



Fall 9-1-1993

Lawyers, Please Check Your First Amendment Rights At The Bar: The Problem Of State-Mandated Bar Dues And Compelled Speech

James B. Lake

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Legal Profession Commons](#)

Recommended Citation

James B. Lake, *Lawyers, Please Check Your First Amendment Rights At The Bar: The Problem Of State-Mandated Bar Dues And Compelled Speech*, 50 Wash. & Lee L. Rev. 1833 (1993).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol50/iss4/20>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

LAWYERS, PLEASE CHECK YOUR FIRST AMENDMENT RIGHTS AT THE BAR: THE PROBLEM OF STATE-MANDATED BAR DUES AND COMPELLED SPEECH*

[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.¹

In 1982, the president of the State Bar of California stood before that organization's convention and scolded a United States Senate candidate and other critics of the California Supreme Court.² Candidate Pete Wilson had urged voters to recall Chief Justice Rose Bird if the court overturned a California ballot initiative known as the Victims' Bill of Rights.³ Responding to Wilson, California Bar president Anthony Murray contended that detractors of the state's highest court were "trying to pull down our legal system."⁴ He rebuked "every unscrupulous politician" who sought to achieve personal gain by abusing the judiciary.⁵ Suggestions of a recall of Bird, said Murray, were "idiotic cries of the self-appointed vigilantes."⁶

Although bar delegates followed Murray's lead by voting to reprimand Wilson for "threatening" the court,⁷ his speech and their resolution appar-

* The author thanks Dean Randall P. Bezanson and Notes & Comments Editor Georgia M. Sullivan for their thoughtful suggestions and valuable advice.

1. An Act for Establishing Religious Freedom, 1785 Va. Laws ch. 34, reprinted in 12 VA. STATS. AT LARGE 84, 85 (Hening 1823).

2. Anthony Murray, Independence of the Judiciary, Address Before the Annual Meeting of the State Bar of California (Sept. 12, 1982), in 1 Joint App. at 20-22, Keller v. State Bar, 496 U.S. 1 (1990) (No. 88-1905); Harriet Chiang, *State Bar to Talk Power This Weekend*, S.F. CHRON., Aug. 24, 1990, at A5.

3. See Murray, *supra* note 2, at 22 (stating that "candidate for national office, himself a lawyer," threatened to support recall of Chief Justice Rose Bird if court overturned Victims' Bill of Rights); Chiang, *supra* note 2, at A5 (stating that bar president's speech criticized Senate candidate Pete Wilson for threatening to take part in recall campaign against Bird). In his speech to the California Bar, President Anthony Murray called the Victims' Bill of Rights "a simplistic, almost childish, but extremely dangerous measure." Murray, *supra* note 2, at 24. The ballot initiative, which voters approved in June 1982, raised California's standard for criminal insanity, banned plea bargaining in some felony cases, and allowed courts to admit all "relevant evidence," including evidence gathered illegally. Robert W. Stewart, *Van de Kamp Hits Supreme Court's Delay on Key Issues*, L.A. TIMES, Jan. 10, 1985, at 3.

4. Murray, *supra* note 2, at 26; Philip Hager, *High Court to Decide on State Bar Limits*, L.A. TIMES, Aug. 29, 1986, at 29; Dan Morain, *Court Restricts Involvement in Politics By Bar*, L.A. TIMES, May 24, 1986, at 1.

5. Murray, *supra* note 2, at 22.

6. *Id.*

7. Chiang, *supra* note 2, at A5; see also Exhibit C, 1 Joint App. at 13, Keller v. State Bar, 496 U.S. 1 (1990) (No. 88-1905) (providing partial list of California Bar resolutions, including resolution expressing disapproval of statements of senatorial candidate Pete Wilson regarding court review of Victims' Bill of Rights).

ently were of slight political consequence: voters ousted Bird in 1986,⁸ and Wilson went on to become a United States senator⁹ and, later, California's governor.¹⁰ But Murray's speech and the bar's resolution did have one major effect: they prompted twenty-one lawyers to sue the California Bar.¹¹ The attorney-plaintiffs argued that the bar violated their First Amendment rights by using lawyers' state-mandated bar dues¹² to fund political activities, such as the distribution of news releases and voter-educational materials containing the text of Murray's speech.¹³

The dissenting attorneys' case eventually reached the United States Supreme Court as *Keller v. State Bar*,¹⁴ in which a unanimous Court found for the attorney-plaintiffs.¹⁵ The Court held that if a state demands that lawyers who practice law within its borders pay dues to a state bar, that organization may not use members' dues to pay for ideological activities unrelated to the bar's purposes.¹⁶ Although a state may require its lawyers to pay for programs germane to regulating the legal profession or to improving legal services in the state, the state may not compel bar members to fund unrelated political activities, such as support for gun-control laws or a nuclear weapons freeze.¹⁷

Unfortunately, the distinction that the *Keller* Court made between appropriate and inappropriate activities is not clear.¹⁸ The *Keller* Court

8. Chiang, *supra* note 2, at A5; Frank Clifford, *Voters Repudiate Three of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at 1.

9. See Keith Love, *Liberals Hope for Revival in Toxics Issue*, L.A. TIMES, Oct. 29, 1986, at 29 (noting that Pete Wilson defeated Edmund Brown, Jr. in 1982 United States Senate election in California).

10. Bill Stall & Cathleen Decker, *Wilson Wins, Moves Quickly to Build New Administration*, L.A. TIMES, Nov. 8, 1990, at 1.

11. See Chiang, *supra* note 2, at A5 (quoting attorney for *Keller* plaintiffs as stating that Murray's speech was "the straw that broke the camel's back" and prompted lawsuit against bar).

12. See CAL. BUS. & PROF. CODE § 6125 (West 1990 & Supp. 1993) (stating that only active members of California Bar may practice law in state); *id.* § 6126 (stating that holding oneself out as entitled to practice law while suspended from state bar is criminal act); *id.* § 6143 (requiring suspension from membership in state bar of any member who fails to pay membership fee); *In re Johnson*, 822 P.2d 1317, 1320 n.2 (Cal. 1992) (noting that practicing law while suspended from bar is unlawful and constitutes contempt of court).

13. See *Keller v. State Bar*, 767 P.2d 1020, 1023, 1032 (Cal. 1989) (linking plaintiffs' objections to Murray's speech to fact that bar publicized speech through news releases and voter educational materials), *rev'd on other grounds*, 496 U.S. 1 (1990); Chiang, *supra* note 2, at A5 (quoting attorney for *Keller* plaintiffs as stating that speech by California Bar President Anthony Murray was "straw that broke the camel's back" and prompted lawsuit against bar). See generally Petitioner's Opening Brief at 24-25, *Keller v. State Bar*, 496 U.S. 1 (1990) (No. 88-1905) (criticizing, inter alia, state bar's opposition to Victims' Bill of Rights).

14. 496 U.S. 1 (1990).

15. See *Keller v. State Bar*, 496 U.S. 1, 3, 4, 17 (1990) (holding that if state requires lawyers to pay dues to bar, that organization may not use members' dues to fund ideological activities unrelated to bar's purposes).

16. *Id.* at 13-14.

17. *Id.* at 13-16.

18. See *id.* at 15 (stating that where line falls between legitimate bar programs and

attempted to balance lawyers' interests in freedom of speech and states' interests in regulation of the legal profession and improvement of the judicial system.¹⁹ That balancing of interests, however, failed to provide bars with a clear way to distinguish their proper duties from illegitimate expenditures.²⁰ The Court relied in large measure upon its earlier opinions limiting expenditures of labor union dues,²¹ but the differences in purpose and function between a bar and a union are too great for the rules governing one to apply to the other.²² A better approach, which the Supreme Court applied in *Rust v. Sullivan*²³ and other free speech cases, asks whether a group's political positions are traceable to its members.²⁴ Because a state bar's speech is reasonably attributable to member lawyers,²⁵ application of the traceability standard in the bar association context would deny states the power to compel lawyers to pay bar dues for any purpose other than regulation of the legal profession.²⁶ By stopping short of such a strict limitation on bar expenditures, the *Keller* opinion, though seemingly a First Amendment victory, left unsettled the question of how bars may spend lawyers' state-compelled dues.²⁷

activities having political or ideological coloration that is not reasonably related to advancement of appropriate goals will not always be easy to discern); Chiang, *supra* note 2, at A5 (quoting then president-elect of California Bar as stating that *Keller* opinion did not give bars any bright lines).

19. See *Keller*, 496 U.S. at 13-14 (stating that California's interest in regulating legal profession and improving legal services in state justified coercion of California's lawyers); *infra* notes 85-106 and accompanying text (comparing balancing of interests in *Keller* to Supreme Court's balancing of interests in other compelled speech cases).

20. See Chiang, *supra* note 2, at A5 (noting that *Keller* decision created confusion within bar concerning standard for determining propriety of various bar activities); see also David F. Addicks, Note, *Renovating the Bar after Keller v. State Bar of California: A Proposal for Strict Limits on Compulsory Fee Expenditure*, 25 U.S.F. L. REV. 681, 701 (1991) (calling *Keller* standard for bar expenditures "quite fuzzy"); *infra* notes 107-41 and accompanying text (discussing ambiguity of *Keller* standard).

21. *Keller v. State Bar*, 496 U.S. 1, 12-14, 17 (1990).

22. See *Keller v. State Bar*, 767 P.2d 1020, 1028 n.12 (Cal. 1989) (stating that bar's situation is not analogous to that of labor union, which serves much more limited function and constituency), *rev'd*, 496 U.S. 1 (1990); Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 51 (1983) (citing bar's broad interests, which potentially include vast areas of legislative activity); *infra* notes 107-19 and accompanying text (discussing differences between labor union and bar association).

23. 111 S. Ct. 1759 (1991). For discussion of this case, see *infra* notes 157-77 and accompanying text.

24. See *infra* notes 151-82 and accompanying text (explaining constitutional significance of traceability, or connection between organization's speech and members of that organization).

25. See *infra* notes 183-243 and accompanying text (applying traceability analysis to situation that lawyers face in states with integrated bars).

26. See *infra* notes 142-50 and accompanying text (advocating strict limits on bar expenditures of mandatory dues).

27. See *infra* notes 107-41 and accompanying text (discussing inherent ambiguity of *Keller* opinion).

I. THE PROBLEM: INTEGRATED BAR ASSOCIATIONS AND COMPELLED SPEECH

An integrated, unified, or mandatory bar is an organization that a state requires lawyers to join and to support financially as a condition of practicing law in that state.²⁸ A lawyer is effectively unable to resign from an integrated bar, because a lawyer who resigns loses the privilege to practice law in that jurisdiction.²⁹

Courts have cited a variety of reasons for compelling lawyers to join state-wide bars. According to the Wisconsin Supreme Court, too many lawyers refuse to join voluntary bars.³⁰ Perhaps more meaningfully, the Wisconsin court also found that members of the legal profession play an important part in the judicial process.³¹ The court concluded that an independent, active, intelligent bar is necessary to the efficient administration of justice.³² Furthermore, according to the Wisconsin court, the general public and legislators are entitled to know how the legal profession as a whole stands on measures directly affecting the administration of justice and the practice of law.³³ An integrated bar, in the Wisconsin court's view, can perform such functions far more effectively than a voluntary bar.³⁴

28. See *In re Unification of N.H. Bar*, 248 A.2d 709, 711 (N.H. 1968) (stating that integrated bar is organization that state requires lawyers to join and to support financially as condition of practicing law); DAYTON D. MCKEAN, *THE INTEGRATED BAR* 25 (1963) (stating that only features of integrated bar that distinguish it from voluntary bar are compulsory membership and mandatory dues); Charles W. Sorenson, Jr., *The Integrated Bar and the Freedom of Nonassociation—Continuing Seige* [sic], 63 NEB. L. REV. 30, 30 n.1 (1983) (defining integrated bar as official state organization to which all attorneys must belong and pay dues as precondition to practicing law within that state); Comment, *The Integrated Bar Association*, 30 FORDHAM L. REV. 477, 477 (1962) (defining integrated bar as official state organization requiring membership and financial support of all attorneys admitted to practice in that jurisdiction).

Although sharing some characteristics, unified bars vary considerably in function. For example, integrated bars in North Carolina and West Virginia serve only to maintain an attorney registry, to collect fees, and to perform certain regulatory tasks. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 2 n.1. Presumably, then, concerns about a bar's political speech would be less likely to arise in those states than in, for example, California, in which the range of bar activities is considerably broader. See *supra* notes 2-13 and accompanying text (discussing activities of State Bar of California).

29. See, e.g., CAL. BUS. & PROF. CODE § 6125 (West 1990 & Supp. 1993) (stating that only active members of California Bar may practice law in state); *id.* § 6126 (stating that holding oneself out as entitled to practice law while suspended from state bar is criminal act); *id.* § 6143 (requiring suspension from membership in California Bar of any member who fails to pay membership fee); *In re Unified Bar*, 530 P.2d 765, 765, 768 (Mont. 1975) (adopting as part of state bar's constitution provision that nonpayment of bar association dues and assessments shall result in suspension of right to practice law); *In re Chapman*, 509 A.2d 753, 756 (N.H. 1986) (stating that lawyer is not at liberty to resign from unified bar, because by doing so lawyer loses privilege to practice law).

30. *In re Integration of the Bar*, 77 N.W.2d 602, 603 (Wis. 1956).

31. *In re Integration of the Bar*, 93 N.W.2d 601, 603 (Wis. 1958).

32. *Id.*

33. *Lathrop v. Donohue*, 102 N.W.2d 404, 409 (Wis. 1960), *aff'd*, 367 U.S. 820 (1961).

34. *Id.*

The New Hampshire Supreme Court also has stated reasons in support of compulsory bar membership.³⁵ Such a structure permits the imposition of ethical standards on all lawyers and provides an effective means for enforcing those standards.³⁶ Additionally, according to the New Hampshire court, a unified bar provides money and personnel to support continuing legal education and to prevent the unauthorized practice of law.³⁷ In an effort to achieve such goals, thirty states have integrated bars.³⁸

Compulsory membership in a state bar is constitutionally significant because, depending on how a bar spends members' dues, paying dues may constitute speech.³⁹ The Supreme Court has recognized that the First Amendment protects contributions to an organization if the contributor's intention

35. *In re* Unification of N.H. Bar, 248 A.2d 709, 713 (N.H. 1968).

36. *Id.*

37. *Id.*

38. See AMERICAN BAR ASSOCIATION, 1992/1993 DIRECTORY 361-75 (1992) (listing state bars). The ABA directory indicates that the following 30 states have unified bars: Alabama, Alaska, Arizona, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* The bars of Puerto Rico and the District of Columbia also are integrated. *Id.* at 363, 371. Three states (North Carolina, Virginia, and West Virginia) and the District of Columbia have both integrated and voluntary bar organizations. *Id.* at 363, 369, 373, 374; McKEAN, *supra* note 28, at 50.

In addition, some authorities name Arkansas and Minnesota as states with "partially integrated" bars. JEFFREY A. PARNES, CITATIONS AND BIBLIOGRAPHY ON THE UNIFIED BAR IN THE UNITED STATES 4 (1973). Those states do not compel membership in a bar association per se but do require lawyers to pay a registration fee to support regulatory programs. Schneyer, *supra* note 28, at 3; see also MINN. SUP. CT. RULES FOR REGISTRATION OF ATTORNEYS 3, reprinted in 52 MINN. STAT. ANN. 586-87 (West 1980 & Supp. 1993) (requiring automatic suspension of attorney who fails to pay annual registration fee); *Lathrop v. Donohue*, 367 U.S. 820, 848 n.1 (1961) (Harlan, J., concurring in the judgment) (stating that integration of Arkansas Bar concerns only disciplinary matters); *In re* Procedures of the Ark. Sup. Ct. Comm. Regulating Professional Conduct of Attorneys at Law, 792 S.W.2d 323, 332 (Ark. 1990) (per curiam) (requiring suspension of attorney for failure to pay annual license fee); *In re* Ark. Bar Ass'n, 687 S.W.2d 118, 124 (Ark. 1985) (same).

For further information on the nature of bars in particular jurisdictions, see *Lathrop*, 367 U.S. at 848 n.1 (Harlan, J., concurring in the judgment) (listing states with integrated bars). See also International Ass'n of Machinists v. Street, 367 U.S. 740, 808 n.14 (1961) (Frankfurter, J., dissenting) (listing states with integrated bars and citing related statutes, rules, and decisions); McKEAN, *supra* note 28, at 49 (listing states with integrated bars and methods and dates of integration); PARNES, *supra*, at 3-4 (listing states with integrated bars and citing related statutes and decisions); Steven Camp, Note, *Arrow v. Dow: The Legacy of Lathrop—State Bars Under Attack*, 8 OKLA. CITY U. L. REV. 89, 118-20 (1983) (same); Peter A. Martin, Comment, *A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan*, 73 MARQ. L. REV. 144, 144 n.3 (1989) (listing states with integrated bars and dates of integration); Jim Reynolds, Comment, *Compulsory Bar Dues in Montana: Two (And a Half) Challenges*, 39 MONT. L. REV. 268, 290-93 (1978) (listing states with integrated bars and citing related statutes and decisions); Comment, *supra* note 28, at 478 n.8 (same).

39. See Edward A. Tomlinson, *Bar Unification—A Caveat*, 26 MD. L. REV. 240, 245 (1966) (stating that legislative activities of unified bar may well interfere with dissenting members' freedom of speech by requiring compelled affirmation of majority-held views).

is to spread a particular message.⁴⁰ Such contributions enable like-minded persons to pool their resources in an effort to further common goals.⁴¹ Because the First Amendment protects such activity, state action that limits contributions implicates fundamental First Amendment interests.⁴² State action that compels such contributions—forcing persons to support an organization's speech—can implicate similar interests.⁴³ Therefore, if an integrated bar spends some portion of a member's dues on speech that the

40. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977). For further discussion of *Abood*, see *infra* notes 101-05 and accompanying text.

41. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (per curiam)).

42. *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (per curiam).

43. *Abood*, 431 U.S. at 234; see also *International Ass'n of Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring) (discussing dangers that state-compelled dues pose to First Amendment rights). In *Street*, Justice Douglas advocated the following limitation on the activities and expenditures of groups that state action constrains citizens to join:

If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; and he should not be required to finance the promotion of causes with which he disagrees.

Id. (Douglas, J., concurring). In a dissenting opinion, Justice Black contended that a law compelling someone to pay money to support political candidates or causes that person opposed would differ only in degree, if at all, from a law compelling that person to speak for a candidate, party, or cause he opposed. *Id.* at 788 (Black, J., dissenting). Black concluded that the First Amendment deprives the government of all power to make any person pay any money to support views that person is against. *Id.* at 791 (Black, J., dissenting).

In addition to *Street*, cases in which the Supreme Court has addressed the problem of compelled speech include *Rutan v. Republican Party*, 497 U.S. 62, 74-75 (1990) (stating that government generally may not base its employment decisions on political affiliation). See also *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795-801 (1988) (declaring unconstitutional state statute forcing professional fundraisers to disclose to potential donors percentage of charitable contributions that fundraiser actually turned over to charity during previous year); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 6, 20, 21 (1986) (holding unconstitutional state agency's attempt to compel utility to publish third party's messages in utility's newsletter); *Abood*, 431 U.S. at 222 (holding that compelling financial support for collective bargaining activities has impact upon First Amendment interests, but that such interference is constitutionally justified by legislative assessment of important contribution of union shop to labor relations); *Wooley v. Maynard*, 430 U.S. 705, 707, 717 (1977) (holding unconstitutional state statute compelling motorists to display license plates with motto "Live Free or Die"); *Buckley v. Valeo*, 424 U.S. 1, 25-29, 60-84 (1976) (upholding federal statutes limiting campaign contributions and compelling disclosure of campaign financial records); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 243-45, 258 (1974) (holding unconstitutional state statute forcing newspapers to give political candidates space in which to reply to editorial criticism); *Torcaso v. Watkins*, 367 U.S. 488, 489, 496 (1961) (striking down state constitution's provision that required public employees, as condition of state employment, to declare belief in God); *Speiser v. Randall*, 357 U.S. 513, 515, 528-29 (1958) (declaring unconstitutional state requirement that in order to obtain tax exemption taxpayer must sign oath pledging that he did not advocate overthrow of government); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional state school board's resolution forcing students to participate in daily ceremonies honoring United States flag).

member opposes, state action that compels payment of dues invades that lawyer's First Amendment interests.⁴⁴

II. THE SUPREME COURT'S SOLUTION

Interference with First Amendment rights, however, does not necessarily make a state's demand for bar dues unconstitutional, because government at times can and does constitutionally abridge First Amendment freedoms.⁴⁵ The Supreme Court first considered whether bar integration is an acceptable infringement on First Amendment rights in *Lathrop v. Donohue*.⁴⁶ In *Lathrop*, a Wisconsin lawyer objected to a state supreme court order⁴⁷ compelling all Wisconsin lawyers to pay dues to the state's bar.⁴⁸ The *Lathrop* Court found that state action compelling a lawyer to join a bar did not violate the lawyer's right to freedom of association.⁴⁹ A plurality of justices, however, concluded that the *Lathrop* record provided an inadequate basis from which to answer free speech questions.⁵⁰ The *Lathrop*

44. See *Falk v. State Bar*, 342 N.W.2d 504, 513 (Mich. 1983) (Boyle, J., concurring) (stating that bar's use of mandatory dues for lobbying effectively compels lawyer to speak and thus impairs lawyer's First Amendment interests), *appeal dismissed and cert. denied*, 469 U.S. 925 (1984); Tomlinson, *supra* note 39, at 246 (stating that lawyer suffers impairment of his freedom of speech if integrated bar sponsors legislation or program that lawyer opposes).

In *Falk*, the Michigan Supreme Court rejected a lawyer's First Amendment challenge to activities of that state's bar association but conceded that some of the Michigan Bar's practices may have warranted closer scrutiny by the court. *Falk*, 342 N.W.2d at 504 (per curiam). Two justices joined in a concurring opinion, finding that the bar's legislative and political activity clearly involved a message. *Id.* at 513 (Boyle, J., concurring). Specifically,

[b]y rendering advice on content or supporting or opposing legislation, the bar engages in expression. To the extent that plaintiff's mandatory dues are used to support such activity, plaintiff is compelled to participate in such expression. Even if plaintiff is opposed to the bar's position, or would choose to take no position at all, he is forced to contribute to the advancement of the bar's position. His freedom of conscience and intellect have been invaded. . . . Plaintiff has thus suffered some cognizable First Amendment related injury.

Id. (Boyle, J., concurring).

45. See *Elrod v. Burns*, 427 U.S. 347, 360 (1976) (plurality opinion) (stating that prohibition on encroachment of First Amendment protections is not absolute).

46. 367 U.S. 820 (1961).

47. *In re Integration of the Bar*, 93 N.W.2d 601 (Wis. 1958).

48. *Lathrop v. Donohue*, 367 U.S. 820, 822 (1961) (plurality opinion). For further discussion of *Lathrop* and various lower-court opinions on the subject of mandatory bar dues, see Jay M. Zitter, Annotation, *Use of Compulsory Bar Association Dues or Fees for Activities from Which Particular Members Dissent*, 40 A.L.R.4TH 672 (1985).

49. See *Lathrop*, 367 U.S. at 843 (stating that *Lathrop* record did not reveal any impingement upon protected rights of association); *id.* at 861 (Harlan, J., concurring) (stating that Wisconsin could constitutionally regard functions of integrated bar as sufficiently important to justify any incursion on lawyers' individual freedoms).

50. *Id.* at 845. The *Lathrop* plurality opinion stated that the record before the Court lacked information concerning the dissenting lawyer's views on issues the bar had addressed publicly. *Id.* at 846. The record also did not reveal the way in which the bar exacted funds from its members or used such funds for political activities. *Id.*

Court therefore did not determine what restraints, if any, the First Amendment Free Speech Clause imposes upon integrated bars.⁵¹

A. *The Keller Opinion*

A more complete record reached the Supreme Court in *Keller*.⁵² The *Keller* plaintiffs, twenty-one California attorneys, objected to the bar's use of their dues to fund political activities.⁵³ The California Supreme Court found that the bar's support for the state supreme court⁵⁴ violated California campaign laws.⁵⁵ More broadly, however, the California court rejected the dissenting lawyers' constitutional objections to bar expenditures.⁵⁶ The attorney-plaintiffs appealed this portion of the California court's decision to the United States Supreme Court, which found for the plaintiffs on free speech grounds.⁵⁷

Adhering to *Lathrop*,⁵⁸ the Court, in an opinion by Chief Justice Rehnquist, found that states could require lawyers to join and pay dues to bar associations.⁵⁹ The Court then reached the issue that the *Lathrop* plurality had not addressed: whether a state bar's use of mandatory dues to finance political activities violates dissenters' free speech rights.⁶⁰ The answer, according to the *Keller* Court, is that a bar can use compulsory dues to regulate the legal profession or to improve legal services in the state.⁶¹ Such compulsion, the Court reasoned, is appropriate for the same reason that unions can compel contributions to their collective bargaining activities.⁶² Just as employees benefit from union negotiations with management, lawyers benefit from a bar association's advice to the courts and legislature on the policing of the legal profession.⁶³ Consequently, beneficiaries of such efforts should pay a fair share of the costs of those efforts.⁶⁴

However, a state cannot constitutionally require that lawyers pay for every program that the bar might create. The justifications for compelled association—the state's interests in regulating lawyers and improving the legal system—limit the permissible extent of that compulsion.⁶⁵ An integrated

51. Tomlinson, *supra* note 39, at 244-45.

52. *Keller v. State Bar*, 496 U.S. 1 (1990).

53. *Id.* at 5.

54. See *supra* notes 2-13 and accompanying text (discussing bar president's speech and bar resolution criticizing senatorial candidate for attacking state supreme court).

55. *Keller v. State Bar*, 767 P.2d 1020, 1033 (Cal. 1989), *rev'd*, 496 U.S. 1 (1990).

56. See *id.* at 1030-31 (upholding bar's lobbying activities by broadly construing statute defining California Bar's purpose).

57. *Keller v. State Bar*, 496 U.S. 1, 17 (1990).

58. *Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality opinion).

59. *Keller*, 496 U.S. at 13-14.

60. *Id.* at 9.

61. *Id.* at 13-14 (citing *Lathrop*, 367 U.S. at 843).

62. *Id.* at 12.

63. *Id.*

64. *Id.*

65. *Id.* at 13-14.

bar must not use mandatory dues to fund ideological activities that fall outside the bar's stated purposes.⁶⁶

To illustrate the application of this standard for bar expenditures, the *Keller* Court relied on Supreme Court cases concerning collective bargaining agreements.⁶⁷ Such agreements may require employees of a particular company to join a union⁶⁸ or to pay a service charge to a union.⁶⁹ Compelled speech problems arise in this context because employees might object to union activities that collective bargaining agreements require them to support as a condition of employment.⁷⁰

The *Keller* Court saw a substantial analogy between the relationship of a union and its member-employees, on the one hand, and the relationship of an integrated bar and its members on the other.⁷¹ Quoting at length from *Ellis v. Brotherhood of Railway, Airline, & Steamship Clerks*,⁷² a Supreme Court opinion concerning the union-employee relationship,⁷³ the *Keller* Court stated that if nonunion employees object to being burdened with particular union expenditures, a court should ask whether the chal-

66. *Id.* at 14.

67. *Id.* at 13-14 (citing *Ellis v. Brotherhood of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 448 (1984)).

68. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 742-44 (1961) (discussing union shop agreement requiring railway employees to pay union dues as condition of employment); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 227 (1956) (stating that railroad employees objected to union shop agreement that compelled them to join specified union or to give up their employment).

69. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212-13 (1977) (stating that nonunion schoolteachers objected to new union's collective-bargaining agreement, which provided that teachers who did not join union had to pay union service charge).

70. *See id.* at 222 (stating that compelling employees to provide financial support for collective bargaining representative has impact upon their First Amendment interests). Despite the apparent lack of government action in a collective bargaining agreement between a union and private-sector employer, compulsory membership provisions can raise First Amendment concerns, because if an employer and union adopt their agreement pursuant to labor laws, those laws are the source of authority by which employees suffer any loss of their rights. *Hanson*, 351 U.S. at 232. Furthermore, were a court to enforce an agreement, such enforcement would be a further instance of state action in conflict with the First Amendment. *Id.* at 232 n.4.

71. *Keller v. State Bar*, 496 U.S. 1, 12 (1990).

72. 466 U.S. 435 (1984).

73. *Ellis v. Brotherhood of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 438-40 (1984). In *Ellis*, Western Airlines employees challenged a union's expenditures of fees that employees paid to the union pursuant to a labor agreement. *Id.* at 439. Specifically, the workers objected to use of their fees to satisfy union meeting, publishing, recruiting, and socializing costs, as well as expenses the union incurred providing death benefits to employees and litigating matters other than collective bargaining. *Id.* at 440. A district court granted the workers' motion for summary judgment, finding that all the questioned activities were beyond the scope of the union's spending authority. *Id.* The Supreme Court disagreed. *Id.* at 457. The Court reasoned that compelling employees to help pay for the union's social events, conventions and publications constituted no infringement of the workers' First Amendment rights beyond the infringement inherent in the formation of a union shop. *Id.* at 456. The Court therefore upheld compulsory funding of those activities. *Id.* at 456-57.

lenged expenditures are a necessary or reasonable part of the union's duties as the employees' exclusive representative in labor-management issues.⁷⁴ A union, acting pursuant to labor laws, may compel objecting employees to share the costs of negotiating and administering a collective-bargaining contract, of settling disputes, and of conducting other activities normally or reasonably associated with a union's representation of employees.⁷⁵ A union may engage in activities beyond the scope of collective bargaining, but the union may not collect funds for such activities from employees under threat of the loss of employment.⁷⁶

Applying the *Ellis* principles to the facts in *Keller*, the Supreme Court concluded that the "guiding standard" for the constitutionality of bar programs funded with state-mandated dues must be whether a bar necessarily or reasonably incurs a particular expenditure for the purpose of regulating the legal profession or improving legal services in the state.⁷⁷ In other words, the relevant issue is *not* whether a particular bar activity might be political or ideological, but rather whether that activity is germane to the state's purpose for the compulsion.⁷⁸

The *Keller* Court concluded its opinion by referring bar associations to *Chicago Teachers Union v. Hudson*⁷⁹ as a model to follow in limiting expenditures of compulsory dues.⁸⁰ In *Hudson*,⁸¹ the Court concluded that a union's funding procedures must entail minimal infringement on employees' First Amendment rights, and that employees must have a fair opportunity both to identify the impact of union expenditures on their interests

74. *Keller*, 496 U.S. at 14 (quoting *Ellis*, 466 U.S. at 448).

75. *Id.*

76. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

77. *Keller v. State Bar*, 496 U.S. 1, 14 (1990).

78. *See id.* at 13-14 (stating that bar may use mandatory dues to fund activities germane to professional regulation and improvement of legal services in state); *id.* at 14 (stating that guiding standard for constitutionality of bar programs funded with mandatory dues must be whether bar necessarily or reasonably incurs challenged expenditures for purpose of regulating legal profession or improving quality of legal services in state).

79. 475 U.S. 292 (1986).

80. *Keller*, 496 U.S. at 17.

81. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986) (holding that union's funding procedures must entail minimal infringement on employees' First Amendment rights). *Hudson* concerned a labor agreement between a union and the Chicago Board of Education. *Id.* at 295. The agreement required that the board deduct money from nonunion employees' paychecks and pay that money to the union to cover collective bargaining expenses incurred in the representation of nonunion employees. *Id.* A group of nonunion employees objected to this assessment and alleged that the union was spending part of their salaries on programs unrelated to collective bargaining. *Id.* at 297. A district court rejected their challenge to the union's procedures, but the United States Court of Appeals for the Seventh Circuit reversed. *Id.* at 298-99. The Supreme Court affirmed the Seventh Circuit. *Id.* at 301. The Court concluded that the union's safeguards allowing employees to appeal deductions from their salaries were inadequate, because the procedures did not provide for a reasonably prompt hearing of an employee's complaint before an impartial decisionmaker. *Id.* at 309. Furthermore, the union did not provide employees with adequate information in advance of the deduction. *Id.* Therefore, the Court concluded, the union's procedures were constitutionally flawed. *Id.*

and to object to those expenditures.⁸² The union's procedures for collecting an agency fee must include an adequate explanation for its basis, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow account to contain amounts reasonably in dispute while such challenges are pending.⁸³ Were an integrated bar to adopt similar safeguards, the Court indicated, the bar's use of compulsory dues would be constitutional.⁸⁴

B. *The Keller Balancing Act*

The *Keller* opinion, which balances the costs of state compulsion against the benefits to those compelled,⁸⁵ is consistent with prior Supreme Court cases concerning compelled speech. Examining those cases as a whole, it is difficult to discern a simple, bright-line test for the constitutionality of state action that compels speech.⁸⁶ It is clear that the Supreme Court does not consider strict scrutiny the appropriate test, because compelled speech cases have not prompted the Court to require a compelling state interest and the least restrictive means of achieving that interest.⁸⁷ Instead, the Court appears

82. *Id.* at 303.

83. *Id.* at 310.

84. *Keller v. State Bar*, 496 U.S. 1, 17 (1990).

85. *See id.* at 12 (stating that government may compel lawyers, who benefit from unique status of admission to practice before state's courts, to pay "fair share" of costs of profession's activities).

86. *See Falk v. State Bar*, 342 N.W.2d 504, 507-09 (Mich. 1983) (Boyle, J., concurring) (summarizing United States Supreme Court cases concerning compelled speech and concluding that Court has not stated clear test for validity of state action compelling expression), *appeal dismissed and cert. denied*, 469 U.S. 925 (1984).

87. *Id.* at 509; *see also* RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 179 (1992) (stating that strict scrutiny requires government to demonstrate that infringement of fundamental rights is necessary to serve compelling ends and that infringement is narrowly tailored to achieve those ends). The Supreme Court has applied a strict scrutiny analysis in cases that include elements of compelled speech, but those cases were less about compelled speech and more about burdens on protected speech. David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 996 n.4 (1982). For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a state statute forcing newspapers to give political candidates newspaper space in which to reply to editorial criticism. *Tornillo*, 418 U.S. at 243, 258. The Court reasoned that the statute inflicted a content-based penalty on newspapers and therefore would chill protected speech. *Id.* at 256-58. The Court applied strict scrutiny, then, not so much because the state had attempted to compel speech, but rather because the state had burdened protected speech. Gaebler, *supra*, at 996 n.4. For similar applications of strict scrutiny, *see Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 13, 19 (1986) (plurality opinion) (applying strict scrutiny and holding unconstitutional state's attempt to compel utility to publish third party's messages in utility's newsletter, in part because forcing utility to subsidize third party's speech would burden its own speech), and *Elrod v. Burns*, 427 U.S. 347, 355, 363 (1976) (plurality opinion) (applying strict scrutiny and finding that government may not force public employee who supported one political party either to join other party or to resign, because such state action would advance interests of party that employee opposes to detriment of his own beliefs).

to have endeavored to balance the weight of the individual interest at stake against the magnitude of the government interest that prompted the compulsion.⁸⁸ In other words, the Court's analysis in compelled speech cases seems to turn on whether the government's asserted interests outweigh the individual's conflicting right to remain silent.⁸⁹

For example, in *Wooley v. Maynard*,⁹⁰ the Supreme Court struck down a state law requiring motorists to display on their cars the state's license plate with the motto, "Live Free or Die."⁹¹ Chief Justice Burger, writing for the *Wooley* majority, cited *West Virginia Board of Education v. Barnette*⁹² for the proposition that the First Amendment protects both the right to speak freely and the right to refrain from speaking.⁹³ The Court acknowledged that the compulsion at issue in *Barnette*—mandatory participation in the pledge of allegiance—constituted a more serious infringement of personal liberties than did the license plate requirement to which *Maynard*

88. *Falk*, 342 N.W.2d at 509. In two cases central to this Note, the Supreme Court did not apply strict scrutiny. See *Keller v. State Bar*, 496 U.S. 1, 12 (1990) (stating that lawyers benefit from bar's advice to courts and legislature and therefore should pay "fair share" of costs involved); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (stating that compelling employees to support collective bargaining has impact on their First Amendment interests, but holding that importance of union shops to federal system of labor regulation constitutionally justifies such interference). The United States Court of Appeals for the Seventh Circuit expressly rejected a district court's application of strict scrutiny in considering a Wisconsin lawyer's challenge to bar integration. See *Levine v. Heffernan*, 864 F.2d 457, 461-62 (7th Cir. 1988) (overruling district court's application of compelling state interest standard), *cert. denied*, 493 U.S. 873 (1989). *But see* *Gibson v. Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986) (stating that strict scrutiny is appropriate analysis for all First Amendment challenges).

89. *Falk*, 342 N.W.2d at 510 (quoting Gaebler, *supra* note 87, at 1014).

90. 430 U.S. 705 (1977).

91. *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977).

92. 319 U.S. 624 (1943). In *West Virginia Bd. of Educ. v. Barnette*, the Supreme Court considered a board of education resolution requiring public school students to participate in daily ceremonies honoring the United States flag. *Id.* at 626. The resolution included the following words:

[T]he West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States [including the pledge of allegiance] now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds.

Id. at 628 n.2. The resolution required that all teachers and pupils participate in the salute and warned that refusal to participate would constitute insubordination. *Id.* A group of citizens sought an injunction preventing enforcement of the resolution. *Id.* at 629. Specifically, the plaintiffs argued that saluting the flag would violate their religious beliefs. *Id.* Acting on the pleadings, a panel of federal judges forbade enforcement of the resolution. *Id.* at 630. The Supreme Court affirmed. *Id.* at 642.

Justice Jackson, writing for the Court, declared that certain rights, including the right to free speech, may not be submitted to a vote. *Id.* at 638. The government, Jackson acknowledged, may foster national unity through persuasion and example. *Id.* at 640. But the state may not constitutionally strive for national unity through compulsion. *Id.* at 640-41. Under the Bill of Rights, the Court concluded, governmental authority does not control public opinion; rather, public opinion controls authority. *Id.* at 641.

93. *Wooley*, 430 U.S. at 714.

objected.⁹⁴ Even so, *Barnette* and *Wooley* presented the same problem: a state's attempt to use its citizens as a means of fostering an ideological viewpoint that some citizens rejected.⁹⁵ Such compulsion, the Court stated, is acceptable only if a countervailing state interest justifies the coercion.⁹⁶ New Hampshire asserted two interests in support of its law: easy identification of vehicles and promotion of history, individualism, and state pride.⁹⁷ The Supreme Court found that the state could meet the first interest without requiring display of the state motto and noted that some New Hampshire license plates did not carry the motto.⁹⁸ The Court rejected the second interest as ideologically loaded.⁹⁹ The state's interest was in disseminating an ideology, and that interest did not outweigh Maynard's First Amendment right to avoid becoming a courier of the government's message.¹⁰⁰

Similarly, in *Abood v. Detroit Board of Education*,¹⁰¹ the Court considered whether the government may empower unions to compel financial support for union activities if that compulsion interferes with First Amend-

94. *Id.* at 715.

95. *Id.*

96. *Id.* at 716 (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)).

97. *Id.*

98. *Id.*

99. *See id.* at 716-17 (noting that New Hampshire's interest in promoting appreciation of history, individualism, and state pride was not ideologically neutral).

100. *Id.* at 717. The Supreme Court recognized a corporation's interest in freedom from compelled speech in *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion). In *Pacific*, a public utility sought to avoid becoming a courier for a third party's messages. *Id.* at 4. For 62 years, Pacific Gas & Electric Co. (Pacific) had published a newsletter and distributed it along with utility bills to the company's customers. *Id.* at 5. In 1980, California's Public Utilities Commission decided that envelope space that Pacific used to distribute its newsletter belonged, not to the company, but to its ratepayers. *Id.* The Commission ordered Pacific to allow a group called Toward Utility Rate Normalization (TURN) to use the envelope space both to raise funds and to communicate with ratepayers. *Id.* at 6. TURN had been critical of Pacific's views and had opposed the utility in rate-making proceedings. *Id.* at 13. Pacific appealed the Commission's decision to the California Supreme Court, which declined to hear the case. *Id.* at 7. The United States Supreme Court overruled the Commission's order. *Id.*

Justice Powell, writing for a majority of the Court, noted that corporations and associations, like individuals, are protected by the First Amendment. *Id.* at 8 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978) (nullifying state prohibition aimed at corporations' attempts to influence outcome of state referendum) and *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980) (invalidating state's efforts to prohibit political discussion in utility's billing materials)). The commission's order violated these protections by taking space the utility had used for its literature and giving that space to TURN; in other words, the commission's order effectively abridged the utility's speech in order to enhance its opponents' speech. *Id.* at 5-6, 14 (citing *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)). Furthermore, compelling Pacific to distribute TURN's notices would require the utility to associate with speech it opposed. *Id.* at 15. Such consequences of state action, the Court concluded, are unacceptable unless the state tailors its action narrowly to serve a compelling state interest. *Id.* at 19. Because the commission could have achieved its stated goals through other, less restrictive means, and because the chosen means burdened some points of view in order to enhance others, those means were constitutionally unacceptable. *Id.* at 19-20.

101. 431 U.S. 209 (1977).

ment rights.¹⁰² The short answer, the *Abood* opinion makes clear, is yes.¹⁰³ Although an employee might object to some union programs; although an employee's moral or religious views on abortion, for example, might conflict with the union's medical plan; and although financing the union might interfere with an employee's freedom to refrain from associating with the union's ideas, the Court concluded that such interference was constitutionally justified by the legislature's assessment of the importance of union shops.¹⁰⁴ In other words, the state's interest in smooth labor-management relations outweighed the employees' rights to refrain from speaking.¹⁰⁵

The *Keller* Court took precisely the same balancing approach. The Court did not discuss whether the state's interests were compelling, nor whether the state's means of achieving those interests were narrowly tailored. Rather, the Court simply found that California's interest in regulating the legal profession and improving legal services in the state justified coercion of California's lawyers.¹⁰⁶ In other words, the state's interests outweighed lawyers' rights to remain silent on those particular topics.

C. Keller's Problems

Although the *Keller* approach is consistent with precedent, it does not provide lawyers and integrated bars a workable solution to this compelled speech problem. One difficulty with the *Keller* opinion stems from its

102. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (stating that compelling employees to provide financial support for collective bargaining has impact upon their First Amendment interests). Louis Abood and other public school teachers objected to a collective bargaining agreement between the school board and a recently certified union. *Id.* at 211-14. That agreement required teachers who did not join the union to pay the union a service charge equal to the regular dues of union members. *Id.* at 212. The school board would fire teachers who did not pay the service charge. *Id.* After state courts held that the school board was entitled to summary judgment, the Supreme Court reversed and remanded the case for trial. *Id.* at 214-16, 242.

103. See *id.* at 222 (stating that interference with teachers' rights is constitutional because of legislature's assessment of importance of union shops).

104. *Id.* The *Abood* Court, in an opinion by Justice Stewart, explained its balancing of interests. *Id.* at 220-22. The Court noted that designating a single collective bargaining representative avoids the confusion that would follow from allowing two or more bargaining units. *Id.* at 220. Also, having a single representative for all employees prevents potential union rivalries and dissension in the work force. *Id.* at 220-21. Exclusive labor representation also frees an employer from the possible threat of conflicting demands from different unions and permits agreements that are not subject to attack from rival organizations. *Id.* at 221.

Furthermore, the duties of an exclusive collective bargaining representative entail great responsibilities. *Id.* Negotiating agreements, administering them, and settling disputes can require a great deal of time and money. *Id.* A union shop arrangement distributes the cost of those activities fairly among beneficiaries. *Id.* at 221-22. Therefore, the Court concluded, the government can compel individual employees to support the union's labor relations activities. *Id.* at 222.

105. See *Ellis v. Brotherhood of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 455-56 (1984) (citing *Abood* and other cases for proposition that governmental interest in industrial peace justifies infringement upon dissenting employees' First Amendment rights).

106. *Keller v. State Bar*, 496 U.S. 1, 13-14 (1990).

reliance on labor cases, which are not applicable in the integrated-bar context. That the Court chose to compare labor unions to mandatory bars was not surprising, because lower courts had used that analogy in deciding similar cases.¹⁰⁷ However, despite the popularity of that analogy, the problems with it are manifest.¹⁰⁸

First, as the *Keller* opinion acknowledged, bar association activities do not benefit lawyers as directly as union programs benefit employees.¹⁰⁹ For example, a bar does not negotiate with clients on behalf of its members, as would a collective bargaining unit.¹¹⁰ Certainly a bar's purposes are unlike the reason for which Congress established collective bargaining: to preserve industrial peace.¹¹¹

A second problem with *Keller's* reliance on labor cases stems from the fact that a labor union serves a much more limited function and constituency than does a bar association.¹¹² The purpose of a bar is not limited to promoting the self-interest of its members, but extends to improving the administration of justice.¹¹³ Therefore, a bar properly concerns itself with legislation that affects society as a whole, not just laws that affect lawyers' earnings and working conditions.¹¹⁴ Even if a state bar narrows its expenditures of compulsory dues to the activities *Keller* allowed,¹¹⁵ the group's coffers nevertheless remain open to a vast number of expenditures. For example, virtually any issue that comes before a state legislature is arguably related to improving that state's legal services, because those services necessarily include interpreting the state's laws.¹¹⁶ Likewise, because the competence of judges relates to the quality of legal services in the state, *Keller* apparently would allow an integrated bar to engage in the very activities that prompted the *Keller* lawsuit.¹¹⁷ In sum, because a bar has a much

107. See *Keller v. State Bar*, 767 P.2d 1020, 1028 (Cal. 1989) (listing opinions treating integrated bar and labor union as similar), *rev'd on other grounds*, 496 U.S. 1 (1990).

108. See *id.* at 1030 (concluding that applying labor union test to bar would impose upon bar massive burden of analyzing all proposed activities under vague and uncertain standards designed for organizations of quite different purpose and structure and probably would discourage bar from carrying out statutory functions).

109. *Keller*, 496 U.S. at 12.

110. See *id.* (conceding that employees' benefits from union negotiations with management are more direct than lawyers' benefits from bar activities).

111. *Lathrop v. Donohue*, 367 U.S. 820, 880 (1961) (Douglas, J., dissenting).

112. *Keller v. State Bar*, 767 P.2d 1020, 1028 n.12 (Cal. 1989), *rev'd on other grounds*, 496 U.S. 1 (1990).

113. *Id.*

114. *Id.*

115. See *Keller v. State Bar*, 496 U.S. 1, 14 (1990) (stating that guiding standard for propriety of bar expenditures must be whether bar necessarily or reasonably incurred challenged expenditures for purpose of regulating legal profession or improving legal services in state).

116. See *Arrow v. Dow*, 544 F. Supp. 458, 462 (D. N.M. 1982) (stating that virtually any issue before state legislature arguably is related to administration of justice or improvement of legal system); Cantor, *supra* note 22, at 51 (stating that all legislation, by definition, comprises part of legal system and therefore is of potential interest to lawyers).

117. See *supra* notes 2-13 and accompanying text (discussing Pete Wilson's support for

broader mission than a union, a bar's legitimate activities are far more difficult to distinguish from unconstitutional expenditures than are a union's legitimate activities.¹¹⁸ Even the *Keller* opinion acknowledged that the difference between legitimate bar projects and forbidden ones would not always be easy to discern.¹¹⁹

The debate over senatorial candidate Pete Wilson's complaints about the California Supreme Court¹²⁰ illustrates the difficulty of putting bar programs into boxes.¹²¹ The *Keller* plaintiffs called bar president Anthony Murray's speech criticizing Wilson an instance in which the California Bar went beyond its proper role.¹²² Murray, however, found defense of the courts an appropriate bar activity.¹²³ He characterized his remarks as "rhetorical" but "perfectly legitimate" and "not political."¹²⁴

The problem is that both the *Keller* plaintiffs and the bar's president are correct. The California Bar's charter empowers that organization to promote the improvement of the administration of justice.¹²⁵ As part of

recall of California Chief Justice Rose Bird and bar president's speech criticizing Wilson for attacking court). Although the bar's criticism of a United States Senate candidate prompted the *Keller* lawsuit, Chiang, *supra* note 2, at A5, that particular bar activity was not before the United States Supreme Court in *Keller*, because the California Supreme Court had held that distribution of the bar president's speech violated a distinct statute and rule governing election expenditures. *Keller v. State Bar*, 767 P.2d 1020, 1031-32 (1989), *rev'd on other grounds*, 496 U.S. 1 (1990). Therefore, how the Court would have ruled on this aspect of the dissenting attorneys' case is not certain. However, as noted in the text above, the performance of a state's chief justice certainly would seem to be relevant to the task of improving legal services in the state, which is among the bar activities that the *Keller* Court approved. *Keller v. State Bar*, 496 U.S. 1, 14 (1990).

118. See *Arrow*, 544 F. Supp. at 462 (denying that advancing administration of justice or improving legal system are bar's equivalent of collective bargaining activities). For further analysis of the *Arrow* opinion, see Schneyer, *supra* note 28, at 60-62.

119. *Keller*, 496 U.S. at 15. The difficulty of distinguishing programs germane to the administration of justice from political activities was not lost on the members of the Court at oral argument in the *Keller* case. Justice Marshall, apparently frustrated at the inability of the plaintiffs' lawyer to define those activities that were beyond the bar's legitimate functions, asked the attorney: "What do you want us to say? Specifically. Words, please." Alexander Wohl, *California Bar Argues for Right to Lobby*, S.F. CHRON., Feb. 28, 1990, at A2.

120. See *supra* notes 2-13 and accompanying text (discussing Pete Wilson's support for recall of California Chief Justice Rose Bird and bar resolution criticizing Wilson for "threatening" court).

121. See Wohl, *supra* note 119, at A2 (recounting events at oral argument in *Keller* and stating that justices tried with little success to determine which activities fall within bar's charter). Oral argument in the *Keller* case included discussion of at least one specific topic of bar speech. *Id.* Justice Scalia indicated a proposed ban on armor-piercing bullets, for which the bar had lobbied, was eminently a political issue having very little to do with lawyers. *Id.* But the lawyer for the California Bar responded that the proposed ban was relevant to the bar's purposes because it related to California's definition of first-degree murder. *Id.*

122. See Chiang, *supra* note 2, at A5 (quoting attorney for *Keller* plaintiffs as stating that Murray's speech was "the straw that broke the camel's back" and prompted lawsuit against bar).

123. Murray, *supra* note 2, at 22.

124. Morain, *supra* note 4, at 1.

125. See Wohl, *supra* note 119, at A2 (quoting provision of California Bar's charter).

that task, the bar might well decide that its members have a duty to act as defenders of the courts.¹²⁶ Recognition of such a duty would be consistent with the Model Code of Professional Responsibility, which urges lawyers to defend the judiciary against unjust criticism.¹²⁷ Furthermore, the general public and legislators might benefit from learning how the legal profession as a whole stands on measures directly affecting the administration of justice and the practice of law.¹²⁸ Therefore, perhaps the bar should speak out in support of the judiciary.¹²⁹ Such expression, related as it is to the functioning of a state's courts, would seem to fall within the *Keller* safe harbor for activities related to improving legal services in the state.¹³⁰

State action compelling lawyers to fund a bar's support for the judiciary, however, could require lawyers who support one political candidate to support the candidate's critics as well. Such compulsion, though possible under *Keller*, would be unconstitutional, because support for a candidate that an individual lawyer opposes furthers that candidate's interests to the detriment of the lawyer's own beliefs.¹³¹ Yet the *Keller* rule allows states to compel lawyers to pay for a bar's speech, including speech those lawyers oppose, provided that the bar's speech is germane to regulation of the legal profession or improvement of legal services in the state.¹³²

This constitutional flaw in the *Keller* limitation on bar expenditures has created much confusion. In fact, the *Keller* opinion left lawyers flounder-

126. Murray, *supra* note 2, at 22.

127. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-6 (1983) (stating that adjudicatory officials, who are not wholly free to defend themselves, are entitled to bar's support against unjust criticism), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 399-400 (1993).

128. Lathrop v. Donohue, 102 N.W.2d 404, 409 (Wis. 1960), *aff'd*, 367 U.S. 820 (1961).

129. See Keller v. State Bar, 767 P.2d 1020, 1031-32 (1989) (stating that bar may act to promote independence of judiciary), *rev'd on other grounds*, 496 U.S. 1 (1990).

130. Keller v. State Bar, 496 U.S. 1, 14 (1990).

131. See Elrod v. Burns, 427 U.S. 347, 355 (1976) (plurality opinion) (finding unconstitutional policy of forcing state employee either to join political party in power or to resign because, inter alia, support for party that employee opposes furthers that party's interests to detriment of employee's own beliefs); International Ass'n of Machinists v. Street, 367 U.S. 740, 790 (1961) (Black, J., dissenting) (stating that First Amendment leaves government no power to compel person to expend energy, time, or money to advance fortunes of candidates he would like to see defeated or to urge ideologies and causes he believes would be hurtful to country); *cf.* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 17 (1986) (plurality opinion) (holding unconstitutional state agency's attempt to compel utility to publish third party's messages in utility's newsletter because, inter alia, agency's order required utility to use its property as vehicle for distribution of message with which it disagreed); Wooley v. Maynard, 430 U.S. 705, 715-17 (1977) (holding that state interest in disseminating ideology cannot outweigh individual's First Amendment right to avoid becoming courier of government's message that individual finds unacceptable).

132. See Keller, 496 U.S. at 13-14 (stating that bar may use mandatory dues to fund activities germane to professional regulation and improvement of legal services in state); *id.* at 14 (stating that guiding standard for constitutionality of bar programs funded with mandatory dues must be whether bar necessarily or reasonably incurred particular expenditure for purpose of regulating legal profession or improving legal services in state).

ing,¹³³ because the Court did not provide integrated bars with a meaningful way of determining whether a particular expenditure would be constitutional.¹³⁴ The *Keller* opinion suggested procedures through which dissenting lawyers might obtain refunds,¹³⁵ and Florida's integrated bar adopted a comparable process.¹³⁶ Similarly, in response to *Keller* the California Bar offered to cut dues for members who objected to the bar's political activities.¹³⁷ But neither *Keller*, nor Florida, nor California suggest solutions that clearly define which bar activities are illegitimate.¹³⁸ Unless integrated bars voluntarily abandon such ineffective remedies in favor of more meaningful spending limitations,¹³⁹ or until the Supreme Court revisits the issue¹⁴⁰ and

133. Chiang, *supra* note 2, at A5 (quoting member of California Bar's Board of Governors).

134. *Id.* (quoting then president-elect of California Bar as stating that *Keller* opinion did not provide bright lines but instead left task of determining proper expenditures to bars). Rather than risk crossing *Keller's* wavy line, the California Bar's president warned delegates to the bar's 1990 convention to pursue only subjects permissible under *Keller*. Victoria Slind-Flor, *Contrast to Other Years: Bar, Bench Meet Quietly in California*, NAT'L L.J., Sept. 10, 1990, at 3. Despite that note of caution, California Bar delegates in 1991 voted to support surrogate parent contracts; that vote prompted yet another First Amendment lawsuit against the California Bar. See William Carlsen, *Two Lawyers Sue to Challenge Mandatory Membership in Bar*, S.F. CHRON., Jan. 18, 1992, at A13 (reporting that two lawyers filed suit in effort to end mandatory membership in California Bar); Lily Dizon, *Orange Lawyer Sues to Practice Without Being Member of Bar*, L.A. TIMES, Jan. 16, 1992, at B6 (same). For further discussion of bars' reactions to the *Keller* decision, see Victoria Slind-Flor & Randall Samborn, *Behind the Big Questions, ABA Mulled Everyday Issues*, NAT'L L.J., Mar. 4, 1991, at 10 (interviewing Alaska, Florida, and Michigan bar officials).

135. See *supra* notes 79-84 and accompanying text (discussing *Keller's* reference to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), as illustration of refund procedures integrated bar might adopt).

136. See *Gibson v. Florida Bar*, 906 F.2d 624, 628-29 (11th Cir. 1990) (discussing procedure through which member of Florida Bar could pursue refund of dues that bar spends unconstitutionally). The Montana Supreme Court in 1983 ordered that state's bar to cease using compulsory dues for lobbying until the bar developed a procedure whereby dissenting lawyers could obtain a partial refund of their dues. *Reynolds v. State Bar*, 660 P.2d 581, 581 (Mont. 1983).

137. Gail D. Cox, *Mad Money*, NAT'L L.J., Dec. 10, 1990, at 6. The California Bar offered to reduce dissenting members' annual dues by \$3 per lawyer out of a total bill of nearly \$500 per lawyer. *Id.* At that rate, the refund plan "may just about pay for a beer, over which each participating California lawyer can ruminate about justice." *Id.*

138. See Florida Bar Re: Amendment to Rule 2-9.3 (Legislative Policies), 526 So. 2d 688, 689-90 (Fla. 1988) (adopting Florida Bar's refund procedure, which would deny dissenting lawyer refund if challenged activities were acceptable under applicable constitutional law). Although the Florida rule predates *Keller*, a court today presumably would read its reference to applicable constitutional law as importing the nebulous *Keller* standard, which allows integrated bars to spend compulsory dues on activities related to regulating the legal profession or to improving legal services in their states. *Keller v. State Bar*, 496 U.S. 1, 14 (1990).

139. See Slind-Flor & Samborn, *supra* note 134, at 10 (quoting Alaska bar official as follows: "Our board is very careful regarding our mandate—discipline, admission and continuing legal education—and we do not get involved in political matters").

140. The Court had an opportunity to revisit *Keller* and agreed to do so but later changed its mind. *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1305, *cert. dismissed*, 112 S. Ct. 633 (1991) (stating that Court improvidently granted writ of certiorari).

replaces *Keller* with a clearer, more narrow standard,¹⁴¹ lawyers in states with integrated bars will continue to face the threat of state-compelled support for political agendas they oppose.

III. AN ALTERNATIVE APPROACH

A. Specificity

The *Keller* opinion suggests, but backs away from, a possible solution to the problem of distinguishing appropriate and inappropriate bar expenditures: using mandatory bar dues *solely* to support programs at the clearly legitimate end of the spectrum of bar activities.¹⁴² Disciplining lawyers and proposing ethical codes are legitimate, nonpolitical expenditures of bar dues, so bar members would have no valid constitutional objection to state action compelling their financial support for such activities.¹⁴³ Furthermore, regulatory functions are clearly separable from more political bar activities.¹⁴⁴ Beyond that narrow zone of clear legitimacy, however, lie vast areas of discourse that, as *Keller* acknowledges, may or may not include political speech for which states cannot constitutionally compel financial support.¹⁴⁵ Unless integrated bars limit their expenditures of compulsory dues to those programs clearly related to regulation of the profession,¹⁴⁶ third parties inevitably will attribute a bar's speech to its individual members.¹⁴⁷

If integrated bars were to use mandatory dues to pay only for professional regulation, the primary function of integrated bars would be sharply defined.¹⁴⁸ Consequently, a bar's political expenditures, funded purely with donated money, would be relatively immune from First Amendment challenge.¹⁴⁹ Thus, narrowing the range of bars' expenditures of mandatory dues

141. See *infra* text accompanying notes 142-50 (arguing that First Amendment requires integrated bars to spend funds derived from compulsory dues solely to regulate legal profession).

142. See *Keller v. State Bar*, 496 U.S. 1, 15-16 (1990) (stating that extreme ends of spectrum of bar activities are clear, and indicating that disciplining members of bar and proposing ethical codes are at clearly legitimate end of that spectrum).

143. *Id.* at 12, 16.

144. *Lathrop v. Donohue*, 367 U.S. 820, 875 (1961) (Black, J., dissenting).

145. See *Keller*, 496 U.S. at 15 (stating that where line falls between legitimate and illegitimate bar activities will not always be easy to discern, but acknowledging that extreme ends of spectrum of bar activities are clear); *Keller v. State Bar*, 767 P.2d 1020, 1031 (Cal. 1989) (stating that bill-by-bill, case-by-case review of bar activities is unworkable), *rev'd*, 496 U.S. 1 (1990).

146. See Addicks, *supra* note 20, at 711-16 (advocating that California Bar read *Keller* narrowly and limit expenditure of mandatory dues to regulating profession).

147. See *infra* notes 151-243 and accompanying text (explaining constitutional significance of traceability, or connection between organization's speech and organization's members).

148. See Addicks, *supra* note 20, at 715-16 (advocating strict limitation on bar expenditures as way to define function and responsibility of California Bar more sharply).

149. See *id.* (arguing that strict limits on bar expenditures would eliminate threat of First Amendment challenges by dissenting lawyers).

would eliminate any chilling effect that the possibility of lawsuits creates.¹⁵⁰ Integrated bars, by funding their speech only with money that supporters provided willingly, would be able to speak out on any issue without fear of court challenges.

B. Traceability

Limiting expenditure of state-mandated bar dues to regulatory activities is not only workable; such an approach also would be consistent with analogous Supreme Court cases concerning compelled speech. Those cases indicate that the "traceability," or directness, of the connection between a government-coerced message and a particular individual is relevant in deciding whether the coercion is constitutional.¹⁵¹

For example, if the government forces an individual to recite the pledge of allegiance,¹⁵² the state has compelled expression in a way that is clearly attributable to a particular person—the individual reciting the pledge.¹⁵³ Conversely, if the government uses general tax revenues to fund its speech, the state-compelled expression is not clearly attributable to any particular taxpayer, because the connection between the message and the individual is so attenuated.¹⁵⁴ Thus a traceability test asks whether a particular message is reasonably attributable to a particular individual.¹⁵⁵ Such attribution is relevant because, unless the government requires an individual to do something that reasonably links him to a message, it is difficult to describe what the state has compelled as expression.¹⁵⁶

Traceability was an important issue for the Supreme Court in *Rust v. Sullivan*.¹⁵⁷ In *Rust*, recipients of federal funding for a family planning

150. See Tomlinson, *supra* note 39, at 243 (stating that First Amendment may require integrated bar to curtail its legislative program in order to protect dissenting members' freedom of speech).

151. See Gaebler, *supra* note 87, at 1010-11 (discussing importance of identification of particular speaker with particular message in compelled speech cases).

152. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional state requirement that public school students participate in daily ceremonies honoring United States flag). For further discussion of this case, see *supra* note 92.

153. Gaebler, *supra* note 87, at 1010.

154. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring) (noting that government as representative of people may compel payment of taxes for controversial projects); *Wooley v. Maynard*, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting) (hypothesizing that state of New Hampshire could use tax revenues to erect and to maintain billboards proclaiming motto, "Live Free or Die," without abridging First Amendment rights of taxpayer opposed to motto); *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989) (stating that nexus between government message that state funds with general tax revenues and individual taxpayer is attenuated), *cert. denied*, 493 U.S. 1094 (1990); Tomlinson, *supra* note 39, at 246 (stating that compelled financial support of government agency does not result in any impermissible identification or attribution of state's policies or views to taxpayer).

155. Gaebler, *supra* note 87, at 1011.

156. *Id.*

157. 111 S. Ct. 1759 (1991).

clinic sued the Secretary of Health and Human Services.¹⁵⁸ Under regulations adopted in 1988,¹⁵⁹ clinics receiving federal funds could not encourage abortion, provide abortion counseling, or refer patients to abortion clinics.¹⁶⁰ Although the regulations restricted recipients' freedom of speech, the Court upheld the restrictions because they applied only to federally funded programs.¹⁶¹ At least one lower court had found that the regulations also limited the availability of privately funded abortion counseling and services.¹⁶² The Supreme Court, however, concluded that the regulations did not affect abortion programs that were part of separate and distinct activities, such as independent clinics that recipients might run with private money after hours.¹⁶³ Furthermore, health-care facilities could avoid the restrictions entirely by declining to accept federal funding.¹⁶⁴

Read broadly, the *Rust* majority opinion would allow the government to require the sacrifice of freedom of speech as a prerequisite to receipt of a governmental benefit.¹⁶⁵ Such a reading of *Rust* raises troubling First

158. *Rust v. Sullivan*, 111 S. Ct. 1759, 1766 (1991).

159. 42 C.F.R. §§ 59.8-10 (1992).

160. *Rust*, 111 S. Ct. at 1765.

161. *Id.* at 1775.

162. *See Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 70 (1st Cir. 1990) (stating that regulations at issue in *Rust* restricted private funds available for abortion counseling and services), *cert. granted and judgment vacated*, 111 S. Ct. 2252, *overruled by Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

163. *Rust v. Sullivan*, 111 S. Ct. 1759, 1774 (1991). *But see Secretary of Health & Human Servs.*, 899 F.2d at 70 (stating that *Rust* regulations restricted privately funded abortion services); *New York v. Sullivan*, 889 F.2d 401, 406 (2d Cir. 1989) (noting that *Rust* regulations required federally funded clinics to remain "physically and financially separate" from abortion counseling programs), *aff'd sub nom. Rust v. Sullivan*, 111 S. Ct. 1759 (1991); Moira T. Roberts, Note, *Individual Rights and Government Power in Collision: A Look at Rust v. Sullivan Through the Lens of Power Analysis*, 49 WASH. & LEE L. REV. 1023, 1027 (1992) (stating that *Rust* regulations effectively required clinics receiving federal grants to refrain from using private funds to support abortion counseling).

164. *Rust*, 111 S. Ct. at 1775 n.5.

165. *See id.* (stating that government does not compel recipient of federal funds to operate with federal support; to avoid regulation, recipient could simply decline funding); David Cole, *Big Brother's New Weapon—Rust v. Sullivan*, WALL ST. J., Feb. 27, 1992, at A13 (stating that *Rust* reasoning would allow government to control content of speech it supported, because speaker who objected to government control could avoid such control by declining government support).

The idea that the government could condition grant of a benefit or privilege on the surrender of freedom of speech is particularly problematic for lawyers, because the opportunity to practice law is a privilege that a state bestows under conditions it selects. *Lathrop v. Donohue*, 102 N.W.2d 404, 408 (Wis. 1960) (quoting *In re Greer*, 81 P.2d 96, 98 (Ariz. 1938)), *aff'd*, 367 U.S. 820 (1961); *see also Lathrop v. Donohue*, 367 U.S. 820, 865 (1961) (Whittaker, J., concurring) (calling practice of law special privilege); *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917) (Cardozo, J.) (stating that membership in bar is privilege burdened with conditions), *cert. denied*, 246 U.S. 661 (1918). Therefore, under a broad reading of *Rust*, one might argue that the First Amendment should not limit conditions on admission to the practice of law, because a person who objected to those conditions could avoid them by declining the privilege of becoming a lawyer. *Cf. Rust*, 111 S. Ct. at 1775 n.5 (stating that recipient of federal funds could avoid accompanying regulation by declining funding).

Amendment questions¹⁶⁶ and seems to conflict with prior Supreme Court opinions.¹⁶⁷ A narrow reading of *Rust* resolves this apparent conflict with

166. See *Rust*, 111 S. Ct. at 1786 (Blackmun, J., dissenting) (asserting that *Rust* majority opinion disregards established principles of law and diminishes force of First Amendment); SMOLLA, *supra* note 87, at 218 (stating that *Rust* decision was lamentable defeat for civil liberties); Cole, *supra* note 165, at A13 (stating that *Rust* decision may have set stage for government indoctrination of citizenry).

State action granting a privilege in exchange for the surrender of fundamental rights is unconstitutional because the very words of the Constitution prohibit state action abridging freedom of speech. See U.S. CONST. amend. I (stating that Congress shall make no law abridging the freedom of speech); *id.* amend. XIV, § 1 (providing that no state shall deprive any person of life, liberty, or property without due process of law). This prohibition applies regardless of whether the government bestows a privilege or benefit as some sort of compensation for the abridgment of rights. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (rejecting broadly any limitation on First Amendment rights as condition on receipt of government benefit); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that government may not infringe upon liberty of expression by denying, or placing conditions upon, benefit or privilege); *Frost v. Railroad Comm'n*, 271 U.S. 583, 594 (1926) (finding that state action compelling surrender of constitutional right as condition of governmental favor could make possible destruction of constitutional guarantees). To borrow an example from Justice Brennan, whether the government fines a person a penny for being a Republican or withholds the grant of a penny for the same reason, that state action infringes on the person's rights. *Elrod v. Burns*, 427 U.S. 347, 359-60 n.13 (1976) (plurality opinion). To allow the state to give persons governmental benefits in exchange for the surrender of certain rights would effectively penalize the exercise of those freedoms; the government could thereby produce a result that it could not command directly. *Perry*, 408 U.S. at 597 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Such interference with First Amendment rights is unconstitutional. *Id.* Freedom of speech would be an empty guarantee if the government were able to attach restrictions on speech to any benefit that it bestowed. SMOLLA, *supra* note 87, at 182. Constitutional rights are not so easy to barter away; the government may not offer a benefit or privilege in exchange for the surrender of liberty. *Sherbert*, 374 U.S. at 404.

167. See *Owens ex rel. Israel S. v. Board of Educ.*, 601 N.E.2d 1264, 1269 (Ill. App. Ct. 1992) (stating that *Rust* partially overruled *Perry*). In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court considered a teacher's First Amendment lawsuit against a Texas junior college. *Id.* at 594-95. The teacher, Sindermann, had joined a group of students in urging that the school become a four-year institution. *Id.* at 595. Sindermann's name appeared in a newspaper advertisement that criticized the school's board of regents. *Id.* When the school later declined to renew Sindermann's contract, he filed a lawsuit in federal court. *Id.* Sindermann alleged that the college had based its decision not to rehire him on his public comments; that decision, Sindermann claimed, violated his right to freedom of speech. *Id.* A district court granted the college's motion for summary judgment, but the United States Court of Appeals for the Fifth Circuit reversed. *Sindermann v. Perry*, 430 F.2d 939, 940 (5th Cir. 1970). The Supreme Court affirmed the Fifth Circuit. *Perry*, 408 U.S. at 603.

The *Perry* Court broadly denounced any government action exacting a penalty, such as the denial of certain benefits, for the exercise of certain First Amendment rights. *Id.* at 597; see also *supra* note 166 (summarizing *Perry* holding). Justice Stewart, writing for the majority, noted that in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), the Court had found constitutional protections applicable to a state-employed teacher's public criticism of his superiors. *Perry*, 408 U.S. at 598. Relying on *Pickering*, the Court concluded that Sindermann should have an opportunity to prove his constitutional claim. See *id.* (reversing summary judgment against Sindermann).

Since the *Perry* decision, the Supreme Court on at least five occasions has refused to allow the government to bestow a benefit on the condition that the recipient surrender First

precedent. The *Rust* opinion upheld regulations that, in the majority's view, constituted merely limitations of on-the-job speech by federally funded health programs' employees.¹⁶⁸ This does not mean that the government may restrict any speech it supports.¹⁶⁹ Rather, *Rust* states merely that the government may restrict medical advice that it funds.¹⁷⁰ Confining *Rust* to those facts is consistent with the government's broad role as a painstaking regulator of health care.¹⁷¹ The idea that the state may regulate medical advice and treatment is hardly novel.¹⁷²

Amendment rights. In *Elrod*, a majority of the Court concluded that the government generally could not deny a person the benefit of public employment simply because that person refused to join a particular political party. See *Elrod*, 427 U.S. at 353, 373 (concluding that dismissal of government employee on partisan basis was unconstitutional); *id.* at 375 (Stewart, J., concurring) (concluding that state may not compel nonpolicymaking, nonconfidential public employee to join particular political party as condition of continued employment). In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court restated the general rule from *Elrod* but issued a new standard concerning exceptions to the ban on partisan firings. See *id.* at 518 (stating that ultimate inquiry is not whether particular employee is in policymaking and confidential position, but rather whether state can show that party affiliation is appropriate requirement for effective performance of public office involved). Similarly, in *Rutan v. Republican Party*, 497 U.S. 62 (1990), the Court found that the First Amendment did not allow government to bestow promotions, transfers, and recalls after layoffs based on public employees' political affiliations. *Id.* at 75.

Additionally, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court refused to allow New Hampshire to deny the privilege of driving to residents who refused to display the state's motto, "Live Free or Die," on their cars. *Id.* at 707, 717; see also *supra* notes 90-100 and accompanying text (discussing *Wooley* opinion, holding, and rationale). Finally, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court held that Congress could not condition award of a federal grant on the surrender of a First Amendment right—freedom to broadcast editorials. *Id.* at 366.

168. *Rust v. Sullivan*, 111 S. Ct. 1759, 1774 (1991); see also *supra* notes 158-64 and accompanying text (discussing facts and holding in *Rust*). But see *supra* notes 162-63 and accompanying text (noting view that *Rust* regulations effectively required clinics receiving federal grants to refrain from abortion counseling even with private funds).

169. But see *Cole*, *supra* note 165, at A13 (suggesting that *Rust* reasoning could allow Postal Service to deny mailing privileges to magazine that criticized government).

170. See *Rust*, 111 S. Ct. at 1774 (stating that *Rust* restrictions apply only to federally funded programs and leave funding recipients free to perform otherwise restricted activities through separate and independent programs).

171. See, e.g., CAL. HEALTH & SAFETY CODE § 1205 (West 1990) (requiring license as prerequisite to operation of health clinic); *id.* §§ 1225-1226 (instructing state agency to promulgate regulations prescribing kinds of services that clinics may provide and minimum standards (1) of adequacy, safety, and sanitation of the physical plant and equipment, (2) for staffing with duly qualified personnel, and (3) for providing services); FLA. STAT. ANN. § 395.003 (West 1993) (requiring persons who establish, conduct, or maintain hospitals to obtain licenses); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (concluding that state may regulate abortions by, inter alia, licensing persons who and facilities that perform abortions); CHAYET & SONNENREICH, P.C., CERTIFICATE OF NEED: AN EXPANDING REGULATORY CONCEPT I (1978) (stating that between 1965 and 1977, 36 states adopted laws requiring that persons wishing to construct or modify certain health facilities first obtain permission from state agency).

172. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 827 (1975) (noting that state has legitimate interest in maintaining quality of medical care within its borders); *Barsky v. Board of Regents of University of State of New York*, 347 U.S. 442, 451 (1954) (stating that admission

More importantly, a narrow reading of *Rust* comports with the Supreme Court's earlier compelled speech decisions based on traceability.¹⁷³ *Rust* is a traceability case because the speech at issue in *Rust*, at least in the majority's view, was less the speech of private individuals than it was the speech of a federally funded program.¹⁷⁴ The *Rust* restrictions, the Court contended, applied only during working hours,¹⁷⁵ so the personal speech of grant recipients was beyond the reach of federal regulation.¹⁷⁶ Therefore, the Court did not attribute the federally funded program's speech to its individual employees, but merely to the program itself.¹⁷⁷

Another application of the traceability test appears in *PruneYard Shopping Center v. Robins*.¹⁷⁸ In *PruneYard*, the Supreme Court concluded that a state could force a shopping center owner to allow protests by others on his property.¹⁷⁹ The owner, by opening his center's doors to shoppers, had effectively invited the public onto his property.¹⁸⁰ Therefore, the Court reasoned, third parties would be unlikely to attribute demonstrators' speech to the shopping center owner.¹⁸¹ In other words, a protestor's speech is the speech of the protestor and is not traceable to the owner of property, open to the public, that is the site of the protest. Indeed, the owner could

to practice of medicine is privilege that state grants under its substantially plenary power to fix terms of admission); *id.* (finding that state's legitimate concern for maintaining high standards of conduct within medical profession extends beyond initial licensing); *Watson v. Maryland*, 218 U.S. 173, 176 (1910) (noting "well settled" proposition that state's police power extends to regulation of certain trades and callings, particularly practice of medicine); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (finding that state's power to provide for general welfare authorizes state to regulate medical practitioners in order to protect people from ignorance or deception); Tanya J. Dobash, Note, *Physician-Patient Sexual Contact: The Battle Between the State and the Medical Profession*, 50 WASH. & LEE L. REV. 1725, 1738-40 (1993) (discussing state's authority to regulate practice of medicine).

173. *Cf. infra* notes 178-82 and accompanying text (discussing application of traceability test in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)); *infra* notes 213-35 and accompanying text (discussing application of traceability test in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)).

174. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1775 (1991) (stating that regulations at issue in *Rust* govern solely scope of federally funded program and do not in any way restrict speech of program employees acting as private individuals).

175. *See id.* (stating that regulations limit clinic employees' freedom of expression during time that they actually work for federally funded project). *But see supra* notes 162-63 and accompanying text (noting view that *Rust* regulations effectively required clinics receiving federal grants to refrain from providing abortion counseling even with private funds).

176. *Rust*, 111 S. Ct. at 1775 (stating that *Rust* regulations do not restrict speech of clinic employees acting as private individuals).

177. *Id.*

178. 447 U.S. 74 (1980).

179. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (concluding that California Supreme Court decision recognizing third party's right of access to shopping center courtyard for speech purposes did not violate shopping center owner's property rights or First Amendment rights).

180. *Id.* at 87.

181. *Id.*

expressly disavow any connection with the protestors by posting signs nearby.¹⁸²

This traceability analysis is applicable to the issue of integrated bar associations and compelled speech.¹⁸³ If a bar's speech is reasonably attributable to a particular lawyer, state action compelling the lawyer to fund the bar's speech infringes upon the lawyer's right to refrain from speaking.¹⁸⁴ Such attribution is appropriate, because it is reasonable to associate an organization's views with a dues-paying member of that organization.¹⁸⁵ A private association, such as a bar, represents only one segment of the population.¹⁸⁶ Therefore, state-compelled support of such a private association is fundamentally different from state-compelled support of government, which represents all persons.¹⁸⁷ The Constitution protects an individual's right to withhold financial support for private associations.¹⁸⁸

182. *Id.*

183. See *Lathrop v. Donohue*, 367 U.S. 820, 858-59 (1961) (Harlan, J., concurring) (applying traceability analysis to determine whether bar integration causes substantial infringement on First Amendment rights); Cantor, *supra* note 22, at 50 (same).

184. See Cantor, *supra* note 22, at 51 (stating that excessive lobbying by bar would make compulsory bar dues inappropriate). One critic of a proposal to integrate the Massachusetts Bar argued that

[i]ntegration is the floral or fuzzy word that means regimentation, collectivism, institutionalism and power politics. It is a species from the great expanding genus Totalitaria. . . . The leaders of the new union of the bar . . . will publish their views and proclaim them as the united voice of the great Bar of Massachusetts. . . . If you don't pay [your dues] you are disbarred, not for dishonor but for dissent.

John E. Hannigan, *In Opposition to Integration*, Mass. L.Q., Oct. 1946, at 17-18.

185. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring) (stating that withholding financial support from private association is fully protected as speech, because private association represents only one segment of population); *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989) (stating that if government requires publicly identified group to contribute to fund for dissemination of particular message associated with group, government has directly focused its coercive power for expressive purposes), *cert. denied*, 493 U.S. 1094 (1990); Petitioner's Opening Brief at 23, *Keller v. State Bar*, 496 U.S. 1 (1990) (No. 88-1905) (citing direct nexus between dissenting lawyer and California Bar's promotion of certain causes); Walter Powers, *Some Objections to Integration of the Bar in Massachusetts*, 27 B.U. L. REV. 118, 120 (1947) (stating that dissenting lawyers must sit by while majority informs legislature, courts, and public that bar policies represent view of "the lawyers"). But see *Lathrop*, 367 U.S. at 858-60 (Harlan, J., concurring) (concluding that connection between individual lawyer and integrated bar's views is factually so remote that compelled membership in bar is constitutional); *Falk v. State Bar*, 342 N.W.2d 504, 513 (Mich. 1983) (Boyle, J., concurring) (stating that reasonable persons are not likely to associate bar's positions with particular lawyer merely because state forces lawyer to pay dues to bar in order to practice law), *appeal dismissed and cert. denied*, 469 U.S. 925 (1984); *In re Integration of the Bar*, 93 N.W.2d 601, 603 (Wis. 1958) (stating that policies of Wisconsin Bar are separate and distinct from each individual member); Cantor, *supra* note 22, at 50 (stating that bar's political positions are not attributable to individual lawyers).

186. See *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) (stating that Constitution protects right to withhold financial support from private association, such as union, because union represents only one segment of population, but government is representative of people as a whole).

187. *Id.*

188. *Id.*

Lawyers' financial and membership support for a bar's speech is unlike the conduct of the PruneYard Shopping Center owner, whose property was the site of a public protest but who did not have to sign a check paying for the speech of the protestors.¹⁸⁹ The coercion lawyers face also is distinguishable from the compulsion that the health-care workers faced in *Rust*, because *Rust* concerned regulations that, at least in the Court's view, limited only government-funded speech.¹⁹⁰ Lawyers in integrated-bar states, on the other hand, must pay for the bar's speech.¹⁹¹ Because dissenting lawyers must fund speech that they oppose, the compulsion they face is different from the disinterested toleration of another's speech that the Court saw and approved in *Rust* and *PruneYard*.

Dissenting lawyers also are unlike the shopping center owner in *PruneYard* and the health care workers in *Rust* because, of the three, lawyers are least able to distance themselves from views that they oppose. The PruneYard Shopping Center owner could have posted signs disclaiming any support for protestors using the center's property.¹⁹² Similar signs could make clear that a health-care facility is a government-funded clinic whose employees, while on the job, speak for the clinic, not for themselves.¹⁹³ Although lawyers likewise have the option of speaking out against the bar's views,¹⁹⁴ dissenting lawyers clearly would face a far greater challenge in attempting to tell everyone they know that they disagree with the bar's positions on various issues. By simply stating that they are lawyers, attorneys in an integrated-bar state are by definition associated with their state's bar.¹⁹⁵ Therefore, because a bar's speech is traceable to particular lawyers, attorneys would seem to have a more compelling First Amendment complaint than

189. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980) (describing facts that prompted shopping center owner's lawsuit).

190. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 (1991) (stating that regulations at issue in *Rust* govern scope of federally funded programs and do not restrict speech of program employees acting as private individuals). *But see supra* notes 162-63 and accompanying text (noting view that *Rust* regulations effectively required clinics receiving federal grants to refrain from providing abortion counseling even with private funds).

191. See *supra* note 28 and accompanying text (noting that integrated bar is organization that state requires lawyers to join and to support financially as condition of practicing law in that state).

192. *PruneYard*, 447 U.S. at 87; see also *supra* notes 178-82 and accompanying text (discussing facts of *PruneYard* and possibility that shopping center owner could use signs to disavow any support for protest at center).

193. See 42 C.F.R. § 59.9(d) (1992) (encouraging federal grant recipient to post signs and other forms of identification of federally funded project); cf. *Rust*, 111 S. Ct. at 1776 (stating that physician working at federally funded clinic is always free to make clear that advice regarding abortion is simply beyond scope of government-funded program).

194. See *In re Unification of N.H. Bar*, 248 A.2d 709, 713 (N.H. 1968) (noting that lawyer is free to voice own views on any subject in any manner, even if such views are diametrically opposed to bar's position); *Lathrop v. Donohue*, 102 N.W.2d 404, 408 (Wis. 1960) (same), *aff'd*, 367 U.S. 820 (1961).

195. See *In re Unification of N.H. Bar*, 248 A.2d at 711 (stating that integrated bar is organization that state requires lawyers to join and to support financially as condition of practicing law in that state).

did the shopping center owner in *PruneYard*, who faced merely the temporary inconvenience of having protestors among the visitors to his shopping center,¹⁹⁶ or the health care workers in *Rust*, who the Court believed faced merely the burden of having to refrain from speaking about certain topics while on the job.¹⁹⁷

Furthermore, even if lawyers effectively could disavow any association with an integrated bar's views, state action compelling lawyers to pay for the bar's speech remains an injury to their right to refrain from speaking.¹⁹⁸ Disavowal might remedy harm that a bar caused to a lawyer's reputation, but it would not prevent infringement upon the lawyer's right to remain silent.¹⁹⁹ Because of the state's compulsion, dissenting lawyers must suffer reputational harm or must speak out to prevent such harm.²⁰⁰ Either way, such lawyers have effectively lost control over how to present themselves to the world.²⁰¹

Finally, regardless of whether others actually associate the bar's speech with a particular lawyer, state action compelling a lawyer to support speech that the lawyer opposes violates the lawyer's freedom of conscience.²⁰² The Supreme Court recognized and protected the individual's interest in freedom of conscience in *Wooley v. Maynard*²⁰³ and in *West Virginia Board of Education v. Barnette*.²⁰⁴ In *Wooley*, the Supreme Court held that a New

196. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980). For further discussion of *PruneYard*, see *supra* notes 178-82 and accompanying text.

197. *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 (1991). For further discussion of *Rust*, see *supra* notes 157-77 and accompanying text.

198. See Gaebler, *supra* note 87, at 1007 (stating that government compulsion of expression deprives individual of opportunity to refrain from speaking).

199. See *id.* at 1010-11 (noting that state action compelling expression infringes upon First Amendment interests by forcing individual to speak when individual might have preferred to remain silent); cf. *PruneYard*, 447 U.S. at 99 (Powell, J., concurring) (stating that mere fact that property owner is free to dissociate himself from views expressed on his property cannot restate his right to refrain from speaking in first place).

200. Cf. *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 15 (1986) (plurality opinion) (criticizing state agency's attempt to compel utility to publish third party's messages in utility's newsletter because, *inter alia*, order would force utility to appear to agree with third party's views or to disclaim those views); *PruneYard*, 447 U.S. at 99 (Powell, J., concurring) (indicating that state could not compel business to allow public to post items on business's bulletin board, because such compulsion would force business to appear to agree with posted material or to disclaim that material).

201. See *Lathrop v. Donohue*, 367 U.S. 820, 874 (1961) (Black, J., dissenting) (stating that interest at stake in First Amendment challenge to integration of Wisconsin Bar was interest of individual lawyers in having full freedom to think their own thoughts, speak their own minds, support their own causes, and wholeheartedly fight whatever ideas they oppose); Gaebler, *supra* note 87, at 1005 (noting that state action depriving individual of right to remain silent denies that individual freedom to decide how to present himself to world).

202. See Gaebler, *supra* note 87, at 1012 (noting that state action compelling individual to affirm belief that individual opposes violates individual's freedom of conscience regardless of whether compliance would communicate message to others).

203. 430 U.S. 705 (1977). For further discussion of *Wooley*, see *supra* notes 90-100 and accompanying text.

204. 319 U.S. 624 (1943). For further discussion of *Barnette*, see *supra* note 92 and accompanying text.

Hampshire statute requiring car owners to carry the state's motto on their cars unconstitutionally compelled speech,²⁰⁵ even though it seems unlikely that others would regard a particular car owner's compliance with the state's demand as affirmation of the state's motto.²⁰⁶ Likewise, in *Barnette*, the Supreme Court held that a school board resolution requiring students to participate in the pledge of allegiance unconstitutionally compelled speech,²⁰⁷ even though it seems unlikely that others would regard a particular student's compliance with the state's demand as affirmation of the state's beliefs.²⁰⁸ In neither case did the Court's decision turn on how *others* would assess the individual's actions.²⁰⁹ Instead, the crucial inquiry was whether the *individual* reasonably might regard compliance with the state's command as affirmation of some belief that the individual opposed.²¹⁰ Similarly, even if no one but a single lawyer realizes that bar dues support speech that the lawyer finds anathema, the individual lawyer reasonably could view what the state requires as an affirmation of belief, because the lawyer's money directly supports the bar's speech.²¹¹ In other words, the lawyer himself would trace the bar's speech to himself.²¹² Therefore, no matter how others interpret the lawyer's actions, a state requirement that all lawyers pay for bar speech that a particular lawyer opposes violates the dissenting lawyer's freedom of conscience.

C. *When Groups Talk, Who is Talking?*

Two recent Supreme Court opinions further illustrate the Court's traceability analysis and, because they involve organizations' speech, are particularly relevant to the issue of integrated bars. In both *FEC v. Massachusetts Citizens for Life, Inc.*,²¹³ and *Austin v. Michigan State Chamber of Com-*

205. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

206. *See* Gaebler, *supra* note 87, at 1011-12 (noting that others probably would not regard compliance with license plate requirement as expression of car owner's views, because state required virtually everyone to display similar license plates).

207. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

208. *See* Gaebler, *supra* note 87, at 1012 (noting that others probably would not regard participation in pledge of allegiance as expression of individual student's views, because state required all students to participate in pledge).

209. *See id.* (discussing *Wooley* and *Barnette* before concluding that crucial inquiry in determining whether state action infringes upon freedom of conscience is not whether compliance would in fact communicate message to others).

210. *Id.*; *cf.* *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) (stating that reasonable dissenter in school graduation ceremony could believe that attendance signified dissenter's participation in or approval of prayer that was part of ceremony).

211. *See* *Keller v. State Bar*, 496 U.S. 1, 5 (1990) (stating that *Keller* plaintiffs challenged bar expenditures that advanced political and ideological causes that plaintiffs opposed); *cf.* Gaebler, *supra* note 87, at 1022 (stating that individual union member might regard payment of dues as general endorsement of union).

212. *See* Petitioner's Opening Brief at 23, *Keller v. State Bar*, 496 U.S. 1 (1990) (No. 88-1905) (citing direct nexus between dissenting lawyer and causes promoted by California Bar); Powers, *supra* note 185, at 120 (stating that dissenting lawyers must sit by while majority informs legislature, courts, and public that bar policies represent view of "the lawyers").

213. 479 U.S. 238 (1986).

merce,²¹⁴ the Court found that an organization's speech was reasonably traceable to the organization's supporters.²¹⁵ The remaining question for the Court, then, was whether the group's speech reflected the intentions of those supporters.²¹⁶

In the first of these cases, *Massachusetts Citizens for Life*, the Court refused to allow enforcement of a federal statute²¹⁷ banning the expenditure of corporate funds for political purposes.²¹⁸ The statute allowed corporations to make political expenditures from segregated funds, but not from corporate treasuries.²¹⁹ The Court reasoned that Massachusetts Citizens for Life (MCFL) was more like a voluntary political association than a traditional corporation.²²⁰ Consequently, donors would be fully aware of MCFL's political purposes and would contribute precisely because they support those purposes.²²¹ In other words, the Court found that MCFL's speech was traceable to its donors,²²² and that because MCFL was a clearly political organization, this traceability was consistent with the donors' intentions.²²³ MCFL's speech, paid for by donors, was almost certainly speech that the donors intended to support. The Court therefore concluded that MCFL's speech, as a clear reflection of donors' intentions, was subject to First Amendment protections that rendered the restrictions at issue unconstitutional.²²⁴

214. 494 U.S. 652 (1989).

215. See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 656 (1990) (stating that Chamber's general treasury, which included money that Chamber collected from all members through annual dues, was source of funds that Chamber used to purchase political advertisement); *id.* at 670 (Brennan, J., concurring) (noting that stockholder funds are ultimate source of expenditures from corporation's general treasury in support of particular political candidate); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260-61 (1986) (noting that donors contribute funds to Massachusetts Citizens for Life (MCFL) in order to support group's political purposes and generally share those purposes with organization); *id.* at 242 (noting that MCFL's members were persons who contributed to organization or indicated support for its activities).

216. See *Austin*, 494 U.S. at 663 (discussing intent of Michigan State Chamber of Commerce members); *Massachusetts Citizens for Life*, 479 U.S. at 260-61 (discussing intent of MCFL donors).

217. Federal Election Campaign Act § 316, 2 U.S.C. § 441(b) (1988).

218. See *Massachusetts Citizens for Life*, 479 U.S. at 241 (holding that statute prohibiting corporation's use of treasury funds for political purposes was unconstitutional as applied).

219. *Id.*

220. See *id.* (noting that MCFL's articles of incorporation stated that group's purpose was to foster respect for human life through educational and political activities); SMOLLA, *supra* note 87, at 227 (stating that MCFL had features more akin to voluntary political associations than business firms).

221. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260-61 (1986).

222. *Id.*; see also *id.* at 242 (noting that MCFL's members were persons who contributed to organization or indicated support for its activities).

223. See *id.* at 261 (noting shared political purposes of political organizations, such as MCFL, and contributors).

224. *Id.* at 263-65.

The Court's reasoning in *Massachusetts Citizens for Life* is comparable to the analysis in *Austin v. Michigan State Chamber of Commerce*,²²⁵ a more recent Supreme Court case concerning traceability and an organization's speech.²²⁶ In *Austin*, the Court upheld a state statute²²⁷ banning the expenditure of funds from a corporation's treasury for political purposes.²²⁸ Under this statute, the Chamber could not expend members' annual dues for political purposes²²⁹ but could use separate funds to pay for the Chamber's political programs.²³⁰ The Court reasoned that burdening the Chamber's speech was appropriate, in part because members might disagree with the group's political expression yet continue to pay dues in order to benefit from the Chamber's nonpolitical programs.²³¹ Because the Chamber, unlike MCFL, was not a clearly political organization, persons who joined the Chamber did not necessarily authorize the use of their dues for the Chamber's political ends.²³² In other words, the Court found that the Chamber's speech was traceable to Chamber members,²³³ but that this traceability was potentially inconsistent with members' intentions.²³⁴ The Chamber's speech, although paid for by members, was not necessarily speech that the members intended to support. The Court therefore concluded that Michigan's statute limiting the Chamber's use of members' dues was not violative of the First Amendment.²³⁵

The *Massachusetts Citizens for Life* and *Austin* approach to traceability and group expenditures, although developed in response to statutory limitations on group speech, is applicable in the integrated bar context. Because state action compels lawyers to support an integrated bar's speech, the

225. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1989).

226. See SMOLLA, *supra* note 87, at 230 (comparing *Massachusetts Citizens for Life* and *Austin* and stating that *Austin* Court found Chamber's purposes were unlike those of MCFL).

227. Michigan Campaign Finance Act § 54(1), MICH. COMP. LAWS § 169.254-.255 (1989).

228. *Austin*, 494 U.S. at 655.

229. See *id.* at 656 (stating that Chamber's proposed use of general funds to purchase newspaper advertisement in support of political candidate would constitute felony).

230. See *id.* at 655 (stating that Michigan statute exempted any expenditure that corporations made from segregated funds from ban on corporate political spending).

231. *Id.* at 663.

232. See *id.* (stating that Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with former may continue to pay dues to participate in latter); *cf.* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260 (1986) (stating that stockholder or union member, who contributes investment funds or union dues for economic gain, does not necessarily authorize use of that money for political ends).

233. See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 656 (1990) (stating that Chamber's general treasury, which included money that Chamber collected from all members through annual dues, was source of funds that Chamber used to purchase political advertisement); *id.* at 670 (Brennan, J., concurring) (noting that stockholder funds are ultimate source of expenditures from corporation's general treasury in support of particular political candidate).

234. See *id.* at 663 (stating that Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with former may continue to pay dues to participate in latter).

235. *Id.* at 666.

federal judiciary has a duty to protect lawyers from such state action if it conflicts with the First Amendment.²³⁶ Lawyers in states with integrated bars, in order to remain lawyers, must pay bar dues whether or not they support the bar's speech.²³⁷ MCFL's contributors faced no such compulsion, because donors to that organization who became dissatisfied with MCFL's expenditures could simply stop contributing.²³⁸ Lawyers, however, like members of the Michigan State Chamber of Commerce, might "disagree with the [bar's] political expression" yet continue to pay dues "because they wish to benefit from the [bar's] non-political programs," particularly its legislated monopoly on the practice of law.²³⁹ Because integrated-bar states demand that lawyers maintain membership in state bars in order to practice law, it is unconstitutional for states or integrated bars to tell lawyers that they may alleviate any unhappiness concerning the bar's use of their money simply by leaving the organization.²⁴⁰ Therefore, under *Austin*, the Supreme Court would say to an integrated bar: In order to spend a member's money on speech, you must be able to show that the member has appointed you his agent for speaking purposes.²⁴¹ Because lawyers in integrated bar states, like members of the Michigan State Chamber of Commerce, pay bar dues for reasons other than to support bars' speech, integrated bars would have

236. *Cf. id.* at 675 (Brennan, J., concurring) (indicating that state action triggers constitutional duty to protect objecting Chamber member or corporate shareholder from use of member's dues or shareholder's invested funds for political purposes).

237. *See, e.g., CAL. BUS. & PROF. CODE* § 6125 (West 1990 & Supp. 1993) (stating that only active members of California Bar may practice law in state); *id.* § 6126 (stating that holding oneself out as entitled to practice law while suspended from state bar is criminal act); *id.* § 6143 (requiring suspension from membership in state bar of any member who fails to pay membership fee); *In re Unified Bar*, 530 P.2d 765, 765, 768 (Mont. 1975) (adopting as part of state bar's constitution provision that nonpayment of bar association dues and assessments shall result in suspension of right to practice law); *In re Chapman*, 509 A.2d 753, 756 (N.H. 1986) (stating that lawyer is not at liberty to resign from unified bar, because by doing so lawyer loses privilege to practice law).

238. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986) (stating that contributor dissatisfied with MCFL's use of donated funds could simply stop contributing).

239. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 663 (1990).

240. *Cf. Massachusetts Citizens for Life*, 479 U.S. at 260 (stating that because stockholder or union member depends on corporation or union for income or job, it is not enough to tell stockholder or union member to remedy any unhappiness concerning group's expenditures simply by leaving corporation or union); *supra* notes 166-67 and accompanying text (discussing rule from Supreme Court cases denying government power to bestow privilege in exchange for surrender of constitutional rights).

241. *Cf. SMOLLA*, *supra* note 87, at 228-39 (finding that *Massachusetts Citizens for Life* and *Austin* limit organizational speech on basis of members' or donors' intent). Smolla reads *Massachusetts Citizens for Life* and *Austin* as announcing the following rule for organizations that engage in speech:

[I]f money is to talk, it must talk for itself. You can spend all you want of your own money on political speech, but not other people's money. In order to spend the money of others on political speech, you must be able to show that they have appointed you their agent for speaking purposes. The power of the money in the pot must reflect the power of the ideas of those who pay into it.

Id. at 237.

to fund their speech with money donated for speech purposes, not with revenues derived from mandatory dues.²⁴² Funds that a state compels lawyers to pay to a bar could be spent solely for the bar's nonspeech purpose—regulation of the legal profession.²⁴³

IV. CONCLUSION

By declining to apply a traceability analysis and instead allowing integrated bars to spend mandatory dues on nonregulatory programs, the Supreme Court in *Keller* created more confusion than clarity.²⁴⁴ To end this disarray and to protect lawyers' First Amendment rights, the Court should look to the traceability analysis it has developed in other free speech cases and should apply that standard in the integrated-bar context.²⁴⁵ Because a bar's political speech is attributable to its members,²⁴⁶ the result of a traceability analysis in the bar association setting would be strict limits on expenditures of compulsory dues and respect for lawyers' rights to refrain from speaking.²⁴⁷ Bars no longer would be able to use the police power of the state to coerce support for their political agendas. Bars would remain free, however, to ask member-lawyers to support political speech.²⁴⁸ Clients would know that hiring a lawyer need not amount to an indirect contribution to the bar's ideological causes. Finally, lawyers would know that bars would spend mandatory dues to regulate the profession and not to advance political agendas that individual lawyers might oppose.

JAMES B. LAKE

242. *Id.*; see also *Gibson v. Florida Bar*, 798 F.2d 1564, 1570 (11th Cir. 1986) (stating that bar may speak on any issue as long as it does so without using compulsory dues of dissenting members).

243. See *supra* notes 142-50 and accompanying text (advocating strict limits on bar expenditures of mandatory dues).

244. See *supra* notes 133-41 and accompanying text (discussing bars' difficulty in applying *Keller* standard).

245. See *supra* notes 151-243 and accompanying text (explaining constitutional significance of traceability and assessing traceability of bar's speech to individual lawyers).

246. See *supra* notes 183-243 and accompanying text (applying traceability analysis to situation that lawyers face in states with integrated bars).

247. See *supra* notes 142-50 and accompanying text (advocating that bars expend funds derived from compulsory dues solely to regulate profession).

248. See *Gibson v. Florida Bar*, 798 F.2d 1564, 1570 (11th Cir. 1986) (stating that bar may speak on any issue as long as it does so without using compulsory dues of dissenting members).