McGeorge Law Review

Volume 20 | Issue 4 Article 9

1-1-1989

Belly Up to the Bar: Your Bar Tab Is Compelled Membership and Mandatory Fees

Christopher Yost

Belly Up To The Bar: Your Bar Tab is Compelled Membership and Mandatory Fees

I. INTRODUCTION

In 1989, members of the California state integrated bar received a bill from the bar for $417, along with a bill for various section memberships.[1] All practicing attorneys in California are required to be members of the California state integrated bar[2] under penalty of law.[3] Practicing attorneys are also required to pay a bar fee.[4] This comment will discuss the constitutional issues involved in both compulsory bar membership and compulsory bar dues, using the collective bargaining unit as a paradigm.[5]

Compelled membership in the bar raises issues of the first amendment rights of association and speech.[6] The interest of the state in regulating the profession of law and improving the administration of

1. *See* State Bar of Cal., Membership Fee Notice (1989) (on file at the *Pacific Law Journal*, attorneys in the first three years of bar membership paid less than $417).

2. *See* Keller v. State Bar, 47 Cal. 3d 1152, 1159-61, 767 P.2d 1020, 1023-24, 255 Cal. Rptr. 542, 545-46 (1989). An integrated state bar is an organization of lawyers within a state that is given a large measure of self-government. *Id.* An integrated bar performs such functions as regulating the profession of law and improving the administration of justice. *Id.*

3. CAL. BUS. & PROF. CODE §§ 6125-26 (West 1974).

4. *Id.* § 6140 (West Supp. 1989).

5. *See infra* notes 128-251 and accompanying text.

6. *Keller*, 47 Cal. 3d at 1176-79, 767 P.2d at 1036-37, 255 Cal. Rptr. at 558-59 (Kaufman, J., dissenting) (1989). *See also* Aood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977) (the freedom of an individual to associate in order to advance his beliefs is protected by the first and fourteenth amendment). *See generally* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (the right to associate includes the right not to associate, or in other words the right of nonassociation).

justice may warrant the abridgement;[7] however, the interest of the state may not be sufficient when dues paid by objecting bar members[8] are put to uses not germane to furthering the state's interest in compelling membership in the bar.[9] The integrated state bar is comparable to a collective bargaining unit.[10]

As in the integrated bar arena, first amendment issues of association and speech are raised when an employee is forced to join and to support a collective bargaining unit as a condition of continued employment.[11] The interest of a state in smooth labor-management negotiations as well as the desire to prevent the free rider[12] problem justifies some limited abridgement of the first amendment right of association and speech in the form of an agency fee.[13] The abridgement may not be justified, however, when the agency fees of nonunion dissenters[14] are used for purposes not sufficiently germane to the compelling state interest in the collective bargaining process.[15]

This comment first discusses United States Supreme Court's treatment of mandatory membership and the permissible uses of agency fees of dissenting nonmembers.[16] Next, this comment will apply the principles established in part one to similar problems found in the

---

7. Lathrop v. Donohue, 367 U.S. 820, 843 (1961). *See Keller*, 47 Cal. 3d at 1161-62, 767 P.2d at 1025, 255 Cal. Rptr. at 547 (1989).

8. Objecting bar members are those who object to expenditures made by the state bar, claiming a violation of interests protected by the first amendment. *Keller*, 47 Cal. 3d at 1175-76, 767 P.2d at 1035, 255 Cal. Rptr. at 557 (1989) (Kaufman, J., dissenting).

9. *Id.* at 1186-88, 767 P.2d at 1043, 255 Cal. Rptr. at 565 (Kaufman J., dissenting). *See* Gibson v. Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986). *See infra* notes 174-218 and accompanying text (discussion of expenditures that are chargeable against dissenting bar members).

10. *Gibson*, 798 F.2d at 1566-67 (the court defined a collective bargaining unit as representing the interest of a class of employees to an employer and then outlined the similarities of a collective bargaining unit and an integrated bar). *See* Railway Employees' Dept. v. Hanson, 351 U.S. 225, 238 (1956) (the Court used the bar as a fortiori example of the effect of compelled membership in a collective bargaining unit).

11. U.S. CONST. amend. I (Congress shall make no law . . . abridging the freedom of speech . . . or the right of people to peaceably assemble . . .). *See Gibson*, 798 F.2d at 1566 (the state bar is closely analogous to a union because members are forced to support the association's positions).

12. International Ass'n of Machinists v. Street, 367 U.S. 740, 761 (1961) (the free rider problem exists when employees enjoy the benefits of collective bargaining unit without sharing in the cost).

13. NLRB v. General Motors Corp., 373 U.S. 734, 742-44 (1963) (the agency shop is designed to charge non union employees represented by the collective bargaining unit for the benefit provided by the unit). *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224-26 (1977).

14. Non-union employee dissenters are employees that desire to disassociate themselves from the union and retain their jobs. *Street*, 367 U.S. at 765-70.

15. *Abood*, 431 U.S. at 235 (the state's interest is in smooth labor negotiations and the elimination of the free rider).

16. *See infra* notes 32-128 and accompanying text.

arena of the integrated bar.[17] Finally, this comment will propose that the bar adopt expedient, fair, and objective avenues of objection for those attorneys wishing to assert the protection of the first amendment.[18]

II. Collective Bargaining Units

Compelled membership in a state integrated bar is analogous to a collective bargaining unit agency shop.[19] An agency shop[20] is a work place in which a union has been designated, usually by the vote of the employees, as the exclusive collective bargaining agent of all the employees.[21] While union members are required to pay full dues, nonunion dissenters are required to pay a fee not to exceed membership dues.[22] This fee is known as an agency fee.[23] An agency fee is designed to eliminate the free rider problem that exists when an employee is allowed to enjoy the benefit of collective bargaining without sharing in the cost.[24]

This section will discuss four issues regarding mandatory membership and the permissible uses of dissenting nonmember's agency fees.[25] The first issue to be addressed is compelled membership as a condition of continued employment.[26] Second, this section will discuss the expenses that unions can charge to nonunion dissenters without unconstitution-

---

17. *See infra* notes 130-253 and accompanying text.

18. *See infra* notes 242-52 and accompanying text.

19. Gibson v. Florida Bar 798 F.2d 1564, 1566-67 (11th Cir. 1986). *Cf.*, Railway Employees' Dept. v. Hanson, 351 U.S. 225, 238 (1956) (compelled membership in a union is compared with compelled membership in an integrated bar).

20. *See generally* R. Gorman, Basic Text on Labor Law 639, 642-46 (1976) (under an agency shop agreement a union that acts as an exclusive bargaining agent may charge non-union members a fee for acting as their bargaining representative).

21. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 762 (1961) (an agency shop consists of a class of employees whose interests are represented by a collective bargaining unit). *See also* Note, *Agency Shops and the First Amendment: A Balancing Test In Need of Unweighted Scales*, 18 Rutgers L.J. 833 (1987) (general discussion of agency shops) *See generally* R. Gorman, Basic Text on Labor Law, 639, 642-46 (1976) (for a discussion of unions and agency shops).

22. NLRB v. General Motors Corp., 737 U.S. 734, 742 n.8 (1963).

23. *Id.* at 742-43 (the agency fee is designed to charge the dissenter for the benefit provided to him by the collective bargaining unit).

24. *Street*, 367 U.S. at 765-70 (the free rider problem led Congress to empower the collective bargaining unit to charge members of the represented class that were not members of the unit a fee to cover the cost of the benefits that accrued to the nonmember as a result of the effort by the unit on behalf of the class, the Court referred to H.R. Rep. No. 2811, 81st Cong., 2d Sess. 4).

25. *See infra* notes 32-128 and accompanying text.

26. *See infra* notes 32-63 and accompanying text.

ally infringing on the right of free speech.[27] Third, the procedures designed to protect the rights of dissenting nonmembers to object to the use of agency fees will be explored.[28] Finally, once the dissenting nonmember has objected to the use of the fees, this section will suggest possible remedies that will prevent even temporary infringement of first amendment rights.[29]

A. Compelled Membership

1. The Free Rider Problem

Complete freedom of association leads to the free rider problem, which arises when employees share in the benefits of collective bargaining without sharing in the cost.[30] The converse of the free rider is mandatory membership and payment of dues as a condition of continued employment, however, this infringes on first amendment rights by forcing association.[31] The United States Supreme Court first encountered the issue of compelled membership in the collective bargaining arena in *RELA v. Hanson*.[32] The Court in *Hanson* upheld the Railway Labor Act (RLA), which authorizes collective bargaining units.[33] The *Hanson* Court held that the RLA, which required the recipient of the benefits of union representation to provide financial support to the union,[34] was a valid exercise of power under the commerce clause,[35] therefore the first amendment right of association was not violated.[36]

The collective bargaining units must have access to considerable funds to perform their functions of procuring employee benefits and

---

27. *See infra* notes 64-90 and accompanying text.
28. *See infra* notes 90-123 and accompanying text.
29. *See infra* notes 123-128 and accompanying text.
30. International Ass'n of Machinists v. Street, 367 U.S. 761, 765-66 (1961) (the concern over the free rider problem overbore the arguments in favor of complete freedom of choice).
31. Pattern Maker's League v. NLRB, 437 U.S. 95, 106 (1985).
32. 351 U.S. 225 (1956).
33. 45 U.S.C.A § 152 Eleventh (West 1986). The Railway Labor Act authorized the unions and the railroad industry to enter into agreements affecting the rights of railroad employees. *Id.*
34. *Hanson*, 351 U.S. at 238 (the Court expressed no opinion on the closed shop arrangement authorized by the RLA because the issue was not properly before them).
35. U.S. CONST. art. I, § 8, cl. 1, 3. "The Congress shall have power to. . . regulate Commerce. . . among the several states. . . ." *Id.*
36. *Hanson*, 351 U.S. at 238 (the Court interpreted the RLA to authorize union shop agreements between interstate railroads and unions).

settling labor-management disputes.[37] The United States Supreme Court in *International Ass'n of Machinists v. Street*[38] stated that the money needed to perform union functions must come from dues paid by the represented class.[39] The Court further held that to allow nonmembers to participate in the benefits while sharing none of the cost was unfair.[40] In addition, the Court in *Street* found that in prescribing collective bargaining units as the means of settling labor disputes, Congress has given the unions a clearly defined and delineated role to play in effectuating the congressional policy of stabilizing labor relations.[41] Furthermore, the Court held in *Steel v. Louisville N.R. Co.*[42] that Congress had clothed collective bargaining unit representatives with powers comparable to legislative bodies, thus allowing the unions to create and restrict the rights of the employees they represent.[43] There are, however, limits on the extent to which membership in the union can be compelled as well as uses to which the union can put collected fees.[44]

2. *The Choice Not to Join a Union*

Prior to the enactment of the Taft-Hartley Act of 1947,[45] the Wagner Act of 1935[46] allowed unions to negotiate closed shop agreements.[47] The Taft-Hartley Act effectively eliminated compulsory union membership by outlawing closed shop agreements.[48] The Taft-Hartley Act

37. International Ass'n of Machinists v. Street, 367 U.S. 740, 760 (1961).
38. 367 U.S. 740 (1960).
39. *Id.* at 761.
40. *Id.* The Court refers to H.R. REP. No. 2811, 81st Cong., 2d Sess.4: "[U]nder the RLA, the collective bargaining unit representative is required to represent fairly, equitably, and in good faith the entire membership of the craft or class, including nonunion members. Benefits resulting from collective bargaining may not be withheld from employees because they are not members of the union." *Id.* at 761-62.
41. *Id.* at 760 (the clearly defined role of collective bargaining units, as delineated by Congress, is to procure employee benefits and settle labor management disputes).
42. 323 U.S. 192 (1944).
43. *Id.* at 202.
44. Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 448-55 (1984).
45. 29 U.S.C.A. §§ 141 et. seq. (West 1973).
46. 29 U.S.C.A. §§ 151 et. seq. (West 1973) (the Wagner Act, generally barred employer discrimination on the basis of union membership; however, the Act did not forbid the employer from making an agreement with a collective bargaining unit that required as a condition of employment membership in the unit).
47. 29 U.S.C.A. §158(a)(3) (West 1973). *See* Communication Workers of Am. v. Beck, 108 S.Ct. 2641, 2649-50 (1988).
48. 29 U.S.C.A. § 158(b)(2) (West 1973) (an employer may not terminate an employee on the grounds that the employee was denied membership in the union, or was expelled from the union for any reason other than failure to pay dues).

opened an avenue for union dissenters to opt out of union membership.[49]

The Court, in *Pattern Maker's League v. NLRB*,[50] protected the right of employees to opt out of union membership and become dissenting nonmembers.[51] The Court held that the Taft-Hartley Act[52] protected the first amendment right of employees who chose not to associate within the collective bargaining arena.[53] The Court interpreted the Taft-Hartley Act to say that union membership could no longer be a requirement of employment, nor could a union member who later became dissatisfied with the union and resigned from its membership be fired.[54] The Court held that although an employer and a union may enter into an agreement that all employees must be "members" of the collective bargaining unit as a condition of continued employment, the membership requirement has been reduced to "its financial core."[55]

After determining that actual membership in a collective bargaining unit cannot be required because the state's interest is neither sufficiently compelling nor accomplished in the least restrictive manner,[56] the Court then addressed whether nonmember dissenters are obligated to support union activities not germane to the compelling government interest in collective bargaining.[57] In *Street*, the Court recognized the need to require employees to share the cost of negotiating and administering collective bargaining contracts.[58] One looks in vain, however, for any suggestion that Congress also meant to provide the union with the means to force employees to support political causes which they

---

49. Pattern Maker's League v. NLRB, 473 U.S. 95, 106 (1985).
50. 473 U.S. 95 (1985).
51. *Id.* at 106.
52. *Id.* (the Taft-Hartley act protects those employees who wanted to resign from a union, or not to join the union).
53. *Id.*
54. *Id.* (the Act allows employees to resign at any time and protects the employee who does not wish to associate with the union, or whose views are divergent from the views of the union and therefore no longer wants to financially support union positions).
55. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963) (the "financial core" is represented by the fee the dissenting nonunion employee is required to pay to avoid the free rider problem discussed *supra*).
56. *See* Gibson v. Florida Bar, 789 F.2d 1564, 1569 (11th Cir. 1986) (first amendment challenges were analyzed under a two part test requiring the state action be justified by a compelling state interest and the means chosen to accomplish that interest be the least restrictive means of accomplishing that interest).
57. *See infra* notes 61-90 and accompanying text.
58. International Ass'n of Machinist v. Street, 367 U.S. 740, 766 (1961). Fees paid are assessments and are used to finance the activities of the general negotiating committee. Fees are based on the expenses and the work of that committee. *Id.*

oppose[59] or activities which are not germane to the interest of the government in the process of collective bargaining.[60]

B. *Collective Bargaining Unit Representatives and Expenses That are Chargeable to the Dissenters*

An employee who has chosen to become a union member cannot complain of an unconstitutional first amendment infringement regarding the use of union dues because the member has chosen to associate with the union.[61] The employee who exercises the first amendment right not to be a member of the union, but is represented by the collective bargaining unit, presents a different situation because only expenditures germane to the collective bargaining process are chargeable against dissenters.[62] This gives rise to a threshold question of what constitutes expenditures germane to the collective bargaining process.[63]

The Court in *Abood v. Detroit Board of Education*[64] recognized the difficulties in determining which expenses are germane to the compelling government interest in the collective bargaining process.[65]

---

59. *Id.* at 764 (the Court found that Congress had incorporated safeguards in the statute to protect dissenters' interest). *See* H.R. REP. No. 2811, 81st Cong. 2d Sess. 68 (the primary purpose of the Railway Labor Act is to prevent discharge of employees not admitted to the union); Railway Labor Act, 45 U.S.C.A. § 152 Eleventh (West 1986) (the relevant part of the act discussed by the Court in *Street*). *Cf.* Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 466 (1984) (the Court quite candidly admitted there was little legislative history to support this conclusion, and plenty to support the opposite view; nevertheless, the Court interpreted the Act to not allow collective bargaining units the power to force dissenters to financially support all union activities).

60. *Ellis*, 466 U.S. at 447. *See infra* notes 64-89 and accompanying text (discussion of what expenses are chargeable against dissenters).

61. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 238 (1977). *See generally* Pattern Maker's League v. NLRB 473 U.S. 95, 104 (1985) (union members who choose to remain members can not complain of the union use of fees).

62. *Abood*, 431 U.S. at 235-36; Brotherhood of Railway & S.S. Clerks v. Allen, 737 U.S. 113, 119 (1962).

63. *See infra* notes 67-90 and accompanying text.

64. 431 U.S. 209, 236 (1977).

65. *Id.* at 236. In dicta the *Abood* Court discussed that there might be distinctions between the private sector and the public sector in regard to chargeable expenses. *Id.* The *Abood* court said that there may 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 contributions may not be compelled. *Id.* In *Abood*, the Court predicted that the line between acceptable uses of agency fees in the public sector may be somewhat hazier than the lines in the private sector. *Id.* The *Abood* court found that the differences between the public and private sector are not in the nature of the employee but rather in the nature of the employer. *Id.* at 230. Yet the Court reiterated that the rights of the public sector employees were not diminished by the nature of the employer and are the same as the rights of private sector

The Court in *Chicago Teachers Union v. Hudson*,[66] however, stated that it is tyrannical to force an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves".[67] The Court in *Hudson* held that regardless of the amount of money at stake, the dissenters have a clear interest in not being compelled to subsidize the propagation of political or ideological views that they oppose.[68]

In *Street*, the Court established a test when state action has triggered first amendment protection using an overtly political standard in order to determine when the proposed expenditure is not properly chargeable against dissenters.[69] The *Street* standard was reiterated by the Court in *Ellis v. Brotherhood of Railway Clerks*[70] holding that the RLA did not authorize a union to spend money collected from a dissenting employee to support political causes opposed by the dissenter.[71] The Court stated that using fees paid by nonunion dissenters for political ends is unrelated to the congressional policy of eliminating the free rider.[72]

The *Ellis* Court further refined the *Street* overtly political standard by holding that unions could not charge dissenting employees for activities and causes not germane to the governmental interest in collective bargaining units.[73] The *Ellis* Court applied a two step process in determining what expenditures are germane to the state's interest.[74] First, the Court attempted to interpret the statute so that it did not

---

employees. *Id.* 229. In *Abood*, the Court held differences in private and public sector unions simply do not translate into differences in first amendment rights. *Id.* at 232. Thus the same first amendment rights to freedom of expression that the private sector dissenter enjoys, the public sector dissenter will enjoy. *Id. E.g.* Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984). Many courts around the country have put a great deal of emphasis on the dicta, and when dealing with public sector unions have allowed certain expenditures by unions for overtly political causes to be charged against the dissenting nonmembers' fees because of the assumption that the process of negotiating with the employer in the public sector is inherently political. *Id.* The New Jersey Supreme Court allowed the use of agency fees, over the objecting of dissenting nonmembers, to support certain lobbying activities pertinent to collective bargaining and contract administration, but not for partisan political activities or ideological causes related only incidentally to collective bargaining functions. *Id.*

66. 106 S.Ct. 1066 (1986).
67. *Id.* at 1075 (quoting Thomas Jefferson).
68. *Id.*
69. International Ass'n of Machinists v. Street, 367 U.S. 740, 768-70 (1961).
70. 466 U.S. 435 (1984).
71. *Id.* at 451-53 (such as supporting a political candidate).
72. *Id.*
73. *Id.* at 448.
74. *Id.* at 447, 456. *See* Keller v. State Bar, 47 Cal. 3d 1152, 1186-89, 767 P.2d 1020, 1043-44, 255 Cal. Rptr. 542, 565-66 (1989) (Kaufman, J., dissenting).

infringe on constitutionally protected rights.[75] Second, when the proposed expenditure did infringe on a constitutional right, the Court conducted a three part first amendment analysis of the expense being charged to the dissenter.[76] First, the judicial body must determine whether the challenged activity is germane to the compelling governmental interest justifying the collection of compelled dues.[77] Second, the judicial body must determine whether the challenged expenditure involves additional first amendment infringements on the dissenters.[78] Third, the additional infringement must be justified by an identifiable government interest.[79]

In *Ellis* the Court ruled on five specific expenditures objected to by nonmember dissenters.[80] First, the Court held that the use of agency fees to finance conventions were properly chargeable to dissenters because the Court found that the unions were required by statute to hold a referendum or convention every five years in order to elect officers.[81] Second, the Court held that the cost of social activities were properly chargeable against dissenters because these de minimis expenditures were for activities similar to the convention and necessary to effect more harmonious working relationships and therefore sufficiently related to the compelling government interest in collective bargaining.[82] Third, certain information printed in union publications are not chargeable against the dissenters.[83] The Court adopted a line by line approach in analyzing published material and held that if a union could not charge a dissenter for a certain activity it certainly could not charge that dissenter for writing about that activity.[84] Fourth, the *Ellis* Court, in ruling on the use of a dissenter's agency fee for union organizing efforts, disallowed the union to charge dissenters for

---

75. *Ellis*, 466 at 445-48.

76. *Id.* at 447-56. *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 776 (1961); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977); *Keller* 47 Cal. 3d at 1186-89, 767 P.2d at 1043-44, 255 Cal. Rptr. at 565-66 (1989) (Kaufman, J., dissenting) (recognizing the state's interests do not justify compulsory financial support by dissenting members).

77. *Ellis*, 466 U.S. at 447.

78. *Id.* at 456.

79. *Id. See Keller* at 47 Cal. 3d 1188-89, 767 P.2d at 1044, 255 Cal. Rptr. at 566 (1989) (Kaufman, J., dissenting) (the infringement must be justified by the governmental purposes underlying the requirement of compulsory membership).

80. *Ellis*, 466 U.S. at 448-55.

81. *Id.* at 448-49 (the Court refused to fault the union for opting to hold conventions rather than using the referendum method).

82. *Id.* at 449-50.

83. *Id.* at 451.

84. *Id.*

efforts aimed at recruiting the dissenter.[85] Fifth, the Court held that only judicial proceedings directly connected with the bargaining process could be charged to dissenters.[86] The Court in *Ellis* established a minimum standard for determining what expenditures are chargeable against dissenters by holding that the union may expend collected fees under the union shop agreement only in support of activities germane to the compelling interest of the government in collective bargaining.[87]

C. The Constitutionally Acceptable Process

First amendment rights are fragile and demand sensitive procedure.[88] In *Hudson* the Court outlined the necessary constitutionally adequate procedure that unions must make available to nonmember dissenters.[89] *Hudson* will be the main focus of the procedure portion of this comment.[90]

1. The Procedure

a. Adequate Disclosure

A nonmember dissenter must have adequate information in order to make a meaningful objection to the use of compelled dues.[91] Because

85. *Id.* at 451-53 (the Court further concluded that Congress did not have this in mind when they were considering the free rider problem).

86. *Id.* at 453.

87. *Id.* at 456. It is important to note that the *Ellis* Court did both a statutory analysis and a constitutional analysis under the RLA. *Id.* The Court found that when there is government action, like that by Congress in the RLA compelling a private person to act, the statute must be interpreted narrowly. *Id.* When, however, the government action infringes on constitutional rights, a constitutional analysis must be done in order to determine: (1) if the government's interest is compelling; and (2) if the means chosen to bring about that government interest is necessary. *Id. See also* Roberts v. United States Jaycees, 468 U.S. 609 (1983) (applying this analysis). *See supra* notes 73-89 and accompanying text (for a complete discussion of the *Ellis* constitutional analysis).

88. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 551 (1969). *See infra* notes 92-128 and accompanying text.

89. Chicago Teachers Union v. Hudson, 106 S. Ct. 1066, 1075-78 (1985) (although *Hudson* is based entirely on a public sector constitutional question, there is no reason why the procedures outlined therein could not to be applied to the private sector). *See also* Abood v. Detroit Board of Education, 431 U.S. 209 (1977) (rights of the public sector employee are the same as the rights of the private sector employees for first amendment purposes). *See generally* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 551 (first amendment rights are fragile and need sensitive due process to safeguard them).

90. *See infra* notes 96-123 and accompanying text (discussion of *Hudson*).

91. *Hudson*, 106 S. Ct. at 1076.

the union is in control of the information that the dissenter requires to make a meaningful objection, the union must make the information available to the dissenter.[92] The Court in *The Brotherhood of Railway Clerks v. Allen*[93] stated that dissenters must affirmatively indicate any objections to union expenditures of agency fees.[94] Under an agency shop agreement, procedural safeguards are necessary to prevent compulsory subsidization of ideological activity by objecting nonmember employees, while enabling the union to require all employees to contribute to the cost of the collective bargaining process.[95] The first amendment protects the right of nonunion employees when the government authorizes collective bargaining units.[96] The first amendment requires that the objection procedure be carefully tailored to minimize union infringement on those rights.[97] The nonunion employee must have a fair opportunity to identify the impact on first amendment rights and be able to assert a meritorious claim.[98]

A meaningful objection to the use of agency fees requires that the dissenter must be informed of the proposed uses of those fees.[99] *Hudson* emphasizes that adequate disclosure requires the collective bargaining unit to identify the chargeable expenditures, rather than merely acknowledge nonchargeable expenditures and thereby treat the balance as chargeable by implication.[100] Adequate disclosure can be accomplished in a number of ways without unduly restricting the ability of the union to collect fees necessary to fulfilling its statutory functions.[101]

First, voluntary contributions could be required to fund expenditures unrelated to the collective bargaining process, thus entirely eliminating the need for dissenters to raise objections.[102] Second, bills that the union sends out to collect dues could itemize expenditures for the past and current fiscal year.[103] These bills could include a statement of proposed future expenditures as well.[104] For those dissenters who do

92. *Id.*
93. 373 U.S. 113 (1963).
94. *Id.* at 118-19.
95. *Hudson*, 106 S. Ct. at 1073-75.
96. *Id.* at 1074.
97. *Id.*
98. *Id.*
99. *Id.* at 1076.
100. *Id.*
101. *See infra notes* 107-12 and accompanying text (for discussion of ways disclosure could be accomplished).
102. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 589 n.5 (1978).
103. *Hudson*, 106 S. Ct. at 1074, 1077-78.
104. *Id.*

not agree with the political or ideological uses for which funds are earmarked, the union could offer objecting dissenters an advance reduction in dues covering the proportionate cost of questionable activities.[105] Occasions may arise when the union believes that uses of fees to which the dissenter objects are germane to the compelling government interest in the collective bargaining process, and therefore, are properly chargeable against the dissenter.[106] Consequently, an avenue of objection and appeal must be made available to the dissenter.[107]

b. Objection and Appeal

The Court in *Hudson* found two reasons why procedural safeguards are necessary to prevent the compulsory subsidization of ideological activities by the unions.[108] First, although the governmental interest in smooth labor negotiations is strong enough to support an agency shop, those rights protected by the first amendment require safeguards that will minimize the constitutional infringement.[109] Second, because the first amendment rights of a nonmember dissenter are being affected, the Constitution requires that the dissenter be able to assert an informed and meritorious claim for relief.[110]

The *Hudson* Court held that the objection procedure must minimize the risk that an agency fee will be used for impermissible purposes.[111] *Hudson* establishes three criteria that must be part of any procedural process.[112] First, the dissenter must have adequate information concerning the use of fees to assert a meritorious claim.[113] Second, once the dissenter has made an objection, the proportionate funds[114] must

105. *Id.* at 1074, 1077-78.

106. *See generally* Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 448-53 (1984) (the court analyzed five specific expenditures when the union and the dissenter disagreed as to what was properly chargeable against the dissenter). *See supra* notes 69-78 and accompanying text (discussing the five specific areas).

107. *Hudson*, 106 S. Ct. at 1074.

108. *Id.*

109. *Id.* at 1074. *See* Gibson v. Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986) (the union must adopt the least restrictive means in achieving the government's goal).

110. *Hudson*, 106 S. Ct. at 1074. An employee must be able to identify infringements on first amendment rights in order to object. *Id.* The information regarding what the fees were spent on are under the control of the bargaining unit. *Id.* at 1076.

111. *Id.* at 1075 (temporary improper use of fees violates the dissenter's first amendment rights during the time the fees are withheld from the dissenter and used improperly).

112. *Id.* at 1078.

113. *Id. See supra* notes 96-112 and accompanying text (for a discussion of what constitutes adequate disclosure).

114. *Hudson*, 106 S. Ct. at 1078 (proportionate funds are the proportionate amount of fees that the dissenter has reasonably challenged).

be protected so that they will not be used even temporarily for a challenged purpose.[115] Third, the dissenter is entitled to an impartial hearing that is reasonably prompt and in a fair and objective forum before an impartial decision maker.[116] The *Hudson* Court held that one possible solution might be expeditious arbitration as long as the selection of the arbitrators did not represent an unrestricted choice by the union.[117]

D. *The Constitutionally Acceptable Remedy*

Once an unconstitutional infringement on first amendment rights has been found, the dissenter is entitled to a constitutionally acceptable remedy.[118] If an impartial decision maker determines that the challenged use of the agency fee is impermissible, that expenditure cannot be charged against the dissenter.[119] The union must make full restitution for the amount of the agency fee earmarked for impermissible activities plus any interest earned on the money.[120] The Court in *Hudson* requires that the amount reasonably in dispute be kept in an interest bearing escrow account while the result is pending.[121] The Court further held that rebate programs are constitutionally inadequate because a rebate program allows the union temporary use of the agency fee.[122]

III. The California State Bar

Compelled membership in the bar raises issues of first amendment rights of association and speech.[123] The Court has held that the

---

115. *Id.* at 1078. The court held that the amounts reasonably in dispute must be placed in escrow while the dispute is pending. *Id.* The Court stated that if the union chooses to use an interest bearing escrow account to protect an amount less than the entire amount of the dissenter's fees, the union must carefully justify the limited escrow on the basis of an independent audit and independently verify the escrow figures. *Id.* at 1078 n.23. *See also* Lehnert v. Ferris Faculty Assoc., 643 F.Supp. 1306, 1332-34 (W.D. Mich. 1986) (example of an application of *Hudson*).

116. *Hudson*, 106 S. Ct. at 1077 (the court found that the procedure in question was inadequate because the entire process was controlled by the union: the first two steps of the review process were heard by union officials, and the third by an arbitrator chosen by union officials).

117. *Id.* at 1077 n.20 & n.21.

118. *Id.* at 1074.

119. Lehnert v. Ferris Faculty Assoc., 643 F.Supp. 1306, 1334 (W.D. Mich. 1986).

120. *Id. See also Hudson*, 106 S. Ct. at 1074 (1986) (holding that interest must be paid on fees impermissibly used and properly objected to).

121. *Hudson*, 106 S. Ct. at 1078.

122. *Id.* at 1074 (pure rebate programs are an infringement on the first amendment rights of objecting nonmember dissenters).

123. Keller v. State Bar, 47 Cal. 3d 1152, 1176-79, 767 P.2d 1020, 1036-37, 255 Cal. Rptr.

interest of the state in regulating the profession of law and improving the administration of justice is sufficient to abridge first amendment rights.[124] The interest of the state may not be sufficient, however, when dues paid by objecting bar members are put to uses not germane to furthering the state interest in compelling membership in the bar.[125]

The first amendment analysis employed by the Court in the collective bargaining arena should apply in the integrated bar arena.[126] The integrated state bar is comparable to the collective bargaining unit in six ways.[127] First, both require the represented class to pay fees.[128] Second, both spend funds to influence the political process.[129] Third, both represent occupationally homogeneous groups.[130] Fourth, both elect association representatives.[131] Fifth, both are comprised of individuals who often disagree on matters of private interest.[132] Sixth, both are associations sanctioned by government action having the capacity to infringe first amendment rights.[133] Therefore, the four main issues discussed *supra*; namely, compelled membership, chargeable expenses, meaningful process, and remedy, are applicable in the integrated bar arena.[134] The Court has consistently held that when a state compels financial membership in an association as a condition precedent to earning a livelihood, the first amendment rights of objectors are violated.[135] Furthermore, when mandatory dues are expended upon philosophical and ideological causes not germane to a compelling state interest, first amendment rights are also violated.[136]

542, 558-59 (1989) (Kaufman, J., dissenting). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977).

124. Lathrop v. Donohue, 367 U.S. 820, 843 (1961).

125. *Keller*, 47 Cal. 3d at 1176-79, 767 P.2d at 1036-37, 255 Cal. Rptr. at 558-59 (1989) (Kaufman, J., dissenting). *See infra* notes 175-218 and accompanying text (discussion of expenditures that are chargeable against dissenting bar members).

126. Gibson v. Florida Bar, 798 F.2d 1564, 1566-78 (11th Cir. 1986). *See infra* note 64-90 and accompanying text.

127. *Gibson*, 798 F.2d at 1568.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Railway Employees' Dept. v. Hanson, 351 U.S. 225, 238 (1956). *See* Keller v. State Bar, 47 Cal. 3d 1152, 1174-75, 767 P.2d 1020, 1034, 255 Cal. Rptr. 542, 556 (1989) (Kaufman, J., dissenting).

134. *See infra* notes 141-226 and accompanying text. *See generally* Gibson v. Florida Bar, 798 F.2d 1564 (11th Cir. 1986); *Keller*, 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989) (Kaufman, J., dissenting) (application of the union paradigm to an integrated bar).

135. *Abood*, 431 U.S. at 234-35 (1977). *See Gibson*, 798 F.2d at 1567; *Keller* 47 Cal. 3d at 1174-75, 767 P.2d at 1034, 255 Cal. Rptr. at 556 (Kaufman, J., dissenting).

136. *Id.*

A. Compelled Membership in the Bar

The California Legislature has empowered the California integrated bar[137] to aid in all matters pertaining to the regulation of the practice of law, the advancement of the science of jurisprudence, and the improvement of the administration of justice.[138] The California Legislature has mandated membership in the state bar as a condition precedent to practicing law in California.[139] In *Keller*, the California Supreme Court held that the state bar is a public entity[140] and that compelled membership in the bar was constitutional.[141]

To conduct a first amendment analysis on the mandatory bar membership requirement, a court must first establish that there exists state action.[142] The Court in *RELA v. Hanson*[143] stated that compelled membership in a union is comparable to compelled membership in a state bar.[144] In *Roberts v. United States Jaycees*,[145] the Court stated that freedom of association presupposes a freedom not to associate and that infringements on freedom of association could only be justified by a compelling state interest.[146] Even so, once the state

---

137. The California State Bar is an integrated bar, and as such is an organization of members of the legal profession of the state with a large measure of self government, performing such functions as examining applicants for admission to the state bar, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law and improving the administration of justice. *Keller*, 47 Cal. 3d at 1159-61, 767 P.2d at 1023-24, 255 Cal. Rptr. at 545-46. The California State Bar is also required to: cooperate with and give assistance to the Commission on Judicial Performance (CAL. GOV'T CODE § 68725 (West 1976)); assist the Law Revision Commission (CAL. GOV'T CODE § 8287 (West Supp. 1989)); and evaluate the judicial qualifications of gubernatorial nominees for appointment to courts of record (CAL. GOV'T CODE § 12011.5 (West 1980)). The California State Bar is authorized to do all acts "necessary or expedient for the administration of its affairs and the attainment of its purposes." CAL. BUS. & PROF. CODE § 6001(g) (West 1974). *See also* B. WITKIN, CALIFORNIA PROCEDURE, ATTORNEYS § 259 (2nd ed. 1985 Supp. 1988) (for a discussion of the functions of the California State Bar).

138. Cal. Bus. & Prof. Code § 6031 (West 1974)

139. *Id.* § 6125 (West 1974). "No person shall practice law in [California] unless he is an active member of the state bar" *Id.*

140. *Keller*, 47 Cal. 3d at 1164-65, 767 P.2d at 1027, 255 Cal. Rptr. at 549 (1989) (the California Supreme Court found that the bar was a public corporation because it is authorized to perform government functions by the state Constitution, statutes, and California state court decisions).

141. *Id.* at 1161-62, 767 P.2d at 1025, 255 Cal. Rptr. at 547 (1989).

142. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156, 164-65 (1978).

143. 351 U.S. 225 (1956).

144. *Id.* at 238.

145. 468 U.S. 609 (1983).

146. *Id.* at 623. *See* NLRB v. General Motors Corp. 373 U.S. 734, 742 (1963) (the Court held that the free rider problem could be solved without compelling membership in the union).

interest is identified as compelling, the interest being advanced must be accomplished by the least restrictive means.[147] The Court in *Roberts* established a three part test to resolve first amendment rights issues.[148] First, the government must establish a compelling interest in infringing on first amendment rights in the chosen arena.[149] Second, the government must adopt the least restrictive means to accomplish the compelling interest.[150] Third, the means adopted by the State must be necessary to the accomplishment of the compelling government interest.[151]

The United States Supreme Court has never held that the first amendment right of citizens to associate is strong enough to overcome the state's interest in maintaining a state bar.[152] To the contrary, the United States Supreme Court held in *Lathrop v. Donohue*[153] that the state could compel a lawyer to belong to an integrated state bar and pay dues.[154] The Court reasoned that the state has a compelling interest in maintaining an integrated bar justifying mandatory membership.[155]

There are instances where the Court has held that the state interest did not justify mandatory membership in an association as a condition of continued employment.[156] The Court has held in the collective bargaining arena that the interests of the government in smooth labor negotiations and the elimination of the free rider could be accomplished in a less restrictive manner than compelling membership in the union.[157] The Court reduced the membership requirement to a financial core.[158] The Court interpreted the Taft-Hartley Act to

147. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1983). *See also* Chicago Teachers Union v. Hudson, 106 S. Ct. 1066, 1074 n.11 (1986) (least restrictive means must be adopted by the state).

148. *Roberts*, 468 U.S. at 623.

149. *Id.*

150. *Id.*

151. *Id.*

152. Lathrop v. Donohue, 367 U.S. 820, 843 (1961) (the Court held that the order to integrate the Wisconsin state bar did not unconstitutionally infringe upon the first amendment rights, given the limited scope of the bar in Wisconsin).

153. 367 U.S. 820 (1961).

154. *Id.* at 832-37.

155. *Id.* at 820 (the Court did not discuss alternatives that would be less restrictive as later required by Roberts v. United States Jaycees, 468 U.S. 609, 632 (1983)).

156. *See supra* notes 48-62 and accompanying text (discussion of the Court's rejection of closed shop agreements in that collective bargaining arena).

157. Pattern Maker's League v. NLRB, 473 U.S. 95, 106 (1985). *See supra* note 54-59 and accompanying text.

158. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963) (the payment of agency fees represent the financial core required to eliminate the free rider problem and achieve the government's goal of smooth labor relations). *See supra* note 57 and accompanying text.

allow only open shop agreements, allowing dissenters to opt out of the union.[159]

The least restrictive means test in a first amendment analysis should address the issue of whether allowing members to exercise the option to opt out will undermine the state bar's ability to perform its statutory functions.[160] The Court in *Lathrop* held that the state has a compelling interest in the regulation of the practice of law and the improvement of the administration of justice justifying mandatory bar membership.[161] The Court's rationale in *Roberts* holds that compelling government interests must be accomplished by the least restrictive means.[162] Eighteen states now have achieved this interest without integrated bars.[163] However, *Lathrop* did not address whether the expenditure of mandatory bar fees must be limited to matters germane to achieving the state interest.[164] The bar should not be permitted to expend the collected mandatory fees for purposes not germane to the government's compelling interest in maintaining the association.[165]

B. Chargeable Expenditures

1. The Majority in Keller

The recent California Supreme Court decision of *Keller v. The State Bar*[166] explicitly rejected the union paradigm as well as the need for a constitutional analysis of bar expenditures when interpreting the nature of the California state bar.[167] The *Keller* court did not employ a constitutional analysis, but rather summarily concluded

---

159. *Pattern Maker's League*, 437 U.S. at 106. *See supra* notes 52-53 and accompanying text.

160. Chicago Teachers Union v. Hudson, 106 S. Ct. 1066, 1074 (1985); Gibson v. Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986). *See infra* notes 227-33 and accompanying text (discussion of the possibility of accomplishing the state objective without compelling membership in the state bar).

161. *Lathrop*, 367 U.S. at 832-37 (1961).

162. *Roberts*, 468 U.S. at 623 (1985). *See infra* notes 227-33 and accompanying text (for proposals on how the bar could accomplish its mission without mandatory membership).

163. Telephone conversation with the American Bar Association (on file at the *Pacific Law Journal*).

164. *Lathrop*, 367 U.S. at 847-48 (1961) (there was not a majority opinion on the expenditure issue, four members of the plurality found that the issue was not properly presented).

165. *Id.* (compulsory fees may not be spent on lobbying or ideological activities that are not related to the purpose that brought the bar together in the first place).

166. 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989).

167. *Id.* at 1157, 1164-65, 767 P.2d at 1022, 1027, 255 Cal. Rptr. 544, 549.

that the state bar may expend compelled dues to finance disciplining members, filing amicus curiae briefs, lobbying the legislature, advising the legislature, delegate conferences, disseminating information and anything else the legislature does not explicitly forbid the bar to do.[163] The only expenditure the California Supreme Court forbade the bar from engaging in was partisan electioneering.[169] By a four to three vote, the *Keller* court held that the integrated bar was a public agency because the bar performs governmental functions, and is treated like a governmental agency by the state Constitution, statutes, and court decisions.[170] Once the *Keller* court characterized the bar as a governmental agency, the court held that the bar may use revenue from whatever source derived for any purpose within statutory authority.[171] The California Supreme Court held that absent explicit legislative prohibition, the state bar could expend funds on ideological and political matters so long as the matter did not promote a partisan position in an election campaign.[172]

2. *A Critique of the Keller Majority*

a. *The Dissent*

Three members of the court dissenting in *Keller* accused the majority of engaging in pure sophistry when the court refused to impose first amendment restrictions on the state bar.[173] The *Keller* dissent insisted that the first amendment prohibits the state bar from expending the fees of objecting members on matters not sufficiently related to the governmental interest justifying mandatory bar mem-

168. *Id.* at 1156-57, 1164-65, 1168-71, 1172-73, 767 P.2d at 1021-22, 1027, 1030-31, 1033, 255 Cal. Rptr. at 543-44, 549, 552-53, 555.

169. *Id.* at 1169-71, 767 P.2d at 1031, 255 Cal. Rptr. at 553 (absent "clear and explicit legislation, [the bar] may not expend funds to promote a partisan position in an election campaign).

170. *Id.* at 1164-65, 767 P.2d at 1027, 255 Cal. Rptr. at 549.

171. *Id.* at 1167-68, 767 P.2d at 1029, 255 Cal. Rptr. at 551. *But see* Gibson v. Florida Bar, 798 F.2d 1564, 1568 (11th Cir. 1986) (because the bar represents only one segment of the population its lobbying activities are viewed more accurately as partisan politics than the supposedly impartial recommendations of a governmental entity).

172. *Keller*, 47 Cal. 3d at 1169-71, 767 P.2d at 1031, 255 Cal. Rptr. at 553. *See* San Francisco Daily Journal, Feb. 24, 1989, at 7, col. 1 (The *Keller* decision is currently on petition to the United States Supreme Court, which has not yet granted certiorari).

173. *Keller*, at 1184-85, 767 P.2d at 1041, 255 Cal. Rptr. at 563 (Kaufman, J., dissenting).

bership.[174] In *Lathrop*, a case holding that membership in the bar can be compelled, there was no majority view on the political expenditure question;[175] however, the Court in *Abood* subsequently characterized *Lathrop* by saying that "the only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached."[176] At the very least, *Lathrop* stands for the proposition that the use of mandatory dues in the integrated bar arena for political or ideological purposes warrants further constitutional analysis.[177] Therefore when bar expenditures are assessed to objecting bar members for purposes not germane to the compelling government interest in the integrated bar first amendment issues arise.[178]

The *Keller* court did not adhere to the philosophy of the United States Supreme Court, reiterated in *Hudson*, when determining what expenses are chargeable against dissenters.[179] The California State Bar is a public corporation,[180] formed or organized for political or governmental purposes; however, according to the *Keller* dissent, this alone does not empower the bar to extract funds for the purpose of supporting political or ideological activities not directly related to the purpose for which the entity is empowered to levy fees.[181] The dissent asserted that the majority should have applied the Court's analysis in *Ellis v. Railway Clerks* when determining what fees are properly

---

174. *Id.* at 1175-76, 767 P.2d at 1035, 255 Cal. Rptr. at 557 (Kaufman, J., dissenting). *See Gibson*, 798 F.2d at 1569 (the Florida state bar's expenditures were subject to constitutional scrutiny).

175. Lathrop v. Donohue 367 U.S. 820, 847-48 (1961) (four members of the plurality found that the issue of political expenditures was not properly raised in the court below, and therefore was not properly before the United States Supreme Court).

176. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 n.29 (1977).

177. *Abood* 431 U.S. at 233 n.29, 241. *See Keller* 47 Cal. 3d at 1178-80, 767 P.2d at 1037, 255 Cal. Rptr. at 559 (1989) (Kaufman, J., dissenting); Arrow v. Dow, 636 F.2d 287, 289 (10th Cir. 1981) (these cases found that generalized allegations are sufficient to raise first amendment issues).

178. Gibson v. Florida Bar 798 F.2d 1564 (the 11th Cir. adopted the union paradigm first amendment analysis to the Florida state bar in evaluating the bar expenditures assessed against objectors).

179. *Keller*, 47 Cal. 3d at 1174-76, 767 P.2d at 1034-1035, 255 Cal. Rptr. at 556-57 (Kaufman, J., dissenting). *See* Chicago Teachers Union v. Hudson, 106 S. Ct. 1066, 1075 (1986) (the language in *Hudson* reiterates the holdings in *Street*, *Ellis* and *Abood*, by saying that it is tyrannical to force an individual to contribute even three cents in order to propagate an opinion which he does not believe). *See* International Ass'n. of Machinists v. Street, 367 U.S. 740, 776 (1961) (Douglas, J., concurring); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234, n.34 (1977); Ellis v. Brotherhood of Railway Clerks 466 U.S. 435, 447 (1984) (the state can not compel a person to support causes to which the person is opposed as a condition to earning a livelihood).

180. CAL. CONST. art. VI. §IX (the state bar is a public corporation).

181. *Keller*, 47 Cal. 3d at 1186-87, 767 P.2d at 1042-43, 255 Cal. Rptr at 564-65 (Kaufman, J., dissenting).

chargeable against dissenters.[182] The Court in *Ellis* held that only those expenditures which are germane to the collective bargaining process are chargeable against dissenters.[183]

In *Ellis* the Court, outlined a three step analysis of the first amendment issues of chargeable expenditures.[184] First, the judicial body must determine whether the challenged activity is germane to the compelling governmental interest justifying the collection of compelled dues.[185] Second, the judicial body must determine whether the challenged expenditure involves additional first amendment infringements on the dissenters.[186] Third, the judicial body must determine that the additional infringement is justified by an identifiable compelling governmental interest.[187]

The dissent in *Keller* applied the *Ellis* analysis to the contested expenditures in three specific areas.[188] First, the dissent recognized the need to consider each lobbying activity and proposed amicus curiae brief in light of the compelling governmental interest in compelling bar membership.[189] If the proposed action is not necessary to achieve the government interest, its cost is not properly chargeable against dissenters.[190] Second, in regard to the Conference of Delegates held by the bar, the bar should be required to identify a governmental interest justifying the expenditure before these expenditures could be charged against dissenters.[191] Third, the dissent agreed with the majority that dissenters cannot be charged for the publication and dissemination of partisan campaign literature.[192]

Furthermore, the dissent argued that the majority should have applied the rationale of the *Abood* concurrence, reasoning that

---

182. *Id.* at 1192-93, 767 P.2d at 1043, 255 Cal. Rptr. at 565 (Kaufman, J., dissenting).
183. *Ellis*, 466 U.S. at 447.
184. *Id.* at 447-56.
185. *Id.* at 447. *See Keller*, 47 Cal. 3d at 1186-89, 767 P.2d at 1043-44, 25 Cal. Rptr. at 565-66 (Kaufman, J., dissenting) (when the challenged expenditure is necessary to finance the activities assigned to the association by the government, the expenditure is considered germane).
186. *Ellis*, 466 U.S. at 456.
187. *Id. See Keller*, 47 Cal. 3d at 1188-89, 767 P.2d at 1044, 255 Cal. Rptr. at 566 (Kaufman, J., dissenting) (the infringement must be justified by the governmental purposes underlying the requirement of compulsory membership in the state bar).
188. *Keller*, 47 Cal. 3d at 1188-91, 767 P.2d at 1044-45, 255 Cal. Rptr. at 566-67 (Kaufman, J., dissenting).
189. *Id.* at 1188-91, 767 P.2d at 1044-45, 255 Cal. Rptr. at 566-67 (Kaufman, J., dissenting).
190. *Id. See* Gibson v. Florida Bar, 798 F.2d 1564, 1570 (11th Cir. 1986) (the court in *Gibson* held that political and ideological expenditures were not properly chargeable against dissenters).
191. *Keller*, 47 Cal. 3d at 1188-90, 767 P.2d at 1044-45, 255 Cal. Rptr. at 566-67 (Kaufman, J., dissenting).
192. *Id. See Ellis*, 466 U.S. at 450-51 (if a dissenter could not be charged for a specific activity, the dissenter could not be charged for publishing information about such activities).

although the state bar may be a governmental agency, the bar only represents one segment of the population; therefore, expenditures made by the bar are subject to first amendment scrutiny.[193] The issue of what expenditures are properly chargeable against dissenters should be analyzed the same way they are analyzed in the collective bargaining unit.[194] According to the *Keller* dissent, the majority's conclusion that the bar is a government agency authorized to make almost unrestricted expenditures,[195] does not dispose of the objector's first amendment complaint.[196] Rather, government action compelling membership in an association as a condition of earning a livelihood should trigger a first amendment analysis.[197] In the opinion of the *Keller* dissent the majority ignored the first amendment analysis which *Lathrop* and *Abood* mandate.[198] In addition to the *Keller* dissent, other jurisdictions have interpreted *Abood* to mandate first amendment scrutiny of expenditures when membership and dues are compelled as a requirement of continued employment.[199] Furthermore, when the association expends mandatory fees to further philosophical, ideological or political causes, first amendment protection is available to dissenters.[200]

---

193. *Keller*, 47 Cal. 3d at 1182-85, 767 P.2d at 1040-41, 255 Cal. Rptr. at 562-63. *See* Abood v. Detroit Bd. of Educ. 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring).

194. *Gibson*, 798 F.2d at 1567-68.

195. *Keller*, 47 Cal. 3d at 1172-73, 767 P.2d at 1033, 255 Cal. Rptr. at 555 (the only restriction the majority placed on the bar was that the bar cannot engage in election campaigning).

196. *Id.* at 1176-78, 767 P.2d at 1035, 255 Cal. Rptr. at 557 (Kaufman, J., dissenting). *See Gibson*, 789 F.2d at 1569 (the Florida state bar's expenditures are subject.to first amendment restrictions).

197. *Keller*, 47 Cal. 3d at 1179-80, 767 P.2d at 1038, 255 Cal. Rptr. at 560 (1989) (Kaufman, J., dissenting) (while recognizing the state's interest in the regulation of the practice of law and improving the administration of justice, these interests do not justify compulsory financial support by dissenting members). *See Gibson*, 798 F.2d at 1570 (the bar may speak on any issue so long as they do not use the fees of dissenters to finance non germane activities). *See generally* International Ass'n. of Machinists v. Street, 367 U.S. 740, 767-68, 776 (1961); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977); Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 447 (1984) (compelling membership as a condition of continued employment raises first amendment concerns).

198. *Keller*, 47 Cal. 3d at 1184-85, 767 P.2d at 1041, 255 Cal. Rptr. at 563 (Kaufman, J., dissenting). *See generally* Lathrop v. Donohue, 367 U.S. 820 (1960) and *Abood*, 431 U.S. at 209 (for discussion of the need to reach the first amendment issues when non germane expenditures are charged against dissenters).

199. *Keller* 47 Cal. 3d at 1185-86, 767 P.2d at 1042, 255 Cal. Rptr. at 564 (Kaufman, J., dissenting). *See generally Gibson*, 798 F.2d 1564 (11th Cir. 1986); Arrow v. Dow, 544 F. Supp. 458 (D.N.M. 1982) (these courts applied the *Abood* analysis to the expenditures of the state bar, recognizing the need for a first amendment analysis when membership and dues are compelled as a condition of continued employment).

200. *Keller*, 47 Cal. 3d at 1174-75, 767 P.2d at 1034, 255 Cal. Rptr. at 556 (Kaufman, J., dissenting).

C. The Eleventh Circuit's Approach

A recent interpretation of *Abood*, directly conflicts with the California Supreme Court decision in *Keller*.[201] Although the *Keller* court was aware of *Gibson v. The Florida State Bar*,[202] it chose not to adopt the *Gibson* analysis and instead relied on the weight of California state law referring to the bar as a governmental entity.[203] The Eleventh Circuit in *Gibson* relied on the concurring opinion in *Abood*[204] to reach the conclusion that "the bar's interests are closely aligned with those of a labor union, and its lobbying activities are more accurately viewed as partisan politics than the supposedly impartial recommendations of a governmental entity."[205]

In *Gibson*, Florida bar members asserted that certain uses of compelled integrated bar fees violated the first amendment.[206] As in California, Florida's Constitution empowers the state to regulate the practice of law and improve the administration of justice.[207] In sum, the Eleventh Circuit applied the analysis in *Abood* to the bar setting and held that the state bar was subject to first amendment constraints when expending dues on political or ideological activities opposed by dissenters.[208] Most important, the court in *Gibson* held that the bar could not use the fees of dissenters to support causes not germane to the statutory purpose of the bar.[209]

---

201. *Gibson*, 798 F.2d at 1567-68.
202. 789 F.2d 1564 (1986).
203. *Keller*, 47 Cal. 3d at 1179-82, 767 P.2d at 1038-1039, 255 Cal. Rptr. at 560-61 (1989) (Kaufman, J., dissenting).
204. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) ". . .the reason for permitting the government to spend the payment of taxes and to spend money on controversial projects is that 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. The withholding of financial support is fully protected as speech in this context." *Id.* (Powell, J., concurring).
205. *Gibson*, 789 F.2d at 1568. *See, e.g., In re* Chapman, 509 A.2d 753 (N.H. 1986); Reports of the Committee to Review the State Bar, 334 N.W.2d 544 (Wis. 1983); On Petition to Amend Rule 2 of the Rules Governing the Bar, 431 A.2d 521 (D.C. 1981) (these decisions have also noted applicability of *Abood* in reviewing state bar activities).
206. *Gibson*, 798 F.2d at 1566.
207. *Id.* at 1565 (the state constitution empowers the state supreme court through the bar, to regulate the practice of law and improve the administration of justice).
208. *Id.* at 1570.
209. *Id.* at 1568.

1. Proposals

The California Supreme Court's ruling in *Keller* forces attorneys to forego first amendment rights as a condition of practicing law in California. The state bar is presently free to expend collected dues for any purpose it sees fit, except for partisan electioneering. Courts of other jurisdictions will no doubt consider the conflicting rationales in *Keller* and *Gibson* when determining the disposition of challenges to compelled bar memberships and use of dues. If the Supreme Court of the United States grants certiorari they should address the following issues: compelled membership; chargeable expenses; adequate procedure and remedy.

2. Compelled Membership

The Court could follow either the *NLRB v. General Motors Corp.* or *Lathrop* when analyzing the issue of compelled bar membership. The Court in *NLRB v General Motors Corp.* reduced the bar membership requirement to a financial core.[210] Under the collective bargaining unit paradigm, the Court would require bar associations to allow attorneys to opt out of bar membership while requiring non-member dissenters to pay an agency fee to defray the cost of activities germane to achieving the stated governmental interest in maintaining a bar association.[211] There are other important professional associations in which the state does not require membership, yet the state interest in regulating the practice and improving the administration of those professions would seem equally compelling. A persuasive example is the medical profession in which doctors must obtain a license from the state, but are not required to be members of a state medical association.[212] This suggests that the state's interest in regulating the practice of law and improving the

210. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

211. *See generally* Pattern Maker's League v. NLRB, 473 U.S. 95, 106 (1985) (the Court held that the interests of the state could be accomplished without compelling membership; therefore the Court protected the right of union members to opt out of the union).

212. CAL. BUS. & PROF. CODE §§ 2166 et. seq. (West 1974) (outlining the requirements of practicing law. Once a certificate to practice is issued, no additional membership in a medical association is required).

administration of justice could be accomplished without mandatory membership. Eighteen states currently achieve this goal without integrated bars.

Alternatively, *Lathrop v. Donohue* held that the compelling state interest justifies mandatory membership in the state bar.[213] In *Lathrop* the Court held that the compelled membership involved in the Wisconsin state bar infringed minimally upon the first amendment rights of objectors because of the limited power of the Wisconsin state bar.[214] The California Supreme Court in *Keller* stated that the California state bar has more power than most state bars.[215] Because the California bar's authority constitutes a greater infringement on first amendment rights than does the Wisconsin bar, the United States Supreme Court should not expand the application of *Lathrop* to the California bar.[216]

3. *Chargeable Expenditures*

The Court should address the issue of what expenditures are properly chargeable against dissenters.[217] As discussed *supra*, the

213. Lathrop v. Donohue, 367 U.S. 820, 832-43 (1961).

214. *Id.* at 843.

215. Keller v. State Bar, 47 Cal. 3d 1152, 1166-68, 767 P.2d 1020, 1028-29, 255 Cal. Rptr. 542, 550-51 (1989).

216. The Wisconsin state integrated bar was established by statute and under the direction of the Wisconsin Supreme Court. *Lathrop*, 367 U.S. at 825. The bar is empowered to define the rights, obligations, and conditions of membership in the bar, promote the public interest by maintaining high standards of conduct in the legal profession and aiding in the efficient administration of justice. *Id.* The Court held that because of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, there was no impingement upon the right of association. *Id.* at 843. On the other hand, the California Supreme Court in *Keller* held that the California State Bar is empowered by the state constitution and statutes to examine applicants for admission to the state bar, formulate rules of professional conduct, discipline members for misconduct, prevent unlawful practice of the law and improve the administration of justice. *Keller* 47 Cal. 3d at 1159-61, 767 P.2d at 1023-24, 255 Cal. Rptr. at 545-46. The California state bar is also required to do the following: (1) Cooperate with and give assistance to the Commission on Judicial Performance (CAL. GOV'T CODE § 68725 (West 1976)); (2) assist the Law Revision Commission (CAL. GOV'T CODE § 8287 (West Supp. 1989)); (3) and evaluate the judicial qualifications of gubernatorial nominees for appointment to courts of record (CAL. GOV'T CODE § 12011.5 (West 1974)). The California State Bar is authorized to do all acts "necessary or expedient for the administration of its affairs and the attainment of its purposes." CAL. BUS. & PROF. CODE § 6001(g) (West 1974). *See Keller*, 47 Cal. 3d at 1158-1162, 767 P.2d at 1023-25, 255 Cal. Rptr. at 545-47 (discussion of the codes). *See also* B. WITKIN, CALIFORNIA PROCEDURE, ATTORNEYS §259 (3rd ed. 1985 & supp. 1988) (for a discussion of the functions of the California State Bar). Furthermore, the California Supreme Court has given the bar almost unrestricted discretion when spending dues. *Keller*, 47 Cal. 3d at 1167-68, 767 P.2d at 1029, 255 Cal. Rptr. at 551.

217. *See supra* notes 182-86 and accompanying text (the question of what expenditures are chargeable against bar members has been raised in *Keller*, and the *Lathrop* court reserved that question for a later case).

union paradigm is a helpful model in evaluating what expenditures are properly chargeable against dissenters.[218] The analysis outlined in *Ellis* provides a useful constitutional model to evaluate contested expenditures.[219] The dissent in *Keller* discussed the *Ellis* analysis in three specific areas.[220] As a general rule, expenditures not germane to the state's interest in maintaining an integrated bar cannot be assessed against objectors.[221]

4. *Adequate Procedure*

The California state bar should follow the procedural guidelines established in *Hudson*.[222] The *Hudson* procedure includes three parts.[223] First the bar must give an adequate explanation of the basis for the dues charged so that a dissenter can make a meaningful objection.[224] To meet the first requirement, for example, the bar could inform members of the proposed uses of dues when sending out the bill for the upcoming year.[225] This would give potential objectors the opportunity to review proposed expenses and make an informed objection and state a meritorious claim.[226]

Second, the bar should provide for a reasonably prompt opportunity for dissenters to challenge the amount of the fee before an impartial decision maker.[227] To fulfill the second requirement, the bar could establish a forum in which the dissenter could make the challenge to the proposed expenditures before an impartial decision maker.[228] This forum should minimize participation by the bar in the decision making process.[229]

---

218. Gibson v. Florida Bar, 798 F.2d 1564, 1566 (11th Cir. 1986).

219. Ellis v. Brotherhood of Railway Clerks, 446 U.S. 435 (1984). *See supra*, notes 76-90, 198-202 and accompanying text (discussion of the *Ellis* three step analysis).

220. *Keller* 47 Cal. 3d at 1188-91, 767 P.2d at 1044-45, 255 Cal. Rptr. at 566-67 (Kaufman, J., dissenting). *See supra* notes 188-200 for a discussion of how the dissent applied *Ellis*).

221. *Keller*, 47 Cal. 3d at 1186-90, 767 P.2d at 1043-44, 255 Cal. Rptr. at 565-66 (Kaufman, J., dissenting). *See Ellis*, 466 U.S. at 447-48; Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36; Gibson v. Florida Bar, 798 F.2d 1564, 1568 (11th Cir. 1986).

222. *Keller*, 47 Cal. 3d at 1191-93, 767 P.2d at 1045-47, 255 Cal. Rptr. at 567-69 (Kaufman, J., dissenting).

223. Chicago Teachers Union v. Hudson, 106 S. Ct. 1066, 1075-78 (1985).

224. *Id.* at Ct. 1066, 1075-78 (1985).

225. *Id.* at 1074, 1078.

226. *Id.* at 1074.

227. *Id.* at 1076-77.

228. *Id.* at 1077.

229. *Id.* at 1077. The procedure in question in *Hudson* was controlled entirely by union officials during the first two stages of objection and by an arbitrator chosen by the union in the

Third, the bar should provide an escrow account for those amounts reasonably in dispute while resolution of the challenges are pending.[230] To satisfy the third requirement, the Court in *Hudson* held that an interest bearing escrow account for the amount reasonably in dispute is required to ensure that the dues paid by dissenters are not used even temporarily for an improper purpose.[231]

D. Remedy

The bar should establish an interest bearing escrow account for those amounts reasonably in dispute not only to protect the first amendment rights of objectors from temporary infringement, but also to provide a fund from which damages could be paid with interest to prevailing objectors. The bar must provide for the return of the nonchargeable proportion of the fees plus any interest earned.[232] Alternatively, the bar could arrange an advance reduction of fees charged to those who indicate an objection to some of the purposes for which the fees were used during the last fiscal year, or proposed for the current fiscal year.[233]

IV. CONCLUSION

The majority in *Keller* correctly concluded that the state bar is a governmental agency; however, the majority erred in concluding that the bar was exempt from first amendment scrutiny.[234] Although the interest of the state in regulating the practice of law and improving the administration of justice may be compelling, the extent of that interest is limited by the first amendment. First, the bar can accom-

---

third stage, the court found this constitutionally inadequate but failed to propose a procedure which would be. *Id.* The Court also seemed to indicated that a dissenter need not exhaust internal hearings before requesting government arbitration. *Id. Hudson* held that the process of objection must yield a prompt determination on the objection of the dissenter. *Id.* The Court found that 90 days was not prompt enough. Id. at 1078 (White, J., concurring).

230. *Id.* at 1077-78.

231. *Id.*

232. *Id.*

233. *Id.* at 1074, 1077-78.

234. Keller v. State Bar, 47 Cal. 3d 1152, 1174-75, 767 P.2d 1020, 1034, 255 Cal. Rptr. 542, 556 (1989) (Kaufman, J., dissenting). *See* Gibson v. Florida Bar, 798 F.2d 1564, 1568 (11th Cir. 1986) (the Florida state bar's expenditures were subject to constitutional scrutiny even though the bar was empowered via the state constitution to regulate the practice of law and further the improvement of the administration of justice).

plish their objectives without compelling membership by adopting an agency shop arrangement. Second, the fees collected by the bar from dissenters should be subject to constitutional scrutiny, as they were in *Gibson*, and only those expenditures germane to the statutory purpose of the bar are properly chargeable against dissenters. Third, the bar must also adopt expedient, fair, and objective avenues for the dissenters to voice their objections. Fourth, the remedy must protect the rights of dissenters against temporary infringement and return unconstitutionally collected fees with interest.

Christopher Yost