supra note 8, at 64.
76. E.g., In re President of Montana Bar Ass'n, 163 Mont. 523, 523, 518 P.2d 32, 33; Comment, supra note 1, at 482.
77. E.g., J. Parness, supra note 24, at 3; Comment, supra note 5, at 89.
78. E.g., Wicker, supra note 39, at 460; Vogl, supra note 8, at 66.
79. See D. McKean, supra note 1, at 131.
81. Id. at 50.
82. Id. at 50-51.
84. E.g., Struckhoff, supra note 43, at 48.
85. Struckhoff, supra note 43, at 44.
86. Id. at 39, 51.
integrationists perhaps bears witness to the truth of DeToqueville's statement that lawyers, "like most other men, are governed by their private interests of the moment."87 Arguably, thirty-one states adopted integrated bar associations between 1921 and 1978 only because the legal profession and bar associations believed they were gaining more than they were losing by integrating.88 During this time, nonetheless, the integrated bar also fared well against challengers in the courts.89 Lathrop v. Donohue,90 decided in 1961, is undoubtedly the most important case in which the constitutionality of the integrated bar was directly at issue. However, two other Supreme Court cases, Railway Employees' Department v. Hanson91 and International Association of Machinists v. Street,92 are of assistance in gaining a proper understanding of Lathrop.

B. The Early Supreme Court Cases

1. Railway Employees' Department v. Hanson

As authorized by section two of the Railway Labor Act,93 labor organizations of Union Pacific Railroad employees entered into a union shop agreement with the company. The agreement provided that all employees would be required to join the union within sixty days of being hired and would have to maintain their membership

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87. A. DeToqueville, Democracy in America (1835) reprinted in D. McKean, supra note 1, at 112.
88. To a certain extent the legal profession's assessment may have depended on the perceived reasonableness of the compulsory fees. Bar fees appeared to have been relatively minimal at the time the integration movement was at its zenith. For example, Herbert Harley, the father of bar unification, stated in 1939 that "[t]he fee is insignificant, ranging from two dollars to seven-fifty. The average is around five dollars." Harley supra note 25, at 41. This was apparently still the case at the time of Lathrop in 1961, where the challenged fee was only $15.00. 367 U.S. 820, 821 (plurality opinion). There is some evidence that the revolt against the integrated bar today has been caused at least partially by what are viewed as excessive fees. Pike, supra note 7, at 1, col. 4. For example, the current cost of compulsory membership in the Nebraska State Bar Association is $150.
89. See J. Parness, supra note 24, at 9. In 1973, Parness stated that "no case was found to support any constitutional or non-constitutional attack on the validity of the bar." Id. Although this statement is not entirely accurate, see, e.g., Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969) (certain activities by the integrated bar found to be ultra vires); In re Integration of the Bar, 249 Wis. 523, 25 N.W.2d 500 (1946) (rejecting bar integration), a review of the case law concerning the integrated bar clearly demonstrates the overwhelming success of integration proponents. See supra notes 3-4 & 22 and accompanying text.
as a condition of employment. Nonunion employees of the railroad obtained an injunction against the enforcement of the agreement. The Nebraska Supreme Court affirmed on the ground that the union shop agreement violated the employees' first amendment rights because it required members to pay dues that were used to obtain objectives unrelated to collective bargaining.

The United States Supreme Court treated the case as one involving primarily a question of the power of Congress to regulate labor relations. Because the validity of the statutory provision authorizing a union shop was characterized as "one of policy with which the judiciary has no concern," the Court stated that it only had to find that the provision was "relevant or appropriate to the constitutional power which Congress exercises." The Court noted the propriety of the asserted interests of industrial peace and stable labor-management relations through collective bargaining with the true representative of the employees, and held that the "requirement for financial support of the collective-bargaining agency by all who receive the benefits . . . does not violate the First or the Fifth Amendments."

Arguably, the Court's treatment of the first amendment claims in Hanson linked the fate of the integrated bar to that of union shops. After reviewing the arguments that a union shop agreement "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought . . .," Justice Douglas, writing for a unanimous Court, stated:

On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to any membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or 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 that case.

94. 351 U.S. at 231 n.3.
96. 351 U.S. at 233.
97. Id. at 234.
98. Id.
99. Id. at 233.
100. Id. at 238.
101. Id. at 238. It must be noted that later, in Lathrop, Justice Douglas ironically retracted his statement concerning the analogy with the integrated bar. See 367 U.S. 820, 879 (1961) (Douglas, J., dissenting).
Hanson has been heavily criticized for the Court's failure to give adequate weight in the reviewing process to fundamental first amendment concerns. Commentators have noted that the deference to the legislative judgment in Hanson was indicative of a lack of the strict scrutiny by the Court that would normally be expected where legislation is challenged based on the first amendment. Moreover, Hanson left unanswered questions concerning the use of compulsory membership fees to support activities other than collective bargaining. Those questions were next addressed in another Railway Labor Act case, International Association of Machinists v. Street.

2. International Association of Machinists v. Street

In Street, the Supreme Court was again faced with a constitutional challenge to section two of the Railway Labor Act. In this case, employees alleged that in order to hold their jobs under a union shop agreement they were compelled to pay fees which were used to a substantial extent to support "political and economic doctrines, concepts and ideologies with which they disagreed." The trial court and the Georgia Supreme Court held that this activity by the union violated, inter alia, the employees' freedom of thought, speech, and association, and entered a decree enjoining enforcement of the union-shop agreement.

The Supreme Court, on appeal, noted that Hanson held only that section two of the Railway Labor Act was "constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." The Court did not address any other aspects of forced association or the issue of the use of dues for


104. E.g., Bond, supra note 103, at 436.

105. See 351 U.S. at 238.


108. 367 U.S. at 744. The trial court and the Georgia Supreme Court specifically found that the union dues were being used to support political candidates for office and to promote legislative programs that were not reasonably necessary to collective bargaining. International Ass'n of Machinists v. Street, 215 Ga. 27, 43-44, 108 S.E.2d 796, 808 (1959).

109. 367 U.S. at 746 n.3.
political causes. Although the Court believed that the record in *Street* squarely presented those constitutional issues, it avoided deciding the constitutional questions by relying on the doctrine that "when the validity of an act of the Congress is drawn in question, and even if serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

The Court was forced to read a great deal into the Railway Labor Act in order to find anything within its provisions which even remotely addressed the issues before the Court. The Court reasoned that the Railway Labor Act union-shop provision had two major purposes: (1) to help defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes; and (2) to protect dissenters' interests. The use of an employee's money over his objections:

- to support candidates for public office, and advance political programs ... is a use which clearly falls outside the reasons advanced by the Unions and accepted by Congress why authority to make union-shop agreements was justified. On the other hand, it is equally clear that it is a use to support activities within the area of dissenters' interests which Congress enacted the proviso to protect.

Therefore, the Court held that section two of the Railway Labor Act denied "the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."

110. *Id.* at 749.
111. *Id.* at 749 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).
112. Critics have suggested that the Court's analysis of the statute in *Street* was artificial and incorrect. Justice Black forcefully argued that the Court had distorted the statute in order to leave itself open later to decide that integrated bar associations could compel financial support for activities with which the members disagreed. See 367 U.S. at 785-86 (Black, J., dissenting). He dissented on the grounds that the constitutional question concerning first amendment rights should have been answered and that "the First Amendment bars use of dues extorted from an employee by law for the promotion of causes, doctrines, and laws that unions generally favor to help the unions, as well as any other political purposes." *Id.* at 790-91. Justice Frankfurter, who believed that the use of union dues to support political activities with which a member did not agree was constitutional, also believed that there was no way the Railway Labor Act could "untorturingly" be construed to bar the union activities in question in *Street*. *Id.* at 800, 803. See Comment, *The Right of Ideological Nonassociation*, 66 CALIF. L. REV. 767, 772 (1978).
113. 367 U.S. at 750-62.
114. See *id.* at 765-70.
115. *Id.* at 768.
116. *Id.* at 768-69. Once the Court found a violation of the Railway Labor Act, it suggested two remedies that would protect both the interests of the majority and those of the dissenters, both of which required employees to first affirma-
It is important to note that the Court in *Street* specifically declined to express any opinion on union expenditures objected to by employees that were not related to collective bargaining and were not political.\(^{117}\)

The question of the constitutionality, under the first amendment, of the use of compulsory dues to support political causes with which an employee disagrees remained unanswered after *Street*. However, there was an opportunity to answer that question in the context of the integrated bar in *Lathrop v. Donohue*,\(^{118}\) decided the same day as *Street*.

### 3. *Lathrop v. Donohue*

To say that *Lathrop* has received mixed reviews by the commentators is to be kind.\(^{119}\) Predictably, the pro-integrationists acclaimed the Supreme Court's decision as probably ranking "as its greatest single contribution to the better administration of justice since the coming of the Federal Rules in 1937."\(^{120}\) However, others have not been so favorably disposed to the decision. Justice Black began his dissenting opinion in *Lathrop* with the statement that "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not."\(^{121}\) One commentator, while heavily criticizing the *Lathrop* opinion, called it "an unusual exercise in judicial logrolling."\(^{122}\) Similarly, the Court has been accused of dodging the constitutional issue that

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\(^{117}\) 367 U.S. at 769-70.

\(^{118}\) 367 U.S. 820 (1961).

\(^{119}\) For additional discussion and analysis of *Lathrop*, see D. McKEAN, supra note 1, at 84-111; Bond, supra note 113, at 436-37; Comment, supra note 112, at 773; Comment, supra note 5, at 90; Comment, supra note 1, at 477; Comment, supra note 5, at 784-90; *Supreme Court Upholds Integrated Bar*, 45 JuD. 37 (1961); Recent Developments, *Constitutionality of Required Payment of Dues to Integrated Bar Association*, 23 Ohio St. L.J. 549 (1962).

\(^{120}\) *A Major Victory for the Integrated Bar*, 45 JuD. 46, 47 (1961).

\(^{121}\) *Lathrop v. Donohue*, 367 U.S. 820, 865 (1961) (Black, J., dissenting). At least part of Justice Black's consternation was due to the fact that there was not majority support for any of the five opinions filed. *See id.* at 866.

\(^{122}\) *The Supreme Court, 1960 Term*, supra note 5, at 134.
was before it. Nevertheless, despite its inadequacies and faults, *Lathrop* stands as the only Supreme Court decision directly addressing the constitutional issues surrounding the integrated bar.\footnote{But see Buschbacher v. Supreme Court of Ohio, No. C-2-75-743, 75-309 (S.D. Ohio 1976), *aff'd sub nom.* Cuyahoga County Bar Ass'n v. Supreme Court of Ohio, 430 U.S. 901 (1977).}

*Lathrop* placed the same issues addressed in *Hanson* before the Court in the context of a court ordered unification of a state bar association. Lathrop, a Wisconsin attorney, challenged the constitutionality of the Wisconsin integrated bar based on the first amendment freedoms of speech, press, assembly, and petition that are inherent in the fourteenth amendment.\footnote{Id. at 234, 102 N.W.2d at 404. The facts primarily consisted of the activities of the state bar, which the court characterized as administration of justice, court reform, and legal practice. *Id.* The propriety and fairness of this procedure in this case has been questioned. *See* D. McKEAN, *supra* note 1, at 48-49; *Supreme Court, 1960 Term, supra* note 5, at 135-36.} Specifically, he argued that there was a freedom not to associate which was violated when the Wisconsin Supreme Court ordered the integration of the bar and forced him to pay a $15 annual membership fee as a condition on his right to practice law.\footnote{Lathrop v. Donohue, 367 U.S. at 823 (plurality opinion).} Lathrop also argued that his first amendment rights were violated by the fact that the state bar association used the dues money to support legislative causes which he opposed.

Although the case was before the Wisconsin Supreme Court on a demurrer, the court decided the constitutional issues on the merits, judicially noticing the facts necessary to reach its decision.\footnote{Id. at 236, 102 N.W.2d at 407-08.} The Wisconsin Supreme Court concluded that the order integrating the bar and continuing that integration did not violate the plaintiff's right of association and that "his rights to free speech were not violated because the state bar used his membership dues to support legislation with which he disagreed."\footnote{Id. at 827.}

On appeal to the United States Supreme Court Justice Brennan, writing for the plurality, characterized Lathrop's central argument as being that an individual "cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds and employees for the purpose of influencing legislation and public opinion toward legislation."\footnote{Id. at 549, 551. But see Comment, *supra* note 112, at 773; Recent Developments, *supra* note 20, at 549-551.} Concluding that the argument was essentially one of freedom of

125. Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1960).
126. See *id.* at 236, 102 N.W.2d at 407-08.
127. *Id.* at 234, 102 N.W.2d at 404. The facts primarily consisted of the activities of the state bar, which the court characterized as administration of justice, court reform, and legal practice. *Id.* The propriety and fairness of this procedure in this case has been questioned. *See* D. McKEAN, *supra* note 1, at 48-49; *Supreme Court, 1960 Term, supra* note 5, at 135-36.
128. Lathrop v. Donohue, 367 U.S. at 823 (plurality opinion).
association, the plurality, accepting the interpretation of the Wisconsin Supreme Court, responded that Lathrop was not being forced to associate with anyone and that the only compulsion he was subjected to was the payment of the $15 annual dues. Therefore, the plurality believed it was confronted with the same question it faced in Hanson, i.e., "compelled financial support of group activities, not with involuntary membership in any other aspect." 

Having analogized the case to Hanson, the plurality apparently applied the same sort of broad analysis used in relation to a union shop agreement to Lathrop's freedom of association rights. Justice Brennan first reviewed the purposes and activities of the state bar and concluded that legislative or political activities clearly were not the predominant activities of the state bar. The plurality found that the Wisconsin court might reasonably conclude that a majority of activities of the state bar improve educational and ethical standards of the bar, resulting in improved quality of legal services to the public. Justice Brennan stated that it could not "be denied that this is a legitimate end of state policy" and concluded that the state may constitutionally impose the costs of this purpose on the lawyers, who are the beneficiaries of bar integration, "even though the organization created to attain the objective also engages in some legislative activity." In light of the presence of a legitimate public objective and the fact that membership was limited to only the compulsory payment of "reasonable annual dues," the Justices constituting the plurality were unwilling to find an infringement of the plaintiff's rights of association.

Justices Harlan, Frankfurter, and Whittaker concurred in the judgment on this issue. Justice Whittaker did so on the grounds that the practice of law was a "special privilege" and not a right.

130. Id. at 828, 842.
131. See Comment, supra note 5, at 785.
132. See Lathrop v. Donohue, 367 U.S. at 828-42. Among the purposes asserted for the integrated bar were:
   to aid . . . the administration of justice; to foster and maintain . . .
   high ideals of integrity, learning, competence and public service and
   high standards of conduct; to safeguard the proper professional inter-
   ests of the members of the bar; to encourage the formation and activi-
   ties of local bar associations; to provide a forum for the discussion of
   subjects pertaining to the practice of law, the science of jurisprudence
   and law reform, and the relations of the bar to the public, and to pub-
   lish information relating thereto; to the end that the public responsi-
   bilities of the legal profession may be more effectively discharged.
   Id. at 828-29 (citation omitted).
133. Id. at 839. Not all commentators would necessarily agree with this assess-
   ment. See Comment, supra note 5, at 785 & n.49.
134. 367 U.S. at 843 (plurality opinion).
135. Id.
136. Id.
under the constitution.\textsuperscript{137} Therefore, neither the compulsory dues requirement nor the use of dues for political causes with which the member disagrees was unconstitutional.\textsuperscript{138} Justice Harlan, joined by Justice Frankfurter, simply stated that \textit{Hanson} a fortiori "surely lays at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs."\textsuperscript{139}

Only Justice Douglas, despite the fact that he had written the opinion for the Court in \textit{Hanson},\textsuperscript{140} did not agree that the state could compel lawyers to pay dues to the integrated bar association as a condition of practicing law within a state.\textsuperscript{141} In reversing his previous position and reaching the conclusion that the integrated bar violated Lathrop's first amendment freedom of association, Justice Douglas stated: "In the Hanson case we said, to be sure, that if a lawyer could be required to join an integrated bar, an employee could be compelled to join a union shop. But on reflection the analogy fails."\textsuperscript{142}

Justice Douglas, arguably applying a traditional first amendment analysis,\textsuperscript{143} asserted that the state interests involved in \textit{Hanson} were of more importance than those involved in \textit{Lathrop}.\textsuperscript{144} The interest served in \textit{Hanson} was to eliminate "freeriders" who

\textsuperscript{137} Id. at 865 (Whittaker, J., concurring).
\textsuperscript{138} The soundness of Justice Whittaker's cryptic analysis is certainly questionable in light of two recent Supreme Court decisions concerning the legal profession and first amendment rights. See \textit{Ohralik v. Ohio State Bar Ass'n}, 436 U.S. 447, 457-62 (1978); \textit{Bates v. State Bar of Arizona}, 433 U.S. 350 (1977) for cases in which the Supreme Court has recognized that the legal practitioner is not without first amendment rights and that at least important state interests must be asserted before infringing on those rights. \textit{See also Gordon v. Committee on Character & Fitness}, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979) (court held six month attorney residency requirement unconstitutional under the privileges and immunities clause); \textit{Note}, \textit{The Constitutionality of State Residency Requirements for Attorneys Under the Privileges and Immunities Clause: The Attack Continues}, 61 Neb. L. Rev. 200 (1981).
\textsuperscript{139} \textit{Lathrop v. Donohue}, 367 U.S. at 849 (Harlan, J., joined by Frankfurter, J., concurring).
\textsuperscript{140} \textit{See Railway Employees' Dep't. v. Hanson}, 351 U.S. 225 (1956) (upheld union shop agreements exacting membership fees as a condition of employment).
\textsuperscript{141} \textit{Lathrop v. Donohue}, 367 U.S. at 877-85 (Douglas, J., dissenting).
\textsuperscript{142} Id. at 879.
\textsuperscript{143} \textit{See id.} at 879-85; Bond, \textit{supra} note 103, at 437.
\textsuperscript{144} \textit{See 367 U.S. at 879-82; Comment, supra note 5, at 787 & n.65. One commentator has stated that Justice Douglas found that the state interest in \textit{Hanson}, elimination of "freeriders," was compelling. Bond, \textit{supra} note 103, at 437. It must be noted, however, that at no point in his dissenting opinion did Justice Douglas employ this characterization, although his analysis would appear to be quite analogous to a compelling state interest test. \textit{See infra} note 144 and accompanying text.
“may be so disruptive of labor relations and therefore so fraught with danger to movement of commerce that Congress has the power to permit a union-shop agreement . . . .”

In Justice Douglas’ opinion, the integrated bar served primarily to discipline members of the bar and promote legislation supported by the majority of the members. Although the right not to associate with a group is not absolute, Justice Douglas would have required exceptional circumstances before that right could be curtailed by narrowly drawn laws. For Justice Douglas, Hanson was “a narrow exception to be closely confined” in order to avoid putting “professional people into goosestepping brigades.”

The second issue discussed in Lathrop is most relevant to the current controversy concerning the constitutionality of certain integrated bar association activities. Justice Brennan stated that the issue raised in the state court was whether the use of Lathrop’s dues to support causes which he opposed violated his first amendment rights. Justice Brennan noted that the Wisconsin court had decided the question on the grounds that the right to practice law is just a privilege which is subject to regulation that does “not impose an unconstitutional burden or deny due process,” and that the public interest promoted by having “public expression of the views of a majority of the lawyers of the state, with respect to legislation effecting the administration of justice and the practice of law . . . voiced through their own democratically chosen representatives . . . far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues.”

Without commenting on this rationale, the plurality declined to decide the issue on the grounds that it was not concretely presented, even if the factual allegations of the complaint were taken as true and construed most expansively. Apparently, the plurality would have required that the dissident bar member allege explicitly the specific views that he held on particular matters on which

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145. 367 U.S. at 879 (Douglas, J., dissenting).
146. Id. at 882.
147. Id. at 884-85.
148. However, it must be noted the Court in Abood indicated that Lathrop lacked precedential value on nonassociation rights. See 431 U.S. 209, 233 n.29 (1977).
149. Lathrop v. Donohue, 367 U.S. at 844.
150. Id.
151. Id. at 844-45 (citation omitted). Interestingly, there is serious doubt as to whether this particular state interest is even legitimate under a rational basis standard. See Comment, supra note 5, at 785 n.54, where the author argued that such forced expression of views would clearly be unconstitutional under the first amendment. Cf. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977) (compelling dissident employee to state specifically what his ideological beliefs are implicates first amendment rights).
152. 367 U.S. at 845.
the bar had taken a position, and the degree and extent to which his exacted funds were used to support those political activities.\textsuperscript{153}

Justices Harlan and Frankfurter believed that this constitutional issue was inescapably before the Court and that it was "most unfortunate that the right of the Wisconsin Integrated Bar to use, in whole or in part, the dues of disdissident members to carry on legislative and other programs of law reforms . . . should be left in such disquieting Constitutional uncertainty."\textsuperscript{154} Justice Harlan characterized Lathrop's arguments of first amendment infringement by being forced to financially support political activities with which he disagreed as bordering on the "chimerical."\textsuperscript{155} He found the state interests supporting the integrated bar sufficient to outweigh any incursions on first amendment freedoms.\textsuperscript{156} In fact, he stated that there is nothing less than "a most substantial state interest in Wisconsin having the views of the members of its Bar 'on measures directly affecting the administration of justice and the practice of law.'"\textsuperscript{157}

Although Justices Black and Douglas clearly agreed with Justices Harlan and Frankfurter that the constitutional issue concerning the use of compulsory fees for political activities repugnant to the integrated bar member was before the Court, they could not have disagreed more with the concurring Justices on the resolution of that issue. Justice Douglas denounced the entire concept of the integrated bar,\textsuperscript{158} and Justice Black rejected the balancing of interest approach as applied by the Wisconsin Supreme Court and Justice Harlan.\textsuperscript{159} Noting that he could think of "few plainer, more

\textsuperscript{153} Id. at 846. These strict pleading requirements asserted in Justice Brennan's opinion as the reasons for the failure of the plurality to reach the constitutional free speech issue have been severely criticized as unreasonable and inconsistent. It should be noted that the record in \textit{Lathrop} was specific, or at least as specific as the record in \textit{Street}, where the issue was reached under the Railway Labor Act. \textit{See Comment, supra} note 5, at 786 \& n.55; \textit{The Supreme Court, 1960 Term, supra} note 5, at 135, 237-39. In addition, because the case was brought before the Wisconsin Supreme Court on a demurrer and decided on the merits by judicial notice, Lathrop never had the opportunity to present evidence on bar activities and use of funds. \textit{The Supreme Court, 1960 Term, supra} note 5, at 136. It should also be noted that forcing the dissident member to come forward and state what in particular he objects to and what his position is on that matter seems to infringe upon first amendment rights. \textit{See Abood v. Detroit Bd. of Educ.}, 431 U.S. at 241, which may have tacitly overruled this part of \textit{Lathrop}.

\textsuperscript{154} 367 U.S. at 848 (Harlan, J., joined by Frankfurter, J., concurring).

\textsuperscript{155} Id. at 852.

\textsuperscript{156} \textit{See Id.} at 861.

\textsuperscript{157} Id. at 864. \textit{But see supra} note 51 and accompanying text.

\textsuperscript{158} \textit{See Id.} at 878-85 (Douglas, J., dissenting); \textit{supra} notes 140-46 and accompanying text.

\textsuperscript{159} Justice Black stated that the "balancing argument here is identical to that
direct abridgments of the First Amendment than to compel persons to support candidates, parties, ideologies, or causes that they are against;" Justice Black reiterated his long standing absolutist position on the first amendment. The Justice also made an extremely important analytical point when he stated that the fact that the integrated bar provides many valuable services was irrelevant as far as this constitutional question was concerned:

For a State can certainly insure that the members of its bar will provide any useful and proper services it desires without creating an association with power to compel members of the bar to pay money to support views to which they are opposed or to fight views they favor. Thus, the power of a bar association to advocate legislation at expense of those who oppose such legislation is wholly separable from any legitimate function of an involuntary bar association and, therefore, even for those who subscribe to the balancing test, there is nothing to balance against this invasion of constitutionally protected rights.

Because of the fragmentation of the Court in Lathrop, the decision of the Wisconsin Supreme Court was affirmed, and the issue of whether an attorney may be constitutionally compelled "to contribute his financial support to political activities he opposes" was reserved. Since four Justices did not reach this issue, three Justices believed on the merits that an attorney could be compelled, and two Justices asserted that such compulsion was unconstitutional, Lathrop provided little guidance as to the issue. After Lathrop, the commentators seemed to agree that it was an issue that the Supreme Court would once again have to face.

Nevertheless, the Hanson, Street, and Lathrop opinions do suggest some tentative conclusions relevant to the present controversy concerning the integrated bar: (1) the issues of the constitutionality of the integrated bar and of labor union agreements creating a union shop have been treated as analogous; (2) compelled financial support of the integrated bar, like that of the labor union which has recently produced a long line of liberty-shifting decisions in the name of "self-preservation." Id. at 872 (Black, J., dissenting).

160. Id. at 873.
161. Justice Black also made it clear that if he were to balance the competing interests involved, he would have no problem concluding that the first amendment freedoms infringed by the integrated bar activities clearly outweighed any state interest served by the integrated bar. Id. at 874.
162. Id. at 875.
163. Id. at 847-48 (Brennan, J., joined by Warren, C. J., Clark, J., & Stewart, J.).
164. See Abood v. Detroit Bd. of Educ., 431 U.S. at 233 n.29; T. Emerson, The System of Free Expression 691 (1970); Comment, supra note 5, at 288.
165. See, e.g., The Supreme Court, 1960 Term, supra note 5, at 136; Comment, supra note 5, at 94; Comment, supra note 5, at 788; Recent Developments, supra note 5, at 549, 552.
166. For a discussion of Hanson, Street, and Lathrop from a slightly different perspective, see T. Emerson, supra note 164, at 578-96.
167. See id. at 692-93.
under a union shop agreement, does not per se violate the freedom of association; (3) those attacking the activities of integrated bar associations and labor unions under a union shop agreement on first amendment grounds, as well as those Supreme Court Justices reaching the merits on those issues, have only addressed activities which would probably be considered political and ideological, e.g., campaigns for public office, lobbying, propaganda, legislation; (4) in none of the cases did a majority of the Court explicitly require a compelling or substantial state interest to justify an infringement on the first amendment rights; and (5) *Lathrop* did leave a "cloud of partial unconstitutionality" floating over the integrated bar.169

There is reason to believe, based on *Street* and *Lathrop*, that given the proper pleadings and record a majority of the Court would have found that compelled financial support of political and ideological activities to which a member objected was unconstitutional as an infringement of freedom of speech.170 Unfortunately, from a certainty standpoint, the case which again raised this issue did not involve the integrated bar but rather another type of labor union agreement. Nevertheless, a substantial number of lawyers, commentators, and courts171 believe that this case, *Abood v. Detroit Board of Education*,172 answered the question reserved in *Lathrop*.

### III. ANALYSIS

#### A. *Abood*—The Holding

In *Abood v. Detroit Board of Education*,173 public school teach-

168. See International Assoc. of Machinists v. Street, 367 U.S. 140, 169-70 (1961). *But see* id. at 791 (Black, J., dissenting). However, it should be noted that in *Lathrop* there was some dispute during the oral argument on the case concerning whether certain activities, e.g., lobbying on judicial salaries, were political. *See* D. McKean, *supra* note 1, at 101-03. Justice Frankfurter indicated that "[y]ou cannot rest this case on a nice line between what is political and what is not political insofar as the bar as a corporate body in your state may express its views." *Id.* at 103. Emerson argues that the distinction made between political and non-political associational expression is inadequate and superficial. T. Emerson, *supra* note 164, at 691-92.

169. 367 U.S. at 865 (Harlan, J. joined by Frankfurter, J., concurring).

170. *See* Comment, *supra* note 54, at 94-95. However, it should be noted that the assurance with which this statement can be made today is somewhat diminished by the fact that only one Justice who decided *Street* and *Lathrop*, Justice Brennan, currently sits on the Supreme Court.

171. *See supra* notes 15-22 and accompanying text.


ers challenged the constitutionality of a Michigan statute which authorized a union and a government employer to agree to an agency shop. Under the agreement, a nonunion employee would be required to contribute to the union a fee equivalent to union dues as a condition of employment. Based on their freedom of association, the plaintiffs sought a declaratory judgment that the agency shop agreement and statute were invalid. They alleged in their complaint that they objected to public sector collective bargaining in general and that the union:

is engaged in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i.e., the negotiation and administration of contracts...177

On appeal, the Supreme Court first addressed the issue of the facial constitutional validity of a public sector agency shop statute and agreement. Relying on Hanson and Street, the Court concluded that although the compulsion of employees to financially support the union has an impact upon first amendment interests, Comment, supra note 112, at 767; Note, Constitutional Limits on the Use of Contributions Compelled under Agency Shop Agreements, 38 LA. L. REV. 850 (1978); Note, Constitutional Right of Non-Association—Abood v. Detroit Board of Education, 14 WAKE FOREST L. REV. 633 (1978).

176. 431 U.S. at 211.
177. Id. at 270.
178. The Court indicated that Hanson and Street recognized the following central congressional interests that were served by exclusive union representation agreements: avoidance of confusion in agreements, prevention of labor dissent and conflict among unions, maximizing employee collectivization, and the fair distribution of costs of representative activities among those who benefit, i.e., eliminating “free-riders.” 431 U.S. at 220-22. The Court summarized these governmental interests as the “desirability of labor peace” and the elimination of “free-riders.” Id. at 224.
179. Id. at 222. The Court, after noting the many ways in which an employee might disagree with union policies, objectives, and programs, stated:

To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in Hanson and Street is that such interference as it exists is constitutionally justified by the legislative assessment of the important con-
"[t]he same important government interests recognized in the Hanson and Street cases presumptively support the impingement upon associational freedom created by the agency shop here at issue."\(^{180}\) Therefore, the Court concluded that to the extent the service charge went toward collective bargaining, contract administration, and grievance adjustment, the agency shop agreement and statute were valid.\(^{181}\)

After finding the agency shop agreement valid on its face, the Court addressed the second issue presented by plaintiff's complaint. Because the Michigan Court had ruled that state law authorized the use of forced contributions to support activities other than collective bargaining, the Supreme Court concluded that it was faced with the constitutional issues not decided in Hanson, Street or Lathrop—"the use of union-shop dues for political and ideological purposes unrelated to collective bargaining."\(^{182}\) The Court stated that earlier decisions\(^{183}\) clearly established a first amendment freedom of association "for the purpose of advancing beliefs and ideas. . . ."\(^{184}\) Moreover, the Court recognized the existence of a right of nonassociation\(^{185}\) which would protect em-
ployees from being required to support financially an ideological cause they may oppose as a condition of public employment. Consequently, the Court concluded that a union could not, in the face of employees' objections, use mandatory dues for ideological activities not germane to collective bargaining.

The Court did discuss another important principle during its consideration of the appropriate remedies for the appellants in Abood. Contrary to the plurality's position in Lathrop, the Court indicated that dissenting employees could obtain relief without indicating the specific expenditures to which they object. All that was necessary was an allegation that they oppose "ideological expenditures of any sort that are unrelated to collective bargaining." Otherwise, an unfair burden of proof would be placed on the employee and, more importantly, "[t]o require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." B. Applicability of Abood to the Integrated Bar

Many commentators and lawyers believe, and developing case law strongly supports the conclusion, that Abood is substantially determinative on the question of the constitutionality of the use of an attorney's compulsory dues for causes to which that attorney objects. Moreover, it can be solidly asserted that the rele-

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186. 431 U.S. at 233 n.29. The significance of this descriptive shift is not clear; however, it might be viewed as an indication that since Lathrop the right of association and nonassociation has broadened, developed, and assumed more importance within the first amendment conceptual framework.

187. Id. at 235.

188. See supra notes 68-71 and accompanying text.

189. 431 U.S. at 241.

190. Id. (footnotes omitted).


192. See Arrow v. Dow, 636 F.2d 287, 288-89 (10th Cir. 1980) (relying in part on Abood, court indicated that a complaint by bar association members alleging that integrated bar used members' fees to engage in ideological activities to which members object states a cause of action under 42 U.S.C. § 1983), on re-
vant constitutional issues and elements arising out of the union shop, agency shop, and integrated bar association cases are analytically analogous.\textsuperscript{193} The essential question that was presented in all the cases concerns the extent to which an individual's freedom not to associate can be infringed by state action which results in that individual being compelled, as a condition of employment, to contribute to an association or group which uses those fees to conduct activities to which that individual objects.\textsuperscript{194}

Admittedly, there are distinctions that can be drawn among the cases which the Court has decided in this area, and among the organizations receiving the dues,\textsuperscript{195} but the Court has made it relatively clear that such distinctions lack constitutional significance under a first amendment freedom of nonassociation analysis. For example, some commentators have construed \textit{Abood} narrowly to address only the relationship between nonmembers and a union in the agency shop situation.\textsuperscript{196} However, the Court, both before and

\textit{mand.}, 544 F. Supp. 458, 460-63 (D.N.M. 1982) (\textit{Abood} controls and prohibits use of bar fees, over members' objections, to support certain lobbying activities that do not serve important or compelling governmental interests); Schneider v. Colegio de Abogados de Puerto Rico, 546 F. Supp. 1251, 1260-62 (D.P.R. 1982) (relying on \textit{Abood} and \textit{Arrow}, court held that challenge by bar members to mandatory membership in bar association and use of fees to support ideological activities with which members disagree states civil rights cause of action under \textit{42 U.S.C. § 1983}). In \textit{re} Justices of Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982) (issued mandamus dismissing suit as to justices, but refused mandamus regarding defendant bar association); Falk v. State Bar of Michigan, 411 Mich. 63, 305 N.W.2d 201 (Mich. 1981) (petition challenging various activities of the state bar remanded for additional findings; however, all justices appear to agree that \textit{Abood} is of primary significance in resolving the issues, \textit{see id.} at 84-119, 305 N.W.2d at 213-16 (Ryan, J., joined by Moody & Fitzgerald, J.J.), \textit{id.} at 120-165, 305 N.W.2d at 227-28 (Williams, J., joined by Coleman, C.J.), \textit{id.} at 165-78, 305 N.W.2d at 241-42 (Levin, J., joined by Kavanaugh, J.)). Other decisions have clearly indicated that \textit{Abood} is not limited to the union context. \textit{See} Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982) (\textit{Abood} applied to university students' challenge to use of student fees for lobbying and research by nonpartisan, non-profit corporation); International Ass'n of Machinists v. Federal Election Comm'n, 678 F.2d 1092, 1116 (D.C. Cir. 1982) (en banc) (\textit{Abood} not applicable only to public employee unions). \textit{But see} Palmer v. Jackson, 617 F.2d 424, 428-30 (5th Cir. 1980); \textit{In re} Discontinuation of State Bar, 93 Wis. 2d 385, 236 N.W.2d 601 (1980); Armstrong v. Board of Governors of State Bar, 80 Wis. 2d 746, 273 N.W.2d 356 (1979).

\textsuperscript{193} \textit{See}, \textit{e.g.}, \textit{Arrow} v. Dow, 544 F. Supp. at 460; \textit{Pike, supra} note 7, at 8, col. 2; \textit{Comment, supra} note 5, at 788. One challenger to integrated bar activities has been quoted as stating: "Conceptually, the state bar of Michigan is a union shop." Pike, \textit{supra}.

\textsuperscript{194} \textit{See} \textit{Abood} v. \textit{Detroit Bd. of Educ.}, 431 U.S. at 222-23, 232-35; \textit{Lathrop v. Donohue}, 367 U.S. at 827-28, 842-44, 845 (plurality opinion).

\textsuperscript{195} \textit{But see} \textit{Comment, supra} note 5, at 788 & n.69.

\textsuperscript{196} \textit{See} \textit{Note, supra} note 173, at 646.
in *Abood*, consistently indicated that it was not so limiting the applicability of its doctrines. In *Abood*, the Court stated it was confronting the constitutional issue not decided in *Hanson, Street*, or *Lathrop* presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining.\(^{197}\) Furthermore, in *Lathrop* the plurality explicitly indicated that the inquiry in the *Hanson, Street*, and *Lathrop* cases turned on the forced payment of fees, not on involuntary membership in an organization.\(^{198}\)

The Court in *Abood* also seemingly rejected any differentiation based on the government's direct or indirect involvement in the infringement. Justice Stewart, writing for the majority, quoted Justice Douglas' broad statement that he read the first amendment as forbidding "any abridgment by government whether directly or indirectly."\(^{199}\) Justice Powell, while rejecting the majority's broad statement, did note a relevant distinction between government use of a taxpayer's funds in ways with which the taxpayer disagrees and a private association using compelled support for activities to which the payer objects. He stated that "the reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests."\(^{200}\) Arguably, in this context an integrated bar is much more like a union than a governmental body.

Although the answer to the question whether there will be a wholesale extension of *Abood* 's principles to the integrated bar association necessarily will remain somewhat open until a challenge to the integrated bar reaches the Supreme Court, a review of the Court's opinions and recent lower court decisions provides little reason to doubt that the issue left open in *Lathrop* and the issue decided in *Abood* are conceptually identical. Nevertheless, the determination that the principles of *Abood* apply to integrated bar association activities does not provide an obvious answer to the question reserved in *Lathrop*. Before this issue is discussed, however, the principles of *Abood* must be analyzed and clarified.

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198. 367 U.S. at 828 (plurality opinion).
199. 431 U.S. at 226 n.23. See also Note, supra note 173, at 853.
C. The Meaning of *Abood*

The task of applying the doctrines of *Abood* to the activities of the integrated bar is made more formidable by the fact that the precise meaning of those doctrines is far from clear. In fact, one can find surprisingly little agreement among commentators and courts as to exactly what principles can be derived from the case. The confusion predominantly stems from a certain amount of imprecision and inconsistency in language usage throughout the opinion, from the fact that the Court did not express itself in terms of familiar first amendment standards\(^{201}\) and did not indicate exactly what type of analysis it was using,\(^{202}\) and from the fact that the Court refused to draw the line between activities which were related to collective bargaining and those which were not.\(^ {203}\)

1. The Holding

One troublesome problem arises out of the inconsistency with which the Court expressed the issue and its conclusion concerning union activities with which an individual disagrees. The issue was stated, at various points, as being "the constitutionality of using compulsory service charges to further 'political purposes' unrelated to collecting bargaining,"\(^{204}\) "the constitutional issues presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining,"\(^ {205}\) and the constitutionality of using "required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."\(^ {206}\)

The Court's conclusion was expressed as being that first amend-


\(^{202}\) Evidence of this is shown by the divergence in the opinions of commentators as to what type of analysis the Court was applying. See, e.g., *Gaebler*, *supra* note 173, at 1015 (not strict scrutiny); Note, *supra* note 18, at 744 (activities must be *germane* to *important* state interest); Note, *supra* note 173, at 855 (balancing approach); Note, *supra* note 173, at 648 (balancing approach); *The Supreme Court, 1976 Term*, *supra* note 173, at 194, 196 (strict scrutiny); *Comment, supra* note 112, at 782 (rational basis and strict scrutiny).

\(^{203}\) See 431 U.S. at 236. The Court indicated that because the case was before the Court on the pleadings, it was appropriate to decide where this line should be drawn. The case was remanded to the Michigan court to where "factual concreteness and adversary presentation" would aid in the linedrawing. *Id.*

\(^{204}\) 431 U.S. at 215.

\(^{205}\) *Id.* at 232.

\(^{206}\) *Id.* at 234.
ment principles prohibit required contributions "to the support of an ideological cause [an employee] may oppose as a condition of holding a job."\textsuperscript{207} In addition, the Court stated:

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so by the threat of loss of governmental employment.

There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.\textsuperscript{208}

It should be noted that the Court also, somewhat contradictorily, stated that: "Nothing in the first Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."\textsuperscript{209} Finally, the Court, in dealing with the facial validity of compulsory service fees for agency shops, indicated 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,"\textsuperscript{210} the impingement upon freedom of association is justified.

The Court's ambiguous language has spawned divergent interpretations concerning the union activities which would be constitutionally prohibited under \textit{Abood} upon objection by a dissenting due-paying member.\textsuperscript{211} The narrowest interpretation of \textit{Abood} is that an employee cannot be forced to contribute to support union political activities unrelated to collective bargaining which the employee finds repugnant.\textsuperscript{212} The fundamental flaw with this interpretation is that the Court explicitly stated that the political nature of the activity and the belief is not the "critical constitutional inquiry"\textsuperscript{213} and strongly indicated that it was not so limiting the activities which could be prohibited.\textsuperscript{214} This interpretation also would require courts to engage in the almost impossible task of distinguishing not only between activities that are related and unrelated to collective-bargaining but also between political and nonpolitical

\begin{itemize}
\item[207.] \textit{Id.} at 235.
\item[208.] \textit{Id.} at 235-36 (footnotes omitted).
\item[209.] \textit{Id.} at 232.
\item[210.] \textit{Id.} at 225-26.
\item[211.] See generally commentators cited \textit{supra} notes 112, 173.
\item[212.] See, e.g., Mitchell, \textit{supra} note 173, at 707-09; Comment, \textit{supra} note 112, at 775, 793; Note, \textit{supra} note 173, at 642.
\item[213.] 431 U.S. at 231-32.
\item[214.] \textit{Id.} at 234-36.
\end{itemize}
Another plausible interpretation of *Abood* is that, at a minimum, a dissenting union member can absolutely block contributions for political candidates and political views. Although superficially this appears to be somewhat contradictory to the Court's statement concerning the irrelevancy of the political nature of the activity or belief, it is clear that the Court did not think that contributions to political candidates or for the advancement of purely political views were germane to a union's duties as collective-bargaining agent. The main problem raised by this interpretation of *Abood* is the sticky question of what is a political view.

The most frequent characterization of the Court's conclusion in *Abood* is that a state may not, even indirectly, require an individual to contribute to the support of ideological activities unrelated or not germane to collective-bargaining. Apparently, this principle requires that two determinations be made—whether the activity is ideological, and whether it is related to collective bargaining. How-

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215. See Mitchell, *supra* note 173, at 708-09; Comment, *supra* note 112, at 793. These commentators note the close relationship between political activities and the objective of collective bargaining, particularly in the public sector. See also T. Emerson, *supra* note 164, at 691-92.


218. Some commentators have argued that this is the central question that should be asked. See Mitchell, *supra* note 173, at 708-09 (the relevant distinction need only be made between partisan political activities and those of a collective bargaining nature); Comment, *supra* note 112, at 788-794. This commentator argues that the purpose of the right of nonassociation is really to protect society's interests by preventing distortions of the political market place and, therefore, the critical question is the political nature of the activity to which the dissenter objects. *Id.* at 788. Under his analysis the distinction should be made between activity that will cause ideological distortions, i.e., external partisan political activity, and activity that does not have an ideological predisposition. *Id.* at 789.

This distinction seems to be as hazy and fraught with difficulty as any other. For example, is the use of compulsory bar association dues to lobby on questions of judicial salaries an issue on which the bar association has an ideological predisposition? See D. McKean, *supra* note 1, at 101-04. In T. Emerson, *supra* note 173, at 691-93, Emerson argues that the distinction between political and non-political expenditures is superficial and ignores the fact that associational freedom serves to protect the individual from forced expression. *Id.* at 693. The individual's right to be free from forced belief seems to have been the focal point of the Court's analysis in *Abood*. 431 U.S. at 434-35. Moreover, it should be noted that focusing on the political nature of the activity in determining whether the dissenter can prohibit the use of his coerced fees for that activity may obscure the central inquiry as to what the state interest is that justifies any infringement on first amendment associational rights.

219. See 431 U.S. at 247, 254-55, (Powell, J., joined by Burger, C. J. & Blackmun, J., concurring); see also *supra* text accompanying notes 204-06.
ever, there is good reason to believe that the "ideological" requirement is mere surplusage which crept into the Court's opinion simply to make it clear that the first amendment associational rights are not limited to the area of purely political beliefs. The basis for such a belief is that the term "ideological" is so nebulous and broad that, absent a specific definition by the Court, the term is virtually meaningless.\textsuperscript{220}

The Supreme Court in \textit{Abood} must have implicitly recognized this when it stated "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection."\textsuperscript{221} The Court also stated that the "freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and the Fourteenth Amendments."\textsuperscript{222} These passages demonstrate the extreme breadth of the beliefs and activities that would be covered by the Court's concept of "ideological." They also establish the principle that the freedom of nonassociation protected by the first amendment is affected by almost any coerced funding or activity that is contrary to an individual's beliefs.\textsuperscript{223} Thus, the only determination that really must be made under \textit{Abood} in a union case is whether the expenditure of compelled dues was made to support activities not germane to or unrelated to collective-bargaining against the employee's wishes; if so, compelling the expenditure violates the first amendment freedom of association.\textsuperscript{224} This analysis is

\textsuperscript{220} Webster's defines ideological as (1) "of, relating to, or based on an ideology" (2) "relating to or concerned with ideas." \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY} (1977). The relevant definition of ideology is probably "a systematic scheme or coordinated body of ideas or concepts esp. about human life or culture." \textit{Id.}

\textsuperscript{221} 431 U.S. at 231. \textit{See id.} at n.28 for a list of cases indicating that the first amendment protects a broad variety of matters of opinion.

\textsuperscript{222} 431 U.S. at 233.

\textsuperscript{223} It should be noted that the appellants in \textit{Abood} also challenged certain social activities of the union; the Supreme Court did not reach this issue because of lack of specificity in the record and the absence of adversary argument. \textit{Id.} at 236 n.33. At least one commentator has interpreted \textit{Abood} to include social activities within its prohibition. \textit{See Note, supra} note 173, at 642, 644.

\textsuperscript{224} Unfortunately, the Supreme Court has left the definition and determination of what is sufficiently "germane" or "related" to collective bargaining to lower courts, and these courts have shown substantial variability as to the degree of relationship that must exist between a union's activities and collective bargaining. \textit{See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks}, 685 F.2d 1065, 1069-75 (9th Cir. 1982) (majority of panel broadly construed activities germane to collective bargaining under \textit{Abood} to mean activities which can be viewed as supporting, promoting or maintaining union as efficient bargaining agent, including union conventions, litigation on any subject matter, union publications, and social activities). \textit{But see id.} at 1075, 1076 (Whelan, D.J., dissenting) (Judge Whelan chastised the majority for reading "germane" too broadly and
strongly supported by the lower federal court cases interpreting Abood. These cases fail to make any mention of a requirement that activities be found to be “ideological,” focusing instead on whether or not the activity is related to collective-bargaining.225

The broad principle from Abood, that the first amendment freedom of nonassociation is implicated whenever the state directly or indirectly compels an individual to contribute financially to support an activity he finds objectionable, would seem to have direct applicability to challenges to integrated bar association activities and would certainly seem to be an improvement over the constitutional analysis that was available and applied a quarter of a century ago in Lathrop.226 However, the principle from Abood that support cannot be compelled for activities unrelated to collective-bargaining lacks literal applicability to the question of which integrated bar activities can be prohibited by dissident members, or more broadly stated, is inapplicable to any context outside that of the union shop or agency shop. What is essential in order for Abood to have any further relevance to integrated bar challenges is a determination of the general first amendment standards and analytical process the Court employed to reach its conclusion. This may well be the most formidable obstacle to reliance on Abood in arguing the potential unconstitutionality of certain integrated bar association activities.

would have held that all the above activities were not closely related to the particular collective bargaining agreement with the employer); Robinson v. New Jersey, 547 F. Supp. 1237, 1316, 1323 (D.N.J. 1982) (Abood limits use of compelled fees to lobbying activities that are designed to serve action required to implement a collective bargaining agreement and there must be a direct relationship between activities and ongoing collective bargaining); Gavett v. Alexander, 477 F. Supp. 1035, 1048 (D.D.C. 1979) (expenditures must be “essential to the collective bargaining process”).


226. Lathrop only dealt with the issue of whether free speech rights were infringed by the use of dues money for political activities to which the member objected. 367 U.S. at 844 (plurality opinion). It is also not clear from the plurality’s opinion in Lathrop whether the majority of the Justices in the Court recognized that compelled support of even political activities had any impact on first amendment rights. See id. at 845, id. at 848-61 (Harlan, J., joined by Frankfurter, J., concurring). See also Abood, 431 U.S. at 233 n.29; Comment, supra note 112, at 776 n.65.
2. Standards and Analysis Used by the Court

Perhaps the most perplexing element of the Court’s opinion in Abood is the absence of overt references to the traditional first amendment standards and to the type of analysis in which the Court was engaging. As a result, commentators and courts have drawn divergent conclusions on these issues. The basic conclusions are that: (1) the Court in Abood applied a broad balancing test under which any legitimate governmental interest would be sufficient to justify the impact on first amendment rights resulting from compelled financial support of unions and their activities;227 (2) the Court was actually applying a traditional first amendment test under which the governmental infringement on first amendment rights was subjected to the exacting scrutiny of the compelling state interest standard;228 or (3) the Court employed a lower level scrutiny requiring an important state interest and that activities for which support could be compelled be “germane” to that interest.229

227. See 431 U.S. at 254-55 (Powell, J. joined by Burger, C.J. & Blackmun, J., concurring); Note, supra note 173, at 855-56; Note, supra note 173, at 845. One commentator has taken the position that the Supreme Court applied a rational basis standard from Hanson and Street to the determination of whether an employee could be compelled to pay fees to the union under an agency shop agreement, but that the Court applied a strict scrutiny standard requiring a compelling state interest for compulsion of financial support for activities unrelated to collective bargaining. See Comment, supra note 112, at 778, 781-82. But see The Supreme Court, 1976 Term, supra note 173, at 190, 194, 196. See, e.g., Galda v. Bloustein, 686 F.2d 159, 164 (3d Cir. 1982); Arrow v. Dow, 544 F. Supp. 458, 463 (D.N.M. 1982); Havas v. C.W.A., 509 F. Supp. 144, 149 (N.D.N.Y. 1981); Shakman v. Democratic Org. of Cook Cty., 481 F. Supp. 1315, 1351 (N.D. Ill. 1979); Gavett v. Alexander, 477 F. Supp. 1035, 1049 (D.D.C. 1979); The Supreme Court, 1976 Term, supra note 173, at 190, 194, 196.


229. See Note, supra note 18, at 744, 746. Arguably, this overly literal interpretation of Abood fails to adequately recognize and distinguish between four concepts implicit in the Court’s treatment of the issues: (1) the governmental interest (e.g., labor peace), (2) the means to achieve that interest (e.g., collective bargaining), (3) activities which can be considered to be collective-bargaining (i.e., closely related or germane), and (4) separate activities which are not collective-bargaining in nature. The “germane” test, if it is a test, only relates to the question of whether or not an activity can be viewed as collective-bargaining. See 431 U.S. at 225-26, 235-36.

One commentator, while not specifying the exact nature of the test used in Abood, has asserted that the Court did not apply rigorous scrutiny because of the implicit recognition that “the infringement on individual interests was not very severe.” Gaebler, supra note 173, at 1015, 1017-22. These contentions concerning the magnitude of the infringement upon nonassociational rights resulting from compelled support of ideological causes with which an individual
Perhaps the strongest argument for concluding that the Court was applying something akin to the rational basis standard under a balancing test is the opinion by Justice Powell concurring in the judgment. He stated that the Court had failed to apply the established first amendment principles, which require exacting scrutiny and a paramount government interest to support the infringement of a first amendment right. The problem with such an argument is that the majority and the concurring Justices did not meet head to head on this issue. Justice Powell also thought that the reason the strict scrutiny test should be applied in Abood, while not used in Hanson and Street, was that Abood involved public-sector collective-bargaining, with a higher degree of government action. This is the issue to which Justice Stewart, writing for the majority, responded, indicating that there was no difference in constitutional scrutiny based on the directness or indirectness of governmental action. However, the Court at no point in its decision directly stated that level of constitutional scrutiny was to be.

disagrees appears to be substantially undermined by the majority's opinion in Abood. See, e.g., 431 U.S. at 234-5 n.31, where the Court quotes Thomas Jefferson to the effect that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." See also supra note 218.


231. See 431 U.S. at 254, passim; The Supreme Court, 1976 Term, supra note 173, at 191 n.21, 193, 195. Justice Powell also believed that the controversiality or strength of a particular belief was relevant to the analysis of whether an impermissible infringement had occurred. 431 U.S. at 263 n.16.

232. See 431 U.S. at 226 n.23.

233. One explanation for the Court's failure to indicate directly the level of constitutional scrutiny that was appropriate can be gleaned from an examination of the context in which the case was presented to the Court. The issues were before the Court on appeal from a summary judgment in favor of the defendant. With regard to the constitutionality of compelled support of an agency shop the Court indicated that Hanson and Street were controlling and stated:

The same important government interest recognized in the Hanson and Street cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, these two decisions of this Court appear to require validation of the agency-shop agreement before us.

431 U.S. at 225-26. Thus, it could be asserted that all the Court determined, based on precedent rather than analysis, was that plaintiff had essentially failed to state a cause of action and that the constitutional scrutiny or balancing on this issue had already taken place in prior decisions. See generally Robinson v. New Jersey, 547 F. Supp. 1297, 1315 (D.N.J. 1982); Falk v. State Bar of Michigan, 411 Mich. 63, 105 & n.20, 305 N.W.2d 201, 212 & n.20 (Mich. 1981) (Ryan, J., joined by Moody and Fitzgerald, J.J.).

With regard to compelled support for activities other than collective bargaining, the Court was still not required to engage in extensive analysis since
Nevertheless, there is some indication that the Court was, in fact, applying strict scrutiny, or at least scrutiny stricter than a rational basis test. First, while recognizing that the compelled payment of fees to support the union's collective-bargaining activity interfered with first amendment rights, the Court indicated that the Hanson and Street decisions recognized that such interference was justified based on the "legislative assessment of the important contribution of the union shop to the system of labor relations,"234 that "the desirability of labor peace is no less important in the public sector,"235 and that the "same important government interests recognized in the Hanson and Street cases presumptively support the impingement upon associational freedoms... here."236 Moreover, the prior Court opinions on which the Abood Court relied to establish the relevant principles were cases in which the Court had applied a traditional first amendment analysis. The Court cited Buckley v. Valeo237 to support its conclusion that the freedom to contribute or not to contribute financially to a cause implicated fundamental first amendment rights.238 However, Buckley is a case which also stands for the proposition that the governmental interest justifying an infringement on first amendment rights must be "paramount" and "closely drawn to avoid unnecessary abridg-

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234. 431 U.S. at 222 (emphasis added).
235. Id. at 224 (emphasis added).
236. Id. at 225 (emphasis added). It should be noted that the Court's opinions in Hanson and Street render it virtually impossible to determine whether the union shop was upheld against a first amendment attack because no first amendment interests were involved, because there was a rational basis for the infringement, or because the infringement on first amendment rights was overridden by a compelling government interest. The Supreme Court, 1976 Term, supra note 173, at 190 n.17; see Railway v. Employees' Dept. v. Hanson, 351 U.S. at 238; Abood v. Detroit Bd. of Educ., 431 U.S. at 249 n.3 (Powell, J., concurring); see also supra discussion in text at section II-B-1, 2. It should also be noted that Justice Douglas, author of the Court's opinion in Hanson, believed the Court had in that case found a compelling state interest in compulsory financing of a union shop. See Lathrop v. Donohue, 367 U.S. at 879 (Douglas, J., dissenting).
238. 431 U.S. at 234.
ment.” The Court also cited *Elrod v. Burns* for the proposition that an individual’s “beliefs should be shaped by his mind and his conscience rather than coerced by the State.” However, *Elrod* is the case in which the Court stated that it “is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny,” and reiterated the requirement that the state interest offered must be paramount and narrowly drawn. Finally, the Court relied on *Board of Education v. Barnette* for the proposition that the freedom of belief is not an “incidental or secondary aspect of First Amendment protection.” It must be remembered that *Barnette* is the case in which the Supreme Court, in striking down a compelled flag salute, also applied an exacting level of scrutiny and required overriding state interests.

Finally, regardless of what the commentators may have thought the Court was doing analytically in *Abood*, recent federal court opinions interpreting the case have concluded that the Court was implicitly applying a traditional first amendment analysis. In *Galda v. Bloustein*, a case in which state university students challenged the use of their student fees to fund an independent student political/educational research organization, the third circuit concluded that the Supreme Court’s opinion in *Abood* implicitly recognized that governmental forced association cannot be justified absent a compelling governmental interest. The *Galda* court indicated that the Supreme Court in *Abood* had found that the national interest in labor peace was sufficiently compelling to justify some intrusion on an individual’s right of association and that the collective bargaining process served that compelling interest. Similarly, in *Arrow v. Dow*, where lawyers challenged the use of mandatory bar dues for lobbying activities by the bar association, the court read *Abood* as standing for the principle that intrusions...
on an individual's right of association could only be justified by important or compelling governmental interests.\textsuperscript{250} The Arrow court concluded that the governmental interest served by collective-bargaining in \textit{Abood} was industrial peace.\textsuperscript{251}

In \textit{Havas v. Communication Workers of America},\textsuperscript{252} a case in which nonunion employees alleged that their agency-shop fees were being used for activities unrelated to collective-bargaining, contract administration, and grievance adjustment, the federal district court interpreted \textit{Abood} as embodying the principle that the government interest which will justify impairment of first amendment freedoms of association must be paramount and of vital importance.\textsuperscript{253} Similarly, the court in \textit{Gavett v. Alexander}\textsuperscript{254} stated: "\textit{Abood} affirmed that government may require an individual to pay dues or to make other contributions to a private organization, but it limited that requirement to matters (such as stable labor relations) which represent a compelling governmental interest."\textsuperscript{255} The court also indicated that \textit{Abood} stood for the proposition that the method chosen to achieve the compelling governmental interest must be central and essential to the achievement of that interest, i.e., it must be the method least restrictive of first amendment freedoms, and that only financial support for activities which were essential to that least restrictive method could be compelled.\textsuperscript{256}

Thus, it would seem that analysis and the weight of authority, at least up to the present, suggest that the Supreme Court's treatment in \textit{Abood} of the question of impermissible infringements upon the right of nonassociation is consistent with traditional first amendment techniques. The Court first found a compelling state interest to justify the impairment of the employee's rights of nonassociation. Once the paramount interest (labor peace) and the narrowly drawn means (collective-bargaining) which served that interest were identified, it was logical for the Court to prohibit the coerced use of the employees' dues for activities unrelated to that

\textsuperscript{250} Id. at 460-63. \\
\textsuperscript{251} Id. at 460. \\
\textsuperscript{252} 509 F. Supp. 144 (N.D.N.Y. 1981). \\
\textsuperscript{253} Id. at 149. \\
\textsuperscript{254} 477 F. Supp. 1035 (D.D.C. 1979). \\
\textsuperscript{255} Id. at 1048. \textit{Gavett} involved an equal protection and first amendment challenge to a statutory provision under which surplus army rifles were sold at a discount to individuals, who, \textit{inter alia}, were members of the National Rifle Association. The court held that this provision was unconstitutional because it was not the means of achieving the governmental interest least restrictive of first amendment freedoms. \\
D. Implications of *Abood* for the Integrated Bar

It is suggested that *Abood* establishes three general principles that are relevant to the current constitutional controversy concerning integrated bar association activities: First, there is a first amendment right of nonassociation which is infringed by state action which compels financial support of an association's ideological activities that an individual finds repugnant. Second, in order to justify that infringement of the individual's rights of nonassociation, there must be an important governmental interest served by the activity for which support is compelled; support cannot be compelled for activities which are unrelated to the essential or central activity that serves the important governmental interest. Although somewhat less certain, it appears that the governmental interest must be paramount or compelling and that the means to serve that interest must be closely drawn to avoid unnecessary abridgment. Third, to challenge expenditures on activities, an individual need not specify the particular activity which he opposes. All that is required is that the individual indicate opposition to any ideological cause, whatever that term may mean. Generally, regardless of the level of governmental interest that is required to justify an associational infringement under *Abood*, the principle that compelled support of ideological activities implicates first amendment interests is going to require courts to re-examine the question that has been avoided since *Lathrop*, i.e., what are the state interests served by the integrated bar association?

1. Facial Validity of the Integrated Bar

A preliminary point of speculation is whether the practical impact of *Abood* is to overrule *Lathrop* as to the facial validity of compelled financial support of the integrated bar. Although this has been suggested by some commentators, integrated bar opponents should probably not expect complete elimination of the integrated bar association unless the courts apply a very rigorous level of review. While it is not clear whether the Supreme Court in *Lathrop* recognized a freedom of association right that would be infringed by compelled financial support, it is clear that the

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257. See *The Supreme Court, 1976 Term*, supra note 173, at 196. For additional discussion of how to distinguish between activities related to collective-bargaining and those unrelated, see *id.* at 196-97. See generally, Merrill, *Limitations Upon the Use of Compulsory Union Dues*, 42 S. Am. L. & Com. 711, 747 (1976).


259. See *supra* notes 129-36, 228 and accompanying text.
plurality found that there was a legitimate state interest served by the integrated bar association—"elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal services available to the people of the State."\textsuperscript{260} Whether the \textit{Lathrop} Court would have also found that this was a compelling state interest is uncertain.\textsuperscript{261}

If \textit{Abood} is interpreted to require only a legitimate state interest to justify forced support of the integrated bar association, there is very little question that the governmental interest in the quality of legal services would supply that interest. All that would be left to a challenger to the constitutionality of an integrated bar would be to attack other asserted state interests and to argue that specific activities of the bar were unrelated to any of the legitimate state interests asserted. However, if a compelling or paramount governmental interest is required to support infringement on associational freedoms resulting from coerced membership in the integrated bar, another line of constitutional attack may be available. Assuming that a compelling state interest (e.g., quality of legal services) exists, the question still remains as to whether the integrated bar association can be considered to provide the most closely drawn means to serve that compelling state interest.\textsuperscript{262} In other words, is there any compelling state interest served by the integrated bar association which could not be served through means which impinge less on first amendment nonassociational rights.\textsuperscript{263}

It is submitted that the effectiveness of the means employed to achieve a governmental interest should be considered in determining whether a means is closely drawn. There have been very serious doubts as to whether the integrated bar is an effective method of providing professional discipline and improving the competency of the legal profession. Basically these criticisms stem from the fact that, under integration, a self-interest group is being asked to regulate itself. Commentators have asserted that the disciplinary procedures of the self-regulatory bar are extremely inadequate.\textsuperscript{264}

\textsuperscript{260} Lathrop v. Donohue, 367 U.S. at 843 (plurality opinion).
\textsuperscript{261} In this regard, Justice Douglas' dissent in \textit{Lathrop} to the effect that the integrated bar did not serve a compelling state interest, as he believed was required under the First Amendment, should be noted. \textit{See} 367 U.S. at 879-85 (Douglas J., dissenting); \textit{supra} notes 144-47 and accompanying text.
\textsuperscript{262} This is a different question than whether the specific activities, e.g., disciplinary, continuing education, and legislative programs, are sufficiently related to the compelling state interest. It is also different from the question of whether the particular state interest assertedly served by integrated bar associations is compelling. \textit{See infra} text section III-D-2.
\textsuperscript{263} \textit{Cf.} Gavett v. Alexander, 477 U.S. 1035, 1048 (D.D.C. 1980) (collective bargaining was viewed as "sine qua non" of the compelling state interest in labor peace).
\textsuperscript{264} \textit{See, e.g.,} Gellhorn, \textit{Abuse of Occupational Licensing}, 44 U. Chi. L. Rev. 6, 24
They also have argued that public (non-lawyer) participation in the regulatory process is needed.\(^{265}\)

In addition, the ability of the integrated bar association to effectively improve the general quality of the legal profession through advisory and legislative activities can be questioned on two grounds. First, it could be argued that members of the integrated bar association, because they are subject to the immediate control of the court, would develop an obsequious attitude on issues of judicial reform and ethics.\(^{266}\) Second, and more importantly, the self-interested nature of the bar association could substantially interfere with its ability to engage in legislative activities which primarily serve the purpose of improving competency and ethics. For example, legislative activities involving minimum fee schedules, unauthorized practice of law, bar admissions policies, and disciplinary rules are examples of matters clearly relating to the general quality of the bar in which lawyer's self-interest could overshadow the public interest.\(^{267}\) Arguably, alternatives more effective than the integrated bar exist to perform these functions.

By pointing to the numerous states which do not have fully integrated bar associations,\(^{268}\) it could be argued that state regulation and participation in voluntary associations would better serve, with less first amendment infringement, every compelling interest served by an integrated bar association.\(^{269}\) Nevertheless, unified bar supporters, relying on the language in *Lathrop* that compelled financial support of the integrated bar does not involve involuntary membership in any other respect,\(^{270}\) might argue that compelled payment to the integrated bar association and to a state regulatory commission are indistinguishable. Arguably, however, this argument ignores the fact, recognized in *Abood*, that there is a right to nonassociation which would be impaired by requiring support of and identification with an association which conducts activities to which an individual objects, even though the individual is not personally required to contribute financial support to those

\(^{265}\) See, e.g., Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 Minn. L. Rev. 619, 641 (1978).

\(^{266}\) D. McKean, *supra* note 1, at 130-31; J. Farness, *supra* note 24, at 3.

\(^{267}\) See D. McKean, *supra* note 1, at 60-69.

\(^{268}\) See *supra* note 1; J. Farness, *supra* note 24, at 3-4; Reynolds, *supra* note 18, at 290-92.

\(^{269}\) See *supra* notes 69-72 and accompanying text.

\(^{270}\) Lathrop v. Donohue, 367 U.S. at 828 (plurality opinion).
Thus, as long as the integrated bar association remains an association in which members can voluntarily support ideological activities of the association, state regulation would be less restrictive and, therefore, constitutionally preferable. The practical result of such a situation may be the existence of integrated bar associations which perform only educational, disciplinary, and client security fund functions. Nevertheless, in the final analysis the success of a renewed challenge to compulsory payment of dues to the integrated bar as a condition of practicing law will depend on the degree of scrutiny to which the courts subject the governmental interests asserted to support the integrated bar and upon close factual determinations that are extremely difficult to predict. It can be stated with some confidence that unless the courts interpret Abod as recognizing that compelled membership in an association infringes upon the right of nonassociation, and as requiring that even if there are compelling state interests the means to achieve those interests must not cause unnecessary abridgment of first amendment rights, there is very little chance that Lathrop's conclusion concerning the facial constitutionality of the integrated bar will be disregarded.

2. State Interests Served by the Integrated Bar

As commonly stated, the purposes of the integrated bar are:

to aid the courts in carrying on and improving the administration of justice;
to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct;
to safeguard the proper professional interests of the members of the bar;
to encourage the formation and activities of local bar associations;
to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public; and
to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged.

272. See Mitchell, supra note 173, at 699; Pike, supra note 7, at 8, col. 2. South Carolina, Virginia, and West Virginia currently have integrated bars which are limited to discipline and admission matters. J. Parness, supra note 24, at 4.
273. At least one challenge to the facial constitutionality of the integrated bar association appears to be pending in federal court. In Schneider v. Colegio de Abogados de Puerto Rico, 546 F. Supp. 1251 (D.P.R. 1982), attorneys have challenged not only the use of mandatory bar fees for ideological purposes with which they disagree, but also compelled membership in the bar organization. See id. at 1260-61. The district court concluded that plaintiffs had stated a cause of action and denied defendant bar association's motion to dismiss. Id. at 1274-75.
274. Lathrop v. Donohue, 367 U.S. at 828-9 (plurality opinion) (citation omitted). A list of purposes of the integrated bar in Nebraska quite similar to this ad-
As noted previously, the plurality in \textit{Lathrop} distilled from these purposes what it considered to be the state's legitimate interest—"elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal services available to the people of the State."\textsuperscript{275} Lower courts facing challenges to the integrated bar prior to \textit{Abood} found that there was a legitimate state interest in the administration of justice and practice of law, which was served by having the input of lawyers through bar legislative activities in the public interest,\textsuperscript{276} and that the public interest in the quality of the legal profession was served by integrated bar activities such as client security funds, fidelity bonds, and continuing legal education programs.\textsuperscript{277}

Moreover, court decisions concerning the validity of certain bar regulations in states that do not have an integrated bar tend to support the conclusion that registration and disciplinary regulation of attorneys serve at least a legitimate state interest related to the quality of the legal profession. Generally, these decisions have upheld, against equal protection and due process attacks, registration or licensing fees to fund disciplinary activities by the state government.\textsuperscript{278} Mandatory payment to a client security fund has also been upheld as a reasonable means to serve the state's legitimate interest in maintaining the quality of the bar and thereby protecting the public.\textsuperscript{279}

It is suggested that many of the asserted purposes for the integrated bar either fail to constitute a legitimate state interest, much less a compelling state interest, or are interests which can be served by means which produce less infringement of nonassociational rights. For example, safeguarding the professional interests of the bar clearly does not seem to constitute a proper governmental interest.\textsuperscript{280} It would seem far too tangentially related to the public interest to be considered even a legitimate state interest, much less a compelling one. Instead, the primary beneficiary would seem advanced in Wisconsin is set forth in \textit{In re Integration of the Bar}, 133 Neb. 283, 291, 275 N.W. 265, 269 (1937).

\textsuperscript{275} \textit{Lathrop v. Donohue}, 367 U.S. at 843 (plurality opinion).

\textsuperscript{276} \textit{See id.} at 844; \textit{Armstrong v. Board of Governors of State Bar}, 86 Wis. 2d 746, 752, 273 N.W.2d 356, 358 (1969).

\textsuperscript{277} \textit{In re Morris}, 175 Mont. 456, 575 P.2d 37, 38 (1978).

\textsuperscript{278} \textit{See}, e.g., \textit{Ables v. Fones}, 587 F.2d 850 (6th Cir. 1978); \textit{Board of Overseers of Bar v. Lee}, 422 A.2d 998 (Me. 1980); \textit{In re Tennessee Bar Ass'n}, 532 S.W.2d 224 (1975).


\textsuperscript{280} The Internal Revenue Service would seem to agree with this assessment. In 1977, it indicated that "protection of the professional interests of its members" does not serve a public purpose. Rev. Rul. 77-232, 1977-2 C.B. 71.
to be the individual lawyer and the legal profession. It has been noted that no other profession has a governmental organization which has the power to lobby for the interests of the profession.\textsuperscript{281} Arguably, there is no reason why the legal profession should receive this special treatment. In fact, it is these self-serving purposes and activities which have caused much of the criticism of the unified bar.\textsuperscript{282}

The interest of the public in knowing how the legal profession views legislation affecting the administration of justice and the profession itself, asserted recently in \textit{Arrow v. Dow}\textsuperscript{283} as a general justification for the legislative activities of the integrated bar, is also of questionable legitimacy. As has been noted previously\textsuperscript{284} this interest, if taken literally, would seem to violate independent first amendment freedoms from forced expression of views and the right to privacy of belief.\textsuperscript{285} This conclusion is clearly supported by the statement from \textit{Abood} that one has "freedom to maintain his own beliefs without public disclosure."\textsuperscript{286} Furthermore, if this interest is viewed narrowly as being served by having only the views of those lawyers who voluntarily express their opinions on these matters, it could be forcefully argued that this would provide a distorted picture of the profession's opinion,\textsuperscript{287} and that the goal could be achieved by means that have far less impact on nonassociational rights of dissenting members, i.e., opinion polls by voluntary bar associations.

Reading the state interest served by the integrated bar as aiding and improving the administration of justice is problematic.\textsuperscript{288} While such a formulation of the state's interest might be considered adequate under a rational basis test, it is far too broad and nebulous to be used in balancing state interests against individuals'

\textsuperscript{281} Katz, \textit{supra} note 65, at 432, 433 (1977).
\textsuperscript{282} See \textit{supra} notes 81-83, 88-90 and accompanying text; D. McKean, \textit{supra} note 1, at 60. One commentator has asserted that the solution to this problem is public participation in the operation of the integrated bar rather than simply eliminating the bar's power to use governmental positions to engage in self-interest lobbying. See Katz, \textit{supra} note 65, at 433-34. See generally Gelhorn, \textit{supra} note 264. Gelhorn argues that occupational licensing in general (including integrated bar associations) has the potential to be contrary to the public interest and merely self-serving to the profession. See id. at 16-18, 21-25.
\textsuperscript{283} 544 F. Supp. 458, 461-62 (D.N.M. 1982).
\textsuperscript{284} See \textit{supra} note 151 and accompanying text.
\textsuperscript{285} See \textit{Abood v. Detroit Bd. of Educ.}, 431 U.S. at 241 & n.42; Comment, \textit{supra} note 5, at 785 & n.54.
\textsuperscript{286} 431 U.S. at 241 (footnote omitted).
\textsuperscript{287} See Comment, \textit{supra} note 5, at 789. It is argued that the group voice drowns out the individual's voice, that the force and frequency of the group voice is deceiving, and that other associations and individuals which are not the beneficiaries of compelled support will be at a disadvantage.
\textsuperscript{288} See Note, \textit{supra} note 18, at 749.
first amendment associational rights under more exacting scrutiny.\textsuperscript{289} The court in \textit{Arrow v. Dow}, in concluding that "advancing the administration of justice or improving the legal system" were not important or compelling governmental interests justifying lobbying activities as contemplated in \textit{Abood}, stated:

The standard urged by the Bar is an all-encompassing exception to the rule of \textit{Abood}. It is difficult to conceive of an issue presented to the New Mexico Legislature which cannot arguably be related to the administration of justice or improvement of the legal system. The standard is too broad.

\ldots The 'public interests' and the 'advancement of jurisprudence' are not unitary concepts subject to a single interpretation. Disagreements regarding legislative or other policy choices arise not only because they result in differing practical affects on individuals, but more importantly because they reflect differing ideological approaches to the subject matter. Such ideological beliefs, and association to promote or oppose such beliefs, lie at 'the core of those activities protected by the First Amendment.' \textit{Elrod v. Burns}, 427 U.S. 347 (1976) (plurality opinion).\textsuperscript{290}

The purposes of the integrated bar most difficult to attack on the basis of the principles expressed in \textit{Abood} are interests related to the quality, competency, and ethics of the legal profession. Admittedly, these purposes could be considered paramount governmental interests. However, the difficulty with accepting these interests as validly supporting the integrated bar on its face is that the integrated bar is not a closely drawn means to serve these interests—there may be other means to achieve these purposes more effectively and with less impairment of first amendment rights. As has been discussed above,\textsuperscript{291} state regulations of discipline and education and voluntary participation in professional legal groups appear to impinge far less on first amendment rights. Assuming that there are paramount government interests which support compelled financial contributions to the integrated bar and that the conclusion in \textit{Lathrop} that compelled membership in the bar for these purposes is constitutional, unification opponents will have to focus their efforts on challenging compelled financial support for particular bar association activities that do not adequately serve these governmental interests.

\textsuperscript{289} See \textit{Arrow v. Dow}, 544 F. Supp. at 462; Note, \textit{supra} note 18, at 749. \textit{But see} \textit{Falk v. State Bar of Michigan}, 411 Mich. at 136, 305 N.W.2d at 228 (Williams, J., joined by Coleman, C.J.), where it is argued that the state does have a compelling interest in using the state bar to "aid in promoting improvement in the administration of justice and advancement in jurisprudence." (citation omitted).


\textsuperscript{291} See \textit{supra} notes 263-72 and accompanying text.
3. Integrated Bar Activities

Any impact which Abood may have on integrated bar association activities depends substantially on just what the "relatedness" standard means, as well as on whether infringements on nonassociational freedom are subjected to exacting scrutiny or something akin to a rational basis test. A difficulty in determining which integrated bar activities are related or germane to the means necessary to achieve the governmental interests and which are unrelated ideological activities stems from the fact that the Supreme Court in Abood was unable to, or chose not to, provide any guidance in drawing the analogous line between "collective-bargaining activities . . . and ideological activities unrelated to collective-bargaining." 292 Neither the degree nor the kind of relation required is indicated by the Court. 293 A reasonable characterization of the dividing line is that the expenditures must be for activities that are essential, not merely helpful, to the union's duties as bargaining representative. 294 There is also some indication in the Court's opinion that it did not consider expenditures on political candidates or political views as being related to collective-bargaining. 295 However, since there has never been an adequate delineation of what constitutes a political view, this characterization only begs the initial question.

Under a traditional legitimate state interest standard, an activity would only have to be rationally related to the governmental interest being served. 296 Thus, virtually any activity, no matter how tenuously related to the state interest, would be considered acceptable. 297 For example, nonassociational rights would have to

293. See id. Note, supra note 173, at 857. In the context of Abood, one commentator has suggested drawing the line between activities that are incident to the negotiation of one contract from those incident to negotiations of contracts in general. See The Supreme Court, 1976 Term, supra note 173, at 197. See also supra note 257.
294. See Gavett v. Alexander, 477 F. Supp. at 1048; The Supreme Court, 1976 Term, supra note 173, at 197. See also Robinson v. New Jersey, 547 F. Supp. 1297, 1316, 1323 (D.N.J. 1982) (Abood limits compelled financial support to activities directly related to and required for collective bargaining). But see Ellis v. Brotherhood Ry., Airline & S.S. Clerks, 685 F.2d 1065, 1068-75 (9th Cir. 1982) (broadly construes activities germane to collective bargaining as including activities that can be seen "to promote, support or maintain the union as an effective collective bargaining agent. . . ." Id. at 1074-75).
295. See 431 U.S. at 235; The Supreme Court, 1976 Term, supra note 173, at 196. But see Note, supra note 173, at 857.
297. See, e.g., Bridegroom v. State Bar, 27 Ariz. App. 47, 550 F.2d 1089 (1976) (upheld expenditures in election campaign for a ballot proposition as being rea-
yield where the means, certainly rationally related to the state interest, are providing a forum for the discussion of legal reform and the legal profession through the publication of a bar journal containing advertisements, articles, commentaries, editorials, and bar polls, or by holding an annual convention at which there are speakers, discussion groups, advertisers, lobbyists, and free alcohol for influential people.\textsuperscript{298} However, such a result renders meaningless the \textit{Abood} Court's distinction between activities for which support can be compelled and those for which it cannot.\textsuperscript{299}

Therefore, even under the legitimate interest test, the "relatedness" standard should require a higher level of scrutiny of activities. In the example above, the question might be which specific activities of the bar would be essential to the discussion of legal reform in order to assure the competency of attorneys and which activities could be called ideological and nonessential. Arguably, under such an analysis many of the activities, (e.g., advertising, social activities, publication, or bar polls) would not be essential and, therefore, could not be supported by dissident member's funds. It must be noted that application of strict scrutiny would probably lead to the conclusion that none of the activities, including providing a forum for the discussion of legal reform, would be drawn closely enough to the paramount state interest of lawyer education, discipline, and regulation to justify compelled financial support.

Because of the serious doubts as to the applicability of the rational basis test and a broad construction of the "relatedness" stan-

\textsuperscript{298} See supra note 297. However, it should be noted that at least one branch of the federal government appears to question the legitimacy of the governmental interest in providing a forum of discussion of legal reform and the legal profession. The Internal Revenue Service indicated that admission, suspension, disbarment, and reprimand are public purposes served by the integrated bar, but that "encouragement of stimulating discussion and protection of the professional interest of members" are private purposes. Rev. Rul. 77-232, 1977-2 C.B. 71.

\textsuperscript{299} The \textit{Supreme Court, 1976 Term}, supra note 173, at 197. See \textit{Ellis v. Brotherhood Ry., Airlines & S.S. Clerks, 685 F.2d 1065, 1076 (9th Cir. 1982) (Whelan, J., dissenting). The possibility of such a result strongly counsels the rejection of the legitimate state interest standard as the one which the Court applied in \textit{Abood}. The majority's decision in \textit{Ellis} exemplifies such a construction of the related standard. By broadly construing the standard to include any activity which promotes, supports or maintains the union as an effective bargaining agent, the court upheld expenditures of compulsory dues on union social activities, conventions, litigation, publications, insurance benefits, and organizing activities. See 685 F.2d at 1072-75.
standard to situations involving infringements of first amendment rights, the remainder of this article will discuss the impact of *Abood* on the integrated bar association assuming application of the paramount state interest analysis. For purposes of discussion, assume that a court faced with a challenge to the activities of an integrated bar association determines that the major governmental interests served by the integrated bar are the compelling state interests in maintaining and improving the quality of legal services. This would be analogous to attaining labor peace and eliminating freeriders in the *Abood* case. Assume further that the means *sine qua non* for achieving these interests is determined to be disciplinary rules and procedures, legal education programs, and admissions controls. This assumption appears to be supportable in that these activities do seem to be central and essential to achieving the governmental interests involved. Such activities could be viewed as the equivalents of the core activities of collective-bargaining—contract administration and grievance adjustment—in *Abood*. The ultimate task is to distinguish between activities directly related to these central activities, for which support can be compelled, and ideological activities unrelated to the central activities, for which such compulsion is prohibited. Because of the close factual questions involved and the lack of guidelines in drawing the line, a clear-cut categorization of all integrated bar activities is not possible. Instead, a brief review of some of the major bar association activities will be undertaken.

Unquestionably, financial support could be compelled for activities that are directly disciplinary, educational, or regulatory in general. Thus, funds to support a disciplinary counsel, client security funds, and support for the basic staff of the bar could be exacted despite members' objections. On the other hand, it is equally clear, based on *Abood*, that an attorney could prohibit the use of his funds for the support of a candidate for public office. Even if the candidate clearly supported the bar's programs, support of a political candidate probably could not be considered essential to education, discipline, and admissions activities.

The more difficult questions arise concerning legislative, lobbying, and publicity activities which are not so clearly political in the partisan sense, but are unquestionably ideological. Examples of activities in this area include bar polls, the publication of bar jour-
nals containing editorials, comments, and opinions on the law and
the legal profession, and the lobbying and study committee activi-
ties of integrated bar associations.

The lobbying and committee activities of the unified bar have
resulted in substantial controversy over the years, and distinguish-

ing between acceptable and unacceptable activities has proven ex-

remely difficult.305 Integrated bar associations employ committees
to carry out most bar activities.306 Some of these committees en-
gage in strictly ministerial activities concerning the operation of the
bar association itself;307 other committees engage in the regulatory
work of the bar association.308 However, a substantial number of
committees are established for monitoring and disseminating infor-
mation and lobbying on certain legal issues both inside and outside
the bar.309 These committees present the greatest problem.

Much of the work of committees established for lobbying or in-
formational purposes is technical and related to legal procedure,
and certainly all of the work of such committees is related broadly
to the concept of improving the administration of justice. However,
some committees deal with areas of law that can only be described
as substantive, e.g., family law, mental health, criminal and corre-
tional law, and trust funds.310 Commentators have suggested draw-
ing a line between lobbying on those activities that are merely
technical and those which are more substantive.311 Commentators
have also suggested drawing a line between activities on which the
state bar would have an ideological position and those on which it
would be ideologically neutral.312 However, neither approach is re-
alistic because of the haziness of the distinction between what is
substantive and what is technical, and because it can be argued
that there is no such thing as an ideologically neutral subject, no

305. The Supreme Court Justices in Lathrop seemed to have a great deal of diffi-
culty with this distinction. See D. McKean, supra note 1, at 54-58, 102-03; see
generally id. at 52-83.

306. See, e.g., Lathrop v. Donohue, 10 Wis. 2d 230, 246-50, 102 N.W.2d 404, 412-15;
NSBA, supra note 303, at 255-81.

307. Examples of these are budget committees and annual meeting committees.
See, e.g., NSBA, supra note 303, at 255.

308. Committees on ethics, unauthorized practice, client security funds, law
schools and legal education are examples. Id. at 260-68.

309. Committees on the administration of justice and legislation generally serve
almost exclusively as lobbyists for the purported position of the bar. See
Lathrop v. Donohue, 10 Wis. 2d at 230, 238-39, 102 N.W.2d at 404, 409 (1960);
NSBA, supra note 303, at 257. In 1980 the Nebraska State Bar Association
listed expenditures of $37,054 on committee activities not related to discipline.
Id. at 313.

310. See generally NSBA, supra note 299, at 261-81.
312. See id.
matter how technical or related to the administration of law, discipline, or education it may be.\(^{313}\)

Because under strict scrutiny the question should be whether the lobbying activities, no matter what the subject, are essential to the core activities of education, discipline, and admissions programs, it could be argued that support could not even be compelled for lobbying or legislative activities to propose a new disciplinary code or establish educational standards. This is because such activities are ideological activities that may not be essential to lawyer discipline or education since the legislatures and courts have the ability to obtain expert input from the legal profession through other means (e.g., subpoena, voluntary appearances),\(^{314}\) and the ability to enforce discipline without bar lobbying. Thus, under *Abood*, it is very possible that an integrated bar should be stripped of the ability to exact support for any legislative activities.\(^{315}\)

On the other hand, to the extent that the committees of the integrated bar simply serve informational purposes such as the provision of educational materials on legal ethics or changes in the laws, they should probably be viewed as being essential to discipline and education and, therefore, not subject to withdrawal of support by dissident members. Nevertheless, if the committee disseminating certain proposed legislation asks for a response from the bar member or if the activities which the committee undertakes relate primarily to the economic self-interests of the member,\(^{316}\) the committee's activities should be viewed as unrelated, that is, nonessential, to the public interest served by education, discipline, and admissions controls.\(^{317}\) Consequently, compelled support should be prohibited. Arguably, if these general guidelines were applied to the standing committees of the Nebraska State Bar Association, at least twenty-six of the thirty-seven committees would

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313. See Note, *supra* note 18, at 752; *supra* notes 81-82 and accompanying text.
314. See Note, *supra* note 18, at 752.
315. *But see* Arrow v. Dow, 544 F. Supp. 458, 461-62 (D.N.M. 1982), where the court held that the state bar association could use mandatory dues to support those lobbying activities which serve the important and compelling state interest of improving the quality of legal services by raising educational and ethical standards. However, it should be noted that the court also held that compelled support for other lobbying activities designed to inform the legislature of the bar's views on legislation effecting the administration of justice and legal system was not constitutionally permissible. *Id.*
316. An example of such suspect committee activity would be that of a lawyer referral service committee, an insurance committee whose primary responsibility is to find good group health insurance plans, or a committee to study the economic conditions of lawyers in the state and make reports and give information to members that will be beneficial to the membership. *See, e.g.,* NSBA, *supra* note 303, at 259-61.
be suspect.318

The conclusion reached in reference to lobbying activities is even more probable in reference to bar polls319 and bar publications. Bar polls and editorials, articles, and opinions in bar journals would clearly qualify as ideological activities since they integrally involve beliefs, opinions, and ideas. Moreover, these activities would seem to be nonessential to the education, discipline, and regulation of the bar. The exception to this statement would be the publication of information relating strictly to discipline, legal education, or bar admissions, e.g., legal materials aimed primarily at lawyers which reflect the current state of the law or expected developments. Thus, with the exception of support for the current-development type of information, financial support should not be exacted from bar members to support bar polls and bar publications.320

A question also arises as to whether financial support can be compelled from lawyers for the support of integrated bar meeting or convention activities. In 1980 the Nebraska State Bar Association, for example, spent approximately $23,000 on meetings.321 Several analytical turns must be negotiated before one can determine if compulsory membership fees can be used to fund such activities. First, it is necessary to separate out the components of state conventions and to determine the nature of each component. Some activities, e.g., speakers on a new disciplinary code or trust act, may be ideological but would appear to be relatively essential to legal education and disciplinary programs. Thus, to the extent the activity is characterized as strictly educational, the bar should be able to compel support.

Other activities may be viewed as primarily social. Although the Court in Abbood avoided directly answering the question of whether first amendment rights of nonassociation extend to social activities to which a member objects,322 it has been argued elsewhere that the term ideological, as used by the Court, is sufficiently broad to

318. See generally NSBA, supra note 303, at 255-81.
319. Bar polls have been a particularly offensive and effective technique to bring the influence of an ideologically motivated profession to bear on an issue. See generally Goldstein, Bar Poll Ratings as the Leading Influence on a Non-partisan Judicial Election, 63 Jud. 377 (1980). But see Axel. v. State Bar, 21 Wis. 2d 661, 124 N.W.2d 671 (1963).
320. It should be noted that the court in Arrow v. Dow did not reach the issue of "the use of Bar funds for research on issues the Bar deems important or for dissemination of the Bar's views on those issues in any manner other than lobbying." 544 F. Supp. at 463.
321. See NSBA, supra 303, at 313.
322. See 431 U.S. at 236 n.33.
include social activities. If this conclusion proves to be sound, the issue becomes whether the particular social activity is sufficiently related to the educational, disciplinary, or admissions programs of the bar association. Golf tournaments and dances would clearly seem to be nonessential, but it would be less clear, for example, whether meals or drinks for an important speaker at a meeting fall within the same category.

Such distinctions, and many others that must be drawn, indicate the extent to which analysis based on Abood may vary substantially from court to court. However, the preceding analysis does suggest that applying Abood principles to the integrated bar activities will result in stripping the bar association of its ability to compel support for many of its current activities. Strict observance of nonassociation rights could allow dissident members to withhold financial support for such bar association activities as lobbying on any subject, any involvement with political issues as an association, committee activities serving primarily the profession's interests, and publication of bar journals as they are now constituted. Nevertheless, the integrated bar associations may be able to continue to engage in some of these activities using funds voluntarily contributed to provide the necessary support.

323. See supra notes 219-24 and accompanying text.

324. The divergence of the interim opinions by the Michigan Supreme Court Justices in Falk v. State Bar of Michigan, 411 Mich. 63, 305 N.W.2d 201 (Mich. 1981), exemplifies the potential variability. Three justices would apply strict scrutiny to challenges to the integrated bar and would hold that the bar may only use mandatory bar fees for regulatory or educational activities. Id. at 112-19, 305 N.W.2d at 216-19 (Ryan, J., joined by Moody and Fitzgerald, J.J.). This would include continuing legal education, bar publications to the extent they relate to informing members of current regulatory and ethical matters, the client security fund, and public informational services to educate the public about the use and availability of legal services. Id. at 114-16, 305 N.W.2d at 217. These justices would prohibit the use of compulsory dues for any legislative or lobbying activities and activities to further the commercial interests of lawyers. Id. at 114-19, 305 N.W.2d at 217-19. Two justices would require a compelling state interest and that bar activities be "germane" to those interests. Id. at 134-38, 305 N.W.2d at 226-27 (Williams, J., joined by Coleman, C.J.). However, they would broadly define the state interest as improving the administration of justice and would conclude that virtually all bar activities, including lobbying and activities related to the profession's economic interests, are germane to that governmental interest. Id. at 138-65, 305 N.W.2d at 228-40. Two justices declined to intimate their views as to the appropriate level of constitutional scrutiny or the definition of the proper state interests served by the bar. Instead, they believed that remand was necessary to develop the record more fully concerning certain bar activities. Id. at 173-79, 305 N.W.2d at 246-47 (Levin, J., joined by Kavanaugh, J.).

325. The results of this analysis are quite similar to the results of a referendum held by the District of Columbia bar association. See supra notes 11-12 and accompanying text.
Resistance to the integrated bar association has stemmed primarily from three factors. First, being compelled to financially support and associate with an organization that conducts activities with which one disagrees in order to practice one's profession is inherently repugnant. This has been recognized since the time of the Founding Fathers. James Madison noted: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 326 Similarly, Thomas Jefferson stated: "[t]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." 327 Second, there is an inherent financial self-interest that causes individuals to rebel against supporting activities when the financial cost becomes excessive in comparison to the value of the activity to the individual. Finally, there have been recurring doubts concerning the efficacy of the integrated bar association in serving the public interest.

Although those opposing the integrated bar association have met with little success in the past, there is substantial reason to believe that the days of the integrated bar association, as it has operated for the last sixty years, are numbered. In addition to mounting anti-integration sentiment from both inside and outside the bar, there have been important legal developments since Lathrop v. Donohue. These developments cast doubt on the continuing constitutionality of most integrated bar association activities. Probably the most important development was the Court's decision in Abood v. Detroit Board of Education.

Abood gave legal recognition to the repugnance of forced financial association by establishing the basic principle that there is a first amendment freedom of nonassociation that is impaired by compelled financial support of an association which carries on activities with which one disagrees. Equally important is the fact that Abood, by recognizing this first amendment principle, implicitly provides a legal standard under which the activities and efficacy of the integrated bar can be examined. Thus, it gives integrated bar opponents more than just the right to petition the state courts and legislatures in order to challenge the integrated bar.

Obviously, many questions concerning the constitutionality of

326. Abood v. Detroit Bd. of Educ., 431 U.S. at 234-35 n.31 (citing 2 The Writings of James Madison 186 (Hunt ed. 1901)).
327. 431 U.S. at 234 n.31 (citing I. Brant, James Madison, The Nationalist 354 (1948)).
the integrated bar association and its activities remain after *Abood*, and perhaps the answers to some of these questions will have to wait until a constitutional challenge to the integrated bar reaches the Supreme Court. Furthermore, it is recognized that many of the conclusions reached herein are unavoidably speculative due to the close factual nature of many of the determinations to be made under *Abood* and to a certain amount of ambiguity in the *Abood* opinion. Nevertheless, analysis indicates that *Abood* and its few progeny clearly portend change for integrated bar associations.

It is submitted that *Abood* recognizes the general principles that financial support and membership in an association cannot be compelled by the state as a condition of employment except to serve a paramount state interest, that the core means to serve that state interest must be the least restrictive of the freedom of non-association, and that all association activities for which financial support can be compelled must be essential or directly related to those core means. Strict application of these principles to the integrated bar association suggests that the facial constitutionality of the integrated bar supposedly established by *Lathrop* is doubtful. This is because the state interests served by the fully integrated bar association could be served more effectively by alternative means that infringe less on first amendment rights.

However, even if the effect of *Abood* is not to cast doubt upon *Lathrop* as to this issue, the ultimate effect of a challenge based on *Abood* to integrated bar activities should be the same—elimination, for all practical purposes, of the integrated bar. The reason for this conclusion is that once the purposes and objectives of the integrated bar association are subjected to exacting scrutiny, the only paramount state interests found to be served by the integrated bar would be maintaining the quality, competency, and ethics of the legal profession. These interests would only be served by activities which are essential to disciplinary, educational, and admissions programs, the central means to achieve the governmental interests. Because monetary support could only be compelled for these activities, the other activities of the integrated bar would have to depend on voluntary contribution.

In light of the resurgence of anti-bar unification sentiment, the integrated bar associations should not be too optimistic about the number of contributions that will come rolling in, especially since the voluntary contributions to integrated bar activities may

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328. For example, a referendum conducted in 1979 in Wisconsin indicated that of 9,139 lawyers, 2,820 answering a poll were against continuation of the integrated bar and only 1,892 were in favor of continuing integration. *In re Discontinuation of State Bar*, 93 Wis. 2d 385, 386, 286 N.W.2d 601, 602 (1980).
not even be tax deductible.\textsuperscript{329} As a result of the decrease in bar revenues to support activities like lobbying, public relations, and activities serving primarily the interests of the profession, the association will not be able to conduct many of these activities at all. When it is remembered that the primary motivation behind the bar integration movement in the first place was to serve the interests of the legal profession,\textsuperscript{330} it could be expected that, when effectively shorn of that ability, many integrated bar associations will disappear or exist in name only. On the other hand, keeping this self-interest motivation of the bar in mind, it might be expected that the self-governing integrated bar would continue to exist in those jurisdictions where lawyer discipline has not been taken out of the hands of the bar or opened to public participation. This self-protectionism\textsuperscript{331} is just one more reason to conclude that the integrated bar association cannot possibly serve any paramount public interest.

As Justice Douglas stated in \textit{Lathrop}, "the necessities of life put us into relations with others that may be undesirable or even abhorrent, if individual standards were to obtain. Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I think exceptional circumstances should be shown."\textsuperscript{332}


\textsuperscript{330} See supra notes 26-29, 49-60, 63 and accompanying text.

\textsuperscript{331} A comment by DeTocqueville seems relevant here: "The lawyers do not, indeed, wish to overthrow the institutions of democracy, but they constantly endeavor to turn it away from its real direction by means that are foreign to its nature." A. DeTocqueville, \textit{Democracy in America} (1835) (quoted in D. McKean, supra note 1, at 134).

\textsuperscript{332} Lathrop v. Donohue, 367 U.S. at 882 (Douglas, J., dissenting).