LAWYERS
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How State Bars Can Defend Democracy and the Rule of Law Consistently with *Keller v. State Bar of California*

Executive Summary

Never before has it been so necessary for lawyers to speak out on the vital importance of: defending the rule of law, democracy, and the Constitution; protecting free and fair elections; and holding other lawyers accountable for violating their oath to uphold the Constitution. The purpose of this article is to provide bar associations – in particular, mandatory state bars – with the underlying research and rationale to support the position that existing case law is not a prohibition against addressing these critical issues facing our democracy today.

Integrated bars *can* speak in defense of fundamental Constitutional principles, consistent with the Supreme Court's decision in *Keller v. California State Bar Association.*[1] *Keller* and case law interpreting it clearly establish that mandatory bars may speak out, and lobby, regarding issues that are "germane" to their core functions. The key question is whether the challenged expenditures are necessary for or reasonably related to either (i) regulating the legal profession or (ii) improving the quality of legal services available to the people of the state.

Bar statements should not run afoul of *Keller* simply because they have "apparent legal coloration," or address "sensitive political topics" or topics "of an ideological nature" – although a bar may be wise to avoid casting issues in a needlessly "ideological manner." Nor do bars need unanimity among their members before a position can be considered germane. And lobbying for germane purposes is permissible.

The standard of review for *Keller* claims is deferential, asking whether a state bar *might reasonably believe* that challenged expressive activities would assist in regulating the legal profession or improve the quality of the legal service available to the people of the State. A state bar is not required to prove that its expenditures were actually successful in accomplishing the stated purpose.

As evidenced in the summaries below, cases vary in the extent to which they specifically address the central issues of (i) legal ethics and accountability, (ii) the rule of law, (iii) democracy, (iv) the Constitution, and (iv) free and fair elections. Yet there are compelling arguments that each of these concepts is germane. To the extent that case law on a topic

[1] 496 U.S. 1 (1990).

is sparse, that may well be because state bars have not previously found it necessary to defend these fundamental precepts of our legal system. But the attacks on democracy today are unprecedented and require a strong response from the legal profession.

Ethics/Accountability. The first half of the *Keller* germaneness test is "regulating the legal profession." Ethics investigations of lawyers who have violated their oath or applicable ethical rules, and the filing of related disciplinary complaints, are at the heart of what state bars can and should do under *Keller*. Indeed, this core function of state bars apparently has never been the subject of a reported case alleging that a bar has violated a member's First Amendment rights.

Rule of law. As multiple cases and the ABA Model Rules of Professional Conduct have recognized, lawyers cannot provide quality legal services without a fair and functioning legal system that operates under, and supports, the rule of law. The ability to serve clients presupposes the existence of an independent judiciary in which people have trust and confidence, and that functions free from interference from the other branches of government.

Democracy. At least one reported case has declared that "vigorously promoting the law as the foundation of a just democracy . . . is germane."[2] Each can only exist together with the other. A democratic society provides accountability mechanisms that should prevent government officials from undermining the legal system for their own needs.

The Constitution. It appears that no court has yet had to opine on the germaneness of defending the Constitution. It should be undebatable, however, that fundamental to the ability of lawyers in the United States to provide quality legal services is a justice system that adheres to the Constitution. Indeed, the federal Constitution, and state constitutions, provide the foundational constructs on which our justice system depends and are the sources of critical rights that lawyers seek to protect on behalf of their clients.

Ensuring free and fair elections. The right to a free and fair election is foundational to our democracy. Moreover, the ability of lawyers to protect and vindicate people's rights is grounded in an election process that people trust to duly elect individuals who are responsible for making the laws, and where the right to vote, and have one's vote counted, exists for all. Although cases addressing the germaneness of bar association statements on election issues have generally found them to be non-germane, the courts issuing them were not facing threats of the scope and nature that exist today. State bars ought to be able to build on the long history of non-partisan efforts to protect the right to vote in speaking out against such threats.

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[2] *Gruber v. Oregon State Bar*, 2019 WL 2251826 (D. Or. April 1, 2019) at *10, *aff'd in part and rev'd in part sub nom. Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021), *cert. denied,* 142 S. Ct. 79 (2021).

Finally, it is important to note that mandatory bars can still speak out and lobby on *non*-germane topics so long as they provide an adequate process for objecting members to get a pro-rata refund of their dues. A bar can meet its First Amendment obligations if it provides members with "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."

The foregoing discussion addresses the First Amendment *free speech* guarantee. The Ninth Circuit recently held that the First Amendment right of *free association* can be violated by non-germane expressive activities of mandatory bars even with a dues refund – a question *Keller* declined to address. However, the court said the violation could be readily avoided by use of disclaimers or by calling lawyers "licensees" rather than "members." A disclaimer seems a sensible and easy step to take in any event.

The following provides the analysis that underlies this Executive Summary.

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The contents of this article do not constitute legal advice; rather, the article is offered as an analytical tool to assist the legal profession in the important work of protecting democracy and the rule of law. LDAD invites comments and suggestions for improvement or updating. In particular, we would appreciate being advised of (i) any newly filed or adjudicated litigation on the matters addressed in this article or developments in pending cases, and (ii) any particularly effective (or less effective) state bar mechanisms for dealing with members' potential First Amendment objections to bar expressive activities.

Discussion

I. The Issue

It is no exaggeration to say that democracy and the rule of law are under threat today in the United States like no other time in our Nation's history. By the nature of their profession, lawyers have an ethical obligation to speak up publicly, and to engage in public advocacy to protect and defend these foundational principles from further erosion. Leaders and members of so-called "integrated" or "mandatory" bars (defined below) are often reluctant to urge their respective bars to do so, however, out of concern that such activities could be challenged in court as violating the First Amendment rights of members who oppose those positions but are required to pay dues to the bar association.

This issue is governed principally by the Supreme Court's decision in *Keller v. California State Bar Association*.[3] This article argues that integrated bars *can* act in defense of democracy and the rule of law consistent with *Keller*. It explains why that is so, and how to implement such activities in a way that is consistent with *Keller*. Part II of the article lays out the applicable Supreme Court case law. Part III applies those cases, and lower court case law construing them, to the issues of legal ethics and accountability, the rule of law, democracy, the Constitution, and the right to free and fair elections. Finally, Part IV explains how state bars can respond to *Keller*-based challenges by maintaining a system for reimbursing the relevant portion of objecting members' dues.

II. Legal Background

A. Introduction

Currently, 32 states and the District of Columbia have mandatory (or integrated) bars, meaning that membership in the bar is required if one wishes to practice law in that jurisdiction. These bars play significant roles in the regulation and licensing of lawyers, under authority delegated by their state high courts.

All such bars are subject to suit under *Keller*, as further explained below. Understandably, leaders of mandatory bar associations tend to view through a *Keller* lens all proposed activities that can be cast as taking a public policy position. Some bars lean toward avoiding anything they think some members might find controversial, resulting in their filing a complaint. For similar reasons, some bars also avoid *any* lobbying activities. But, as this article demonstrates, such responses are an overreaction to *Keller*.

As explained below, *Keller* and related case law clearly establish that mandatory bars may freely speak out, and lobby, with respect to issues that are "germane" to their core

[3] 496 U.S. 1 (1990).

functions of regulating lawyers and improving the quality of legal services. Case law also makes clear that the foregoing phrases are more capacious than they might first appear.[4]

B. *Lathrop v. Donahue*

The Supreme Court first considered a First Amendment challenge to the expressive activities of a mandatory bar in the 1961 case of *Lathrop v. Donohue.*[5] There, a Wisconsin lawyer objected to being "coerced to support," by paying $15 in annual dues, "an organization which is authorized and directed to engage in political and propaganda activities."[6]

The Court noted that, just five years earlier, it had upheld a requirement that workers in union shops pay union dues, whether or not they join the union, on the theory that such a law represents "no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."[7] The Court observed that the Wisconsin bar's lobbying activities had been limited to topics "affecting the practice of law, or lawyers as a class," and "bills of importance to the administration of justice."[8] Moreover, it concluded:

> Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy.[9]

Accordingly, the Court declared itself "unable to find any impingement upon protected rights of association."[10] However, it reserved to another day whether a lawyer's "rights of free speech are violated by the use of his money for causes which he opposes."[11]

C. *Keller v. State Bar of California*

The Supreme Court answered the free speech question in *Keller*, in which a group of California lawyers challenged their obligation to pay dues to a bar that took positions on

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[4] The scope of the Supreme Court cases discussed in this part of the article is also illustrated graphically below in Appendix A – Supreme Court Coverage of First Amendment Issues Posed by Mandatory Bar Activities.
[5] 367 U.S. 820 (1961).
[6] *Id*. at 822.
[7] *Id*. at 843 (quoting *Railways Employes' Department v. Hanson*, 351 U.S. 225, 238 (1956)).
[8] *Id*. at 837-38.
[9] *Id*. at 843. The Court also noted that "legislative activity is not the major activity of the State Bar." *Id.* at 839. Courts have declined to create a "*de minimis*" exemption for state bar activities based on this "stray adjective," however. *See, e.g., Boudreaux v. Louisiana State Bar Association,* 86 F.4th 620, 636-637 (5th Cir. 2023).
[10] 367 U.S. at 843.
[11] *Id*. at 845.

a vast range of topic.[12] Relying again on the labor union analogy employed in *Lathrop,* the Court looked to its more recent decision in *Abood v. Detroit Board of Education*,[13] in which it permitted public sector unions to spend members' dues on the expression of political views to topics that were "germane to its duties as a collective-bargaining representative."[14]

Rejecting the California Supreme Court's decision that the universe of topics that the bar addressed were all encompassed within the bar's authority to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice," the Court paraphrased *Lathrop*'s thumbnail summary of what state bars may properly do:

> Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. . . . Thus, the guiding standard must be whether the challenged expenditures are "*reasonably or necessarily incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.* "'[15]

The Court recognized that this is easier said than done:

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[12] The full list of topics the petitioners complained about is "(1) Lobbying for or against state legislation prohibiting state and local agency employers from requiring employees to take polygraph tests; prohibiting possession of armor-piercing handgun ammunition; creating an unlimited right of action to sue anybody causing air pollution; creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors; limiting the right to individualized education programs for students in need of special education; creating an unlimited exclusion from gift tax for gifts to pay for education tuition and medical care; providing that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance; deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects; requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries; (2) Filing amicus curiae briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm; and (3) The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a United States senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing." 496 U.S. at 5 n.2.

[13] 431 U.S. 209 (1977).

[14] 496 U.S. at 9-11.

[15] *Id.* at 14 (quoting *Lathrop*, 367 U.S. at 843) (emphasis added). Most, if not all, state bars also have "improving the administration of justice" as one of their goals. It is unfortunate that *Lathrop* did not fasten on this language (it could have – *see* 367 U.S. at 828-29). It is even more unfortunate that the California Supreme Court in *Keller* found that the phrase encompassed the universe of hot-button issues on which the state bar spoke out, and that the U.S. Supreme Court's response was to disclaim reliance on the phrase, rather than simply to construe it more narrowly. The result, regrettably, is that a long-standing, broad term for what is highly germane for state bars to do has been excluded from legal analyses of germaneness.

> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.[16]

So how to draw the line? The Fifth Circuit in *Boudreaux v. Louisiana State Bar Association* recently ventured that permissible activities must be "inherently about the practice of law or the legal profession more generally," rather than having a "mere connection to a personal matter that might impact a person who is practicing law."[17] The First Circuit has taken a different approach, asking whether the bar's "position rested upon partisan political views rather than on lawyerly concerns."[18] The First Circuit further indicated that the best way to determine what sort of bar activities are permissible under *Keller* is to compare the subject of the challenged activity with the allowable and non-allowable topics described in *Keller*, in order to see which "kinds of State bar activities" the challenged activity is more like.[19] We apply the standards from these cases to the public issues addressed in this memo in Part III.D below.

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[16] 496 U.S. at 15-16. The reference in this paragraph to "having political or ideological coloration" is best construed as flagging the *kinds* of non-germane statements that are likely to trigger First Amendment objections, rather than indicating that political or ideological statements are inherently non-germane. Indeed, as the Seventh Circuit has clarified, non-germane activities can raise First Amendment concerns even if they are not politically objectionable. *See Kingstad v. State Bar of Wisconsin,* 622 F.3d 708, 717-18 (7th Cir. 2010). This interpretation is also more consistent with other language in *Keller. See* Part III.A below.

[17] 86 F.4th at 633.

[18] *Schneider v. Colegio de Abogados de Puerto Rico,* 917 F.2d 620, 632 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992).

[19] 496 U.S. at 15. As noted above, the only two topics the majority expressly said were not germane "to endorse or advance" were "a gun control or nuclear weapons freeze initiative."[19] But the text of the opinion also mentioned, and can be assumed to disapprove of, "lobbying for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armor-piercing handgun ammunition; (3) creating an unlimited right of action to sue anybody causing air pollution; and (4) requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries[,] endors[ing] a gun control initiative, disapprov[ing] statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endors[ing] a nuclear weapons freeze initiative, and oppos[ing] federal legislation limiting federal court jurisdiction over abortions, public school prayer, and busing." *Id*.

Keller's remedy for lawyers who complain that their bar association spent dues on non-germane expressive activities also had its roots in a labor case. It held that a bar could meet its First Amendment obligations if it provided members with "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[20]

Finally, *Keller* added that the petitioner also seemed to be raising "a much broader freedom of association claim than was at issue in *Lathrop*[,] urg[ing] that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*."[21] In other words, the petitioner seemed to be arguing that free association claims rights could be violated by nongermane conduct even if a dues refund were available. The Court left this contention open.

The Fifth Circuit recently treated free speech and free association claims identically, reiterating that a dues refund remedies the effects of non-germane speech on both free speech and free association rights.[22]

More recently, however, the Ninth Circuit held that a mandatory bar member's free association rights were infringed even though he received a pro rata dues refund. As the court explained, a bar member is "forced to associate with [non-germane speech] in two ways. First, his dues [a]re used to fund [it]. Second, he [i]s associated with the [bar's] activities in the public eye."[23] A refund only addresses the former. On the other hand, the court noted that "[t]he remedy for this violation need not be drastic. . . . [I]f OSB does engage in nongermane activities, in situations in which those activities might be attributed to its members it could include a disclaimer that makes clear that it does not speak on behalf of all those members. . . OSB could also lessen the risk of misattribution by following the California State Bar's lead and referring to attorneys as 'licensees,' rather than 'members.'"[24]

D. *Janus*

As noted above, *Keller* borrowed the concept of "germaneness" – i.e., the universe of communicative activities that state bars can engage in without violating members' First Amendment rights – from *Abood*. The Supreme Court overruled *Abood*, however, four years ago in another free speech case involving public sector unions, *Janus v. AFSCME*.[25]

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[20] 496 U.S. at 16-17 (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986)).
[21] *Id*. at 17.
[22] *See Boudreaux, supra,* 86 F.4th at 631, 638-640.
[23] *Crowe v. Oregon State Bar*, 112 F.4th 1218, 1239 (9th Cir. 2024) (citations omitted).
[24] *Id.* at 1240.
[25] 138 S.Ct. 2448 (2018).

In *Janus*, the Court concluded that compelling government employees to subsidize speech they disagree with is so objectionable that they cannot be compelled to pay union dues even for "germane" activities like collective bargaining.[26] The *Janus* decision raises the prospect that, if there is no universe of "germane" activities that do not violate First Amendment protections, then lawyers likewise can no longer be required to pay dues to or belong to the bar – thus spelling the end of mandatory bars. This concern was heightened in 2020 when Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari in *Jarchow v. State Bar of Wisconsin*:

> Our decision to overrule *Abood* casts significant doubt on *Keller*. The opinion in *Keller* rests almost entirely on the framework of *Abood*. Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*. If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*.[27]

In fact, the prospect of *Keller* being overruled seems unlikely, at least in the near term. Justice Alito wrote *Janus*, but he also wrote *Harris v. Quinn,*[28] and there, he stated that overruling *Abood* would not require overruling *Keller*:

> Respondents contend, finally, that a refusal to extend *Abood* to cover the situation presented in this case will call into question our decision[] in *Keller*. . . . Respondents are mistaken.
>
> In *Keller* we considered the constitutionality of a rule applicable to all members of an "integrated" bar, i.e., "an association of attorneys in which membership and dues are required as a condition of practicing law." We held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members.
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> This decision fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.[29]

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[26] *Id*. at 2463-2469.
[27] 140 S.Ct. 1720 (2020).
[28] 573 U.S. 616 (2014).
[29] *Id.* at 655-656 (citations and footnotes omitted).

Justice Thomas' *Jarchow* dissent tried to distinguish *Harris* by contending that "*Keller* has unavoidably been called into question" now.[30] But the Court has since denied cert. in multiple other cases of lawyers challenging mandatory bar activities (including four decided since the Court was joined by Justice Barrett) without any further dissent.[31]

The Tenth Circuit's opinion in one of the cases for which the Court denied cert. does a good job of further explaining why Keller should survive:

> *Keller*'s holding is meaningfully distinct from *Abood*'s holding for the same reason that bar associations are meaningfully distinct from unions, despite the substantial analogy between the two types of entities. Specifically, the analysis conducted in *Janus*, which drew into question the furtherance of the state's interest in labor peace through agency shop agreements, is not directly in play for regulating the legal profession and improving the quality of the legal service available were the interests identified in *Keller* in support of mandatory bar dues.[32]

III. Keller Should Not Prevent Integrated Bars from Defending Democracy and the Rule of Law

This section of the article applies the foregoing cases, and lower court decisions construing them, to bar activities aimed at regulating the legal profession, protecting the rule of law, democracy, and the Constitution, and ensuring free and fair elections. Appendix B lists the federal judicial circuits, indicates which mandatory state bars are located within each, and identifies the leading cases in each.

In reviewing this case law, several important generalizations can be made that should give state bars greater assurance about their ability to express views on topics that are fundamental to the functioning of our democracy. These are discussed first.

A. "Political" or "Ideological" Activities – as well as Lobbying – Can Be Completely Germane

The most common misunderstanding of *Keller* and its application is the notion that integrated bar associations are barred from taking positions that are "political" or "ideological." Those adjectives are *not* the appropriate test. Rather, the *only* test is whether particular activities, however political, are necessary for or reasonably related to

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[30] 140 S.Ct. at 1721 note.

[31] *See File v. Hickey, 143 S.Ct. 745 (2023); McDonald v. Firth*, 142 S.Ct. 1442 (2022); *Taylor v. Heath*, 142 S.Ct. 1441 (2022); *Schell v. Darby*, 142 S.Ct. 1440 (2022); *Crowe v. Oregon State Bar*, 142 S.Ct. 79 (2021).

[32] *Schell v. Chief Justice and Justices of the Oklahoma Supreme Court*, 11 F.4th 1178, 1190 (10th Cir. 2021) (cleaned up), *cert denied sub nom. Schell v. Darby*, 142 S.Ct. 1440 (2022).

regulating the legal profession or improving the quality of the legal services available to the people of the state.

Keller makes this clear. In characterizing the broader free association question that the Court declined to answer in that case, it speaks of "political or ideological activities *beyond those* for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*"[33] – thus recognizing that mandatory financial support is proper for political or ideological activities that are germane. The Fifth Circuit made the same point in *McDonald v. Langley*:[34]

> The plaintiffs contend that OMA's diversity initiatives are "highly ideological," because they support the approach of "having programs targeted at certain individuals based on their race, gender, or sexual orientation" and "people of good faith . . . disagree sharply about the merits of such programs." The plaintiffs are certainly right on that point—affirmative action and other identity-based programs, in contexts ranging from contract bidding to higher education, have spawned sharply divided public debate and widespread, contentious litigation. Legislation has been introduced in Congress to address a number of race-based issues, and litigation remains pending challenging several diversity-justified initiatives. In other words, that issue is a "sensitive political topic[ ]" that is "undoubtedly [a] matter[ ] of profound value and concern to the public." But, despite the controversial and ideological nature of those diversity initiatives, they are germane to the purposes identified by *Keller*. They are aimed at "creating a fair and equal legal profession for minority, women, and LGBT attorneys," which is a form of regulating the legal profession. And the Bar contends that those initiatives "help to build and maintain the public's trust in the legal profession and the judicial process as a whole," which is an improvement in the quality of legal services.[35]

Similarly, bar statements regarding the value of protecting and defending democracy, the Constitution, the rule of law, and free and fair elections can reasonably be expected to improve the quality of legal services by helping build and maintain the public's trust in our nation's system of government, including the justice system.

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[33] 496 U.S. at 17 (emphasis added).

[34] 4 F.4th 229 (5th Cir. 2021), *cert. denied sub nom. McDonald v. Firth*, 142 S.Ct. 1442 (2022).

[35] 4 F.4th at 249 (citations omitted). The opinion was authored by Judge Smith (appointed by Reagan) and joined by Judges Willett and Duncan (both appointed by Trump). In another opinion authored by Judge Smith, the court reiterated this holding, "acknowledg[ing] that something 'ideologically charged' may still be germane." *Boudreaux, supra*, 86 F.4th at 633. Remarkably, the *Boudreaux* opinion cites the Supreme Court's recent decision striking down the use of race in college admissions as evidence that the idea of "diversity" is "fraught with controversy," yet the opinion nowhere ventures that state bar efforts to promote diversity among lawyers may be constitutionally suspect. *See id.* at 635-636 (citing *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 230-231 (2023)).

The Seventh Circuit similarly recognized, in *Kingstad v. State Bar of Wisconsin*, that germane statements can be ideological or political:

> [T]he State Bar may use the mandatory dues of objecting members to fund only those activities that are reasonably related to the State Bar's dual purposes of regulating the profession and improving the quality of legal services, *whether or not those same expenditures are also non-ideological and non-political*."[36]

Finally, at least one district court in the Ninth Circuit has held that statements that "can be construed as inflammatory or ideological" can be germane, so long as "they are still 'reasonably related to the advancement' of the acceptable goals of the bar."[37] Thus, bar statements should not run afoul of *Keller* simply because they have "apparent legal coloration" or address "sensitive political topics" or topics "of an ideological nature."

Two other circuits, however, have adopted a more restrictive view regarding topics that should be deemed ideological or political. The Tenth Circuit's opinion in *Schell v. The Chief Justice and Justices of the Oklahoma Supreme Court* seems to judge the permissibility of various bar journal articles in part by whether they are "inherently political or ideological in nature" or address topics that "often break along political lines" or "hav[e] an ideological tinge."[38] Likewise, the First Circuit seems to evaluate issues as much by whether they are "controversial" or "noncontroversial" as by whether they are "directly linked to the legal profession or the judicial system."[39]

But both courts seemed to be influenced as much by the "manner" in which issues were phrased as by the issues themselves, suggesting that tone and word choice may be highly influential.[40] And there are strong arguments, moreover, that foundational issues like the rule of law, democracy, the Constitution, and free and fair elections are not inherently

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[36] 622 F.3d 708, 718 (7th Cir. 2010) (emphasis added).

[37] *See Crowe v. Oregon State Bar*, 2023 WL 1991529 (D. Or. Feb. 14, 2023), at *5.

[38] 11 F.4th 1178, 1193-94 (10th Cir. 2021), *cert. denied sub nom. Schell v. Darby*, 142 S.Ct. 1440 (2022). This perspective has since been perpetuated in a district court decision in the circuit. *See Pomeroy v. Utah State Bar*, 589 F. Supp. 3d 1250, 1259-1261 (D. Utah 2022) (citing *Schell* and repeating the quoted phrases above in accepting, at the motion to dismiss stage, that topics including "lobbying against a proposal to switch to an elected judiciary" are non-germane). *See also* 2022 WL 3716940 (D. Utah Aug. 29, 2022) at *4 (later decision in same matter, repeating same points in refusing to grant interlocutory review).

[39] *See Schneider*, 917 F.2d at 633.

[40] *Schell* expressed concern that some articles "discussed matters in an ideological manner." 11 F.4th at 1194. Indeed, it is hard to see what, besides tone, would distinguish ''big money and special interest groups . . . elect[ing] judges and justices'' (found arguably non-germane) from "Oklahoma's merit-based process for selecting judges" (found germane). *Id*. at 1193-1194. Similarly, *Schneider* asked whether the bar's "position rested upon partisan political views rather than on lawyerly concerns." *See* 917 F.2d at 632.

political or partisan, in comparison to the (generally) narrower issues addressed in the Tenth[41] and First Circuit decisions.[42]

A corollary of the *Keller* standard is that lobbying for germane purposes is also permissible. *Lathrop* made that point expressly:

> We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.[43]

McDonald clarifies this point as well:

> Lobbying for legislation regarding the functioning of the state's courts or legal system writ large, on the other hand, is germane. So too is advocating for laws governing the activities of lawyers qua lawyers.[44]

A simple lobbying prohibition is, therefore, both over- and under-inclusive, as it prevents a bar from lobbying on topics that are germane, but does not stop the bar from engaging in non-lobbying activities (e.g., issuing publications[45]) on topics that are not germane.

Finally, the Fifth Circuit's opinion in *McDonald* clarifies that bars do not need unanimity among their members before a position can be considered germane:

> The germaneness test does not require that there be unanimity on the Bar's position on what best regulates the legal profession—that is typically for the Bar to decide. To take a non-controversial example, the Bar's advocating a particular

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[41] *Schell* disapproved of articles (i) criticizing ''big money and special interest groups'' making campaign contributions and ''elect[ing] judges and justices''; and (ii) advocating for the ability of prisoners to bring tort suits against prisons and jails. 11 F.4th at 1193-1194. But *Schell* found three other articles to be germane that are arguably closer to the issues discussed in this article: "the harms of politics in the judicial system," merit-based selection of judges, and advocating for the role of lawyers in the legislature. *Id*. at 1193.

[42] *Schneider* disapproved of a mix of (i) "liberal" issues like "[d]ecoloniz[ing] the United Nations" and banning nuclear weapons, and (ii) broader, good-government issues like "enhanc[ing] the level of political debate in our country" and "enforc[ing] compliance with the laws governing the voting process." 917 F.2d at 633. *Schneider* was also decided more than thirty years ago, and the First Circuit may well conclude today that issues like the rule of law or free and fair elections rest more on "lawyerly concerns" than "partisan political views." *Id*. at 632.

[43] 367 U.S. at 843.

[44] 4 F.4th at 248. *Boudreaux* repeats this point. *See* 86 F.4th at 632.

[45] *See, e.g., Schell*, 11 F.4th at 1183-84 (articles in Oklahoma Bar Journal). *See also Kingstad*, 622 F.3d at 718 (state bar "public image campaign").

> ethical rule is germane no matter how strenuously an attorney might disagree with its propriety. The same principle applies here.[46]

B. Germaneness Analysis is a Deferential Standard

As we saw in the foregoing discussion of *Lathrop*, the Court's key conclusion was:

> Both in purport and in practice the bulk of State Bar activities serve the function, *or at least so Wisconsin might reasonably believe*, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy.[47]

Keller quoted this same passage approvingly.[48] The Seventh Circuit in *Kingstad* reinforced the point made in the italicized language above:

> The standard of review is deferential, as when we review challenged legislation to determine whether it is reasonably related to a legitimate governmental purpose. . . . [T]he State Bar is not required to prove that its expenditures were actually successful in accomplishing the stated purpose, or that they served only that purpose, or that the public image campaign was a particularly wise use of the State Bar's funds. . . . The limited issue before us is whether the public image campaign was reasonably related to the constitutionally legitimate purpose of improving the quality of legal services, and we find that it was.[49]

The Ninth Circuit has similarly held that a bar's public relations campaign to improve its image was reasonably related to improving the quality of legal services received by people in that state.[50]

Relatedly, the Fifth Circuit in *McDonald* declared that ''help[ing] to build and maintain the public's trust in the legal profession and the judicial process as a whole'' . . . is an improvement in the quality of legal services."[51] The germaneness of maintaining trust

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[46] 4 F.4th at 249-250 (footnote omitted). *Lathrop* noted that the policy of the State Bar of Wisconsin was to lobby only on issues where there was "substantial unanimity," 367 U.S. at 834, but that was just one of numerous features identified during an extremely lengthy description of the Bar's operations, *id*. at 828-843, and is not mentioned when the Court finally explained its conclusion and reasons therefor, *id.* at 842-43.

[47] 367 U.S. at 843 (emphasis added). *See* Part II.B *supra*.

[48] *See* 496 U.S. at 8.

[49] 622 F.3d at 719.

[50] *See Gardner v. State Bar of Nevada,* 284 F.3d 1040, 1042-43 (9th Cir. 2002).

[51] 4 F.4th at 249 (citations omitted).

has also been emphasized by the Tenth Circuit[52] and a district court in the Ninth Circuit.[53]

Under the deferential standard applied under these cases, courts should readily find it reasonable for state bars to believe that actions promoting foundational concepts like the rule of law and democracy will improve the quality of legal services available to the people of those states, as so much of our system of justice requires trust in our democratic institutions to function effectively.

C. Regulating the Legal Profession Is a Core Role of State Bars

The first half of the *Keller* germaneness test is "regulating the legal profession." This core function of state bars apparently has not been the subject of a reported case alleging that a bar has violated a member's First Amendment rights. That may well be because the function consists narrowly of formulating ethics rules and policing the conformance of individual lawyers to those rules.[54]

Even if a member were to argue that an ethics rule was motivated by partisan considerations, it seems likely that a court would defer to the bar propounding it on the theory that the activity of formulating ethics rules is essential to the traditional function of bars. A member might also argue that an ethics proceeding against him or her was politically motivated, but again, it seems likely that a court would defer to the bar, unless the member could show that the proceeding was "a sham . . . deliberately designed to further a program of political action."[55] Thus, ethics investigations of lawyers like John Eastman,[56] Jeffrey Clark[57] and Kenneth Paxton[58] are at the heart of what state bars can and should do under *Keller*.

D. Defending the Rule of Law, Democracy, the Constitution, and Free and Fair Elections Is Necessary for and Reasonably Related to Improving the Quality of the Legal Services Available to the People

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[52] *See Schell,* 11 F.4th at 1193 ("[P]romotion of the public's view of the judicial system as independent enhances public trust in the judicial system and associated attorney services.").
[53] *See Crowe v. Oregon State Bar*, 2023 WL 1991529 at *5 (quoting *McDonald*).
[54] Technically speaking, bars conduct both activities in an advisory fashion for ultimate adoption by state supreme courts. *See Keller*, 496 U.S. at 11.
[55] *Lathrop*, 367 U.S. at 834.
[56] State Bar of California, "State Bar Announces John Eastman Ethics Investigation" (March 1, 2022), available at https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation.
[57] Reuters, "EXCLUSIVE: Two former U.S. officials help ethics probe of Trump ally Clark, source says" (March 29, 2022), available at https://www.reuters.com/world/us/exclusive-two-former-us-officials-help-ethics-probe-trump-ally-clark-source-says-2022-03-29/.
[58] Houston Chronicle, "Texas State Bar complaint moves forward against AG Ken Paxton over attempt to overturn 2020 election" (March 8, 2000), available at https://www.houstonchronicle.com/politics/texas/article/Texas-State-Bar-complaint-moves-forward-against-16987171.php (subscription required).

Keller's "guiding standard" – that bar expenditures be "reasonably or necessarily incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State'" – does not use the words (or phrases) "rule of law," "democracy," "the Constitution," "elections" or "voting." Multiple lower court decisions interpreting *Keller* have found state bar activities defending the rule of law to be germane, and at least one decision has declared that democracy is a germane topic. No decisions appear to address the germaneness of the Constitution.

Cases addressing election issues have usually found them to be non-germane, but when those cases were decided, our election system was not being systematically curtailed and undermined as it is today. Today's election issues relate to threats of violence against impartial election officials, state laws that attempt to put election results into partisan hands, and other measures that are designed to impact the right of people to vote and to have their vote counted. Legal services cannot be properly rendered in an environment where the heart of our democratic system is under threat. How these issues were cast may also have been a dispositive factor.

The mostly likely reason there are so few cases addressing some of these topics is that state bars have not previously felt obliged to speak out on such fundamental issues, as the issues have never been under such assault as they have been since those cases were decided. Very compelling arguments can be made, moreover, that lawyers currently have a special obligation to speak out, and that bar associations have a special role among civic institutions to lead discussions and otherwise address these fundamental challenges of our time.

In doing so, state bars should emphasize that these issues are inherently related to the practice of law, because our Nation's legal system has always been grounded in the Constitution, the rule of law, and a democracy based on free and fair elections. State bars should also seek, in their advocacy, to avoid terminology that is identified with partisan perspectives, and emphasize that their positions derive fundamentally from lawyerly concerns, not partisan political views.

1. Rule of Law

Lawyers cannot provide quality legal services without a fair and functioning legal system that operates under, and supports, the rule of law. Indeed, the notion of providing clients with legal services presupposes the existence of a system where the law, not the people who make or execute it, is supreme, where legal questions are adjudicated by an independent judiciary, and where the public has abiding faith in these institutions. The preamble to the ABA Model Rules of Professional Conduct recognizes these truths. In a statement adopted in almost two-thirds of the states, it instructs that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice

system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[59]

The rule of law is not "a personal matter that might impact a person who is practicing law," or something that "improves . . . the practice of law indirectly."[60] The whole point of providing legal services is to protect and vindicate the rights of the lawyer's client under law. Without an independent judiciary, and a legal system that operates under the rule of law, lawyers would be profoundly limited in their ability to provide quality legal services. Indeed, rendering such services would be impossible or futile. No "political or ideological coloration" should be associated with the goals of an independent judiciary or a legal system that operates under the rule of law.

Historically, Americans have had confidence that, whatever the executive and legislative branches of government did, the courts could generally be relied upon to ensure that their constitutional rights were protected against government overreach. Trust in the proper functioning of the rule of law is critical to the functioning of our democracy. When these fundamental underpinnings are under attack in a way that creates distrust in the ability of government to function and our courts to operate independently, the legal system is in severe jeopardy.

Cases interpreting *Keller* have demonstrated an awareness that the provision of quality legal services is only possible in a system governed by the rule of law – and understood by the public to be so governed. The clearest example is the district court's 2023 opinion in *Crowe v. Oregon State Bar*, which assessed the germaneness of the Bar's "Statement on White Nationalism and Normalization of Violence." The district court declared that the statement

> emphasizes the rule of law, the equal protection of the laws, and the importance of a justice system that is accessible to all and does not include racial discrimination or the acceptability of violence. The statement was "aimed at creating a fair and equal legal profession ... which is a form of regulating the legal profession" and "help[s] to build and maintain the public's trust in the legal profession and the judicial process as a whole." *McDonald*, 4 F.4th at 249-50; *see also Schell*, 11 F.4th at 1193 (finding that conduct that "enhances public trust in the judicial

[59] As of May 2024, this sentence was incorporated into the rules of professional conduct of 32 states (AK, AR, CO, DE, FL, HI, ID, IL, IN, KY, MA, MD, MN, MO, MS, MT, NC, ND, NE, NM, NY, OH, OK, RI, SC, SD, TN, UT, WA, WI, WV and WY.)

[60] *Boudreaux*, 86 F.4th at 633. Relying on these distinctions, the Fifth Circuit approved of:

- Initiatives that seek to diversify the legal profession for minority, women, and LGBT attorneys, but not display of a pride flag;
- Advice about software designed for attorneys' use, but not general iPhone software updates; and
- Information about legal pro bono activities, but not generic holiday charity drives.

See id. at 632-636.

> system and associated attorney services" is germane). The statement also is focused on access to justice, which is germane. *McDonald*, 4 F.4th at 250.[61]

Two justices of the Wisconsin Supreme Court made the point even more directly in *Matter of State Bar of WI*:

> All lawyers have a special responsibility to society. That responsibility involves far more than merely representing a client. Lawyers are the guardians of the rule of law. The rule of law forms the very matrix of our society. Without the rule of law, there is chaos. Lawyers not only have a responsibility to their clients, they have an equal responsibility to the courts in which the rule of law is practiced, and to society as a whole to see that justice is done.[62]

Several circuit courts have endorsed bar activities with language synonymous with the rule of law. The Fifth Circuit in *McDonald* had no difficulty recognizing that "[l]obbying for legislation regarding the functioning of the state's courts *or legal system writ large* . . . is germane," as is "help[ing] build and maintain trust in the legal profession and the judicial process *as a whole*."[63] In concluding that a state bar public information and education campaign was germane, the Ninth Circuit in *Gardner v. State Bar of Nevada*[64] adopted this formulation of the campaign's purpose: "to advance understanding of the law, *the system of justice*, and the role of lawyers, as opposed to nonlawyers, *to make the law work for everyone*."[65] As the court explained:

> The law is a profession where a near monopoly of access to the courts is granted to a trained group of men and women on the basis that they will follow the profession's rules of conduct and in so doing serve the cause of justice. . . . [I]n our real world, lawyers are not merely a necessity but a blessing. If the public doesn't understand that—and the State Bar had reason to think many members of the public did not—the justice system itself will wither.[66]

The Tenth Circuit in *Schell* likewise concluded that an article in a bar journal "warn[ing] the public about the harms of politics in the judicial system . . . is germane because the judicial system is designed to be an apolitical branch of government, and promotion of the public's view of the judicial system as independent enhances public trust in the judicial system and associated attorney services."[67]

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[61] 2023 WL 1991529 at *5.
[62] 169 Wisc. 2d 21, 485 N.W. 2d 225, 227 (1992) (Bablitch and Heffernan, JJ., concurring).
[63] 4 F.4th at 248 (emphasis added).
[64] 284 F.3d 1040 (9th Cir. 2002).
[65] *Id*. at 1043 (emphasis added).
[66] *Id.*
[67] 11 F.4th at 1193. *Schell* also found articles on merit-based selection of judges and advocating for the role of lawyers in the legislature to be germane. *Id. See* note 38 *supra* for topics it found not to be germane.

Moreover, the realm of the rule of law, as a concept, is not limited to the judicial branch, but rather encompasses our entire system of government. Under the Constitution, Congress passes "Laws,"[68] and the President, aided by Officers and other employees of the Executive Branch, "take[s] care that the Laws be faithfully executed."[69] All three of these branches are themselves subject to laws governing what they must, may and may not do, from the Constitution down to their own rules. Lawyers have a privileged role in protecting the rule of law, as understood in this broad context. The Tenth Circuit has endorsed this view, finding germane "articles . . . advocating for the role of attorneys in the state legislature" because "they promote the important role of the [Oklahoma Bar Association]'s attorney members in using their professional skills to interpret and advise on pending legislation."[70]

The bottom line is that expressive activities of state bars that purport to defend the rule of law should be seen as germane under *Keller*.

2. Democracy

The word "democracy" does not come up often in cases discussing *Keller*. One where it does is *Gruber v. Oregon State Bar*, another decision addressing the germaneness of the Bar's "Statement on White Nationalism and Normalization of Violence." The district court adopted the magistrate judge's conclusion that the statement

> was made within the specific context of promotion of access to justice, the rule of law, and a healthy and functional judicial system that equitably serves everyone ("the [Bar] remains committed to equity and justice for all, and to vigorously promoting the law as the foundation of a just democracy"). This is germane to improving the quality of legal services.[71]

It may be that the word is used so infrequently in these cases because quality legal services and democracy are so mutually reinforcing – indeed, it can compellingly be argued that each can only exist together with the other.[72] It may also be that "democracy"

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[68] *E.g.*, art. I, § 7, cl. 2 (capitalized in the original).
[69] *Id*. art. II, § 3.
[70] 11 F.4th at 1193.
[71] 2019 WL 2251826 at *10 (citing *Gardner*). *See also Crowe v. Oregon State Bar*, 989 F.3d 714, 723-724 (9th Cir. 2021) (discussing proceedings below). On appeal, the Ninth Circuit assumed, without deciding, that the statement was non-germane, because it was reviewing a decision to dismiss the complaint. *Id*. at 724. On remand more recently, the district court denied a summary judgment motion in which the plaintiffs argued that germaneness was irrelevant. *See Gruber v. Oregon State Bar*, 2022 WL 1538645 at *4.
[72] The ABA's Center for Global Programs has recently sponsored two events "highlight[ing] the importance of the rule of law and legal systems towards the advancement of democracies around the world." *See* https://www.americanbar.org/advocacy/rule_of_law/aba-summit-for-democracy/aba-summit-for-democracy-events/.

is rarely cited in *Keller* case law because state bars have not previously felt the need to come to the defense of democracy in the United States.

Sadly, that need to defend democracy is all too obvious now. In any event, virtually everything said above regarding the rule of law is applicable to democracy as well. Only a democratic society provides the accountability that prevents the government from twisting the legal system to its own needs.

3. The Constitution

The Constitution similarly does not appear to be cited in reported *Keller* cases as something that challenged state bar activities have declared themselves to be supporting or defending. To the contrary, it is cited exclusively as the basis of the complaining bar members' actions.

As with democracy, this absence may be because state bars have not previously perceived a need to speak out in its defense, as it was not under attack as it is today. Yet, just as democracy is essential to a legitimate legal system, lawyers in the United States can only provide quality legal services in a legal system that adheres to the Constitution. Indeed, both the federal Constitution, and state constitutions, provide the foundation on which that system is constructed, and are the sources of the rights that lawyers protect on behalf of their clients.

4. Protecting the Right to Free and Fair Elections

Bar associations should be able to successfully argue the germaneness of their efforts to protect a free and fair election system. This should be true notwithstanding three prior court cases that have viewed the involvement by bars in election issues as non-germane. For example, Justice Thomas's dissent in *Jarchow* highlighted "legislation on felon voting rights" as one of several "matters of intense public interest and concern" that implicitly are non-germane.[73] Similarly, one of the articles that the Tenth Circuit in *Schell* found to be "plausib[ly] non-germane" expressed views on the appropriateness of "big money and special interest groups" in elections.[74] Finally, the First Circuit in *Schneider* held that the Bar Association of Puerto Rico's Electoral Process Committee, formed "to enhance the level of political debate in our country, to enforce compliance with the laws governing the voting process and to frame a code of ethics to regulate public debate among political candidates," was not germane.[75]

[73] 140 S.Ct. at 1720.

[74] 11 F.4th at 1194. The court remanded the case, without deciding the issue, because the articles themselves were not in the record. *Id.*

[75] 917 F.2d. at 633.

Viewed through the prism of more current case law, however, the freedom and fairness of elections inherently affects the legitimacy of "the legal system writ large"[76] in which lawyers are officers, and from which they derive their exclusive license to practice. It is not just "a personal matter that might impact a person who is practicing law."[77]

The concept of democracy necessarily presumes a functioning electoral process – so if democracy is germane under *Keller*, there should be some level of state bar communication that is acceptable regarding the ability to trust in the constitutional right to vote and to have one's vote counted.

The quality of legal services that lawyers can offer to people in a jurisdiction is certainly improved to the extent people in that jurisdiction are aware of, and able to freely exercise, their power to express their views through the ballot box and rely on the results. Conversely, the ability of lawyers to protect and vindicate people's rights is impaired by a corrupt election process where the outcome cannot be trusted, or one where wide swaths of the community are disproportionately prevented from voting.

As noted earlier, the independence of the electoral process and the fundamental right to vote are currently under coordinated assault in ways not experienced for decades. In states across the country, the essential integrity of America's election system is being systematically undermined by partisan actors seeking to assume positions previously filled by independent officials.
When people cannot trust the independence of those who count their vote, or if efforts are being made to deny voting rights altogether to targeted communities, trust in government is severely undermined, leading to the destabilization of other institutions, including our justice system.

Groups like the League of Women Voters and the Committee of Seventy (in Philadelphia) have worked on a studiously non-partisan basis for decades – some for over a century – to "protect the freedom to vote [and] improve elections,"[78] and to "protect and improve the voting process."[79] Issues and positions that groups like these have advanced are thus deeply rooted in our nation's history and traditions. State bars should be able to point to this history as a defense against accusations of partisanship.

Ultimately, however, election issues are so important, and under such an unprecedented level of threat, that bars may need to speak out regardless of whether their positions line up with those of one party or another. As noted earlier, even *Keller* recognized that issues can be partisan and yet be germane.[80]

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[76] *See McDonald*, 4 F.4th at 248.
[77] *See Boudreaux*, 86 F.4th at 633.
[78] https://www.lwv.org/.
[79] https://seventy.org/.
[80] *See* note 31 and accompanying text *supra.*

In the final analysis, elections that are not free and fair impede lawyers from providing quality legal services by sowing doubt in our system of government and the justice system.

At the same time, as noted earlier, both *Schell* and *Schneider* seemed influenced as much by the "manner" in which issues were expressed as by the nature of the issues, suggesting that tone and word choice (e.g., avoiding phrases like "big money" or "special interest groups") are highly important in this area.[81] Unfortunately, some verbal formulations of positions on election law issues have come to serve as shorthand for positions that are viewed as partisan (compare, for example, the term "voter suppression" with the term "election integrity"). Accordingly, state bars should exercise care in highlighting election-related problems to avoid adopting partisan terminology.

IV. Integrated Bars Can Speak Out and Lobby on any Topic So Long as They Provide an Adequate Process for Objecting Members to Seek a Pro-Rata Refund of Their Dues. Disclaimers Would Also Be a Wise Practice.

As noted above, *Keller* said that the only obligation of a mandatory bar that engages in non-germane expressive activity is to provide its members with a process for obtaining a refund of their dues to the extent those dues were used to pay for non-germane communications. Borrowing from *Chicago Teachers Union v. Hudson*, a labor union case, the Court said it would suffice for a state bar to provide objecting members with "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[82]

The Court also adopted the concurring and dissenting opinion of a California Supreme Court Justice in the decision below, who opined that (i) "the State Bar would not have to perform th[is] three-step . . . analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter" and (ii) "unions representing government employees have developed, and have operated successfully within[,] the parameters of [such] procedures for over a decade."[83]

Circuit courts have uniformly adopted this logic. Some have expressly held that it represents the constitutional minimum;[84] others have held that it does not.[85] In any event, it is not unduly demanding – and it does provide a state bar with a degree of assurance

[81] *See* note 38 and accompanying text *supra.*
[82] 496 U.S. at 16-17 (quoting 475 U.S. at 310).
[83] *Id*. (quoting 767 P.2d 1020, 1046) (concurring and dissenting statement of Justice Kaufman).
[84] *See, e.g., Boudreaux v. Louisiana State Bar Ass'n*, 3 F.4th 748, 758-59 (5th Cir. 2021).
[85] *See, e.g., Crowe*, 989 F.3d at 726.

that it can assert its important voice without fear of being successfully sued by members over statements with which they disagree.

Although it is beyond the scope of this article to summarize the various mechanisms that the thirty-two mandatory bars have established to implement such a refund process (or to avoid needing one), one past example of such mechanisms can be found in the State Bar of Michigan's 2014 compendium of documents summarizing ways that mandatory bars address *Keller*.[86]

Based on the case law discussed above and scholarship on the issue,[87] bars should put in place mechanisms to address potential challenges, and include such considerations as: a process for determining what percentage of the budget involves germane activities and what percentage involves non-germane activities; a process for members to register their objections; an internal procedure for adjudicating disagreements; and a mechanism by which dues are paid following such a process or a procedure for paying dues into an escrow account pending the full resolution of a dispute.

State bars that decline to provide a dues refund mechanism and limit their activities to potentially over-broad definitions of germaneness may be unnecessarily hampering their ability to protect democracy and the constitution. That result essentially cedes the conversation about the gravity of the threat currently facing our democratic institutions and denies bar associations an opportunity to play a leadership role in protecting democracy. It would be preferable, and likely more responsive to members, for a bar to institute a *Chicago Teachers Union v. Hudson* process for addressing member complaints, and then to be able to speak out as the majority of their members feel called to do.

Finally, as noted earlier, the Ninth Circuit has held that a mandatory bar member's free association rights can be infringed by a bar statement even if he or she receives a pro rata dues refund. However, the court also opined that a bar could dispel the implication that a lawyer agrees with its statement with a "a disclaimer that makes clear that it does not speak on behalf of all [its] members [or by] referring to attorneys as 'licensees,' rather than members.'"[88] If mandatory bars felt their engagement warranted, it may be an easy and prudent practice for to draft a brief disclaimer noting that their statements on behalf of democracy and the rule of law do not necessarily represent the views of all their members.

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[86] "Managing Keller: Mandatory State Bars" (March 2014), available at https://www.michbar.org/opinions/keller/cfm.

[87] *See "An Aliquot Portion of Their Dues": A Survey of Unified Bar Compliance with Hudson and Keller*, 1 TEX. TECH. J. TEX. ADMIN. LAW 23 (2000).

[88] *Crowe v. Oregon State Bar*, 112 F.4th at 1240.

Conclusion

Members of the legal community have a special responsibility to defend the Constitution and the values on which our democracy depends. Highly regarded rankings of democracies throughout the world identify the United States as declining in markers that are vital to a vibrant democracy.[89] As lawyers, we must do everything we can to reverse this troubling trend, protect the rule of law, and ensure the right to vote and that all votes are counted fairly. These principles are fundamental to an American democratic system of government.

Lawyers Defending American Democracy stands ready to galvanize and support bar associations at this historic time as they engage in the important work of protecting the fundamental principles of our system of government. As part of this effort, we invite all lawyers to review and sign onto our Democracy Commitment, created for the legal profession, as a way to engage lawyers in these efforts.

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[89] *See, e.g.,* https://worldpopulationreview.com/country-rankings/democracy-countries.

Appendix A – Supreme Court Coverage of First Amendment Issues Posed by Mandatory Bar Activities

This diagram identifies which aspects of the First Amendment are addressed – or not – by Supreme Court decisions involving bar association activities, and the core holdings of each.

First Amendment		
Free Speech	Free Association	
Keller	*Lathrop*	[Reserved by *Keller*]
- Free speech rights not violated by having to pay dues in support of "germane" political activities or statements by mandatory bar. - Germane activities are those necessary for or reasonably related to (i) regulation of the legal profession or (ii) improving the quality of legal services received by the public. - Free speech rights violated if compelled to pay for non-germane activities. - Members may seek dues refund to the extent bar activities or statements are non-germane.	- Right of free association not violated by being compelled to pay mandatory bar dues for activities that "serve the function . . . of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State" (i.e., activities subsequently defined by *Keller* as "germane").	- Whether right of free association is violated by having to pay for non-germane activities, *even if a refund is available*. The Ninth Circuit has adopted this position. - *Keller* borrowed "germaneness" concept from *Abood* (free speech case involving public employee unions). *Janus* overruled *Abood*. If concept of "germane" activities goes away in context of bar activities, then perhaps lawyers cannot be compelled to join a bar to practice law, period (i.e., mandatory bar requirements are unconstitutional). No court has adopted this view.

Appendix B – Mandatory Bar States (and leading cases) by Circuit

Circuit court case law interpreting *Keller* varies in its favorability to the arguments made in this article. This appendix lists the federal judicial circuits, indicates which mandatory state bars are located within each, and identifies leading cases in each circuit chronologically.

DC Circuit **DC**

No cases identified

First Circuit **NH, RI**

Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992).

Second Circuit **[no states w/ mandatory bars]**

Third Circuit **[no states w/ mandatory bars]**

Fourth Circuit **NC, SC, VA, WV**

No cases identified

Fifth Circuit **LA, MS, TX**

Boudreaux v. Louisiana State Bar Association, 86 F.4th 620 (5th Cir. 2023)

McDonald v. Langley, 4 F.4th 229 (5th Cir. 2021), *cert. denied sub nom. McDonald v. Firth*, 142 S.Ct. 1442 (2022).

Boudreaux v. Louisiana State Bar Ass'n, 3 F.4th 748 (5th Cir. 2021).

Sixth Circuit **KY, MI**

Taylor v. Buchanan, 4 F.4th 406 (6th Cir. 2021), *cert. denied sub nom. Taylor v. Heath*, 142 S.Ct. 1441 (2022).

Seventh Circuit **WI**

File v. Martin, 33 F.4th 385 (7th Cir. 2022), cert. denied sub nom. File v. Hickey, 143 S.Ct. 745 (2023).

Jarchow v. State Bar of Wisconsin, 2019 WL 8953257 (7th Cir. 2019), *cert. denied*, 140 S.Ct. 1720 (2020).

Kingstad v. State Bar of Wisconsin, 622 F.3d 708 (7th Cir. 2010).

Eighth Circuit MO, NE, ND, SD

Fleck v. Wetch, 937 F.3d 1112 (8th Cir. 2097), *cert. denied,* 140 S.Ct. 1294 (2020).

Ninth Circuit AK, AZ, CA, HI, ID, MT, NV, OR, WA

Crowe v. Oregon State Bar, 112 F.4th 1218 (9th Cir. 2024) (*Crowe* II).

Gruber v. Oregon State Bar, 2022 WL 1538645 (D. Or. May 16, 2022).

Crowe v. Oregon State Bar, 989 F.3d 714 (9th Cir. 2021), *cert. denied,* 142 S. Ct. 79 (2021) (*Crowe* I).

Gruber v. Oregon State Bar, 2019 WL 2251826 (D. Or. April 1, 2019) *(aff'd in part and rev'd in part by Crowe, supra).*

Gardner v. State Bar of Nevada, 284 F. 3d 1040 (9th Cir. 2002).

Tenth Circuit NM, OK, UT, WY

Schell v. Chief Justice and Justices of the Oklahoma Supreme Court, 11 F. 4th 1178 (10th Cir. 2021); *cert denied sub nom. Schell v. Darby*, 142 S.Ct. 1440 (April 4, 2022).

Eleventh Circuit AL, FL, GA

Brown v. The Florida Bar, 406 Fed. Appx. 434 (11th Cir. 2010), *cert. denied*, 563 U.S. 1021 (2011).

Kaimowitz v. The Florida Bar, 996 F.2d 1151 (11th Cir. 1993).

Gibson v. The Florida Bar, 906 F.2d 624 (11th Cir. 1990), *cert. dismissed,* 502 U.S. 104 (1991).